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SUMMARY

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EDITORIAL

Meritum Magazine is a traditional journal and 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.

Started the year 2020, with Volume 15, news: modernized graphic project, with new cover and core format, diagramming of the pages for easier reading of texts, English version of articles written in Portuguese and the MP3 audio version, novelty and novelty among journals edited in Brazil, adhering extensive program of social inclusion in the Stricto Sensu Graduate Program in Law (PPGD) of fumec University. It began to adopt the quarterly periodicity (three issues per year), and special commemorative number of the 10 (ten) years of PPGD FUMEC, with receipt of articles and continuous flow evaluation for publication. In addition, we highlight the internationalization, through the aforementioned English version of the texts and, in particular, the DOI (Digital Object Identifier), that is, it was identified the respective article individually with the digital code, allowing the publication to be detected in a unique and persistent way in the Web environment.

The articles submitted to Meritum Vol. Magazine. 15, n. 2, were evaluated by the Editorial Coordination, which examined the adequacy to the editorial line of the journal, formal and methodological aspects elementary and advanced, among others. Each text was then referred 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.

In this vol. 15, n. 2, prestigious the issues of the legal universe related to the Democratic State of Law and the realization of fundamental constitutional rights. It seeks to analyze and debate perspectives that help critically interpret contemporary times and the challenges that come from it.

It is perceived a salutary concern of the authors in combining the examination of the main theoretical contours of the institutes, combining the current view of effectiveness in the search for consensus among the conflicting ones. Generally speaking, the texts gathered translate mature and fruitful interdisciplinary discourses. The texts are also enriched with legal and doctrinal investigations of foreign legal experience to enable an essential exchange to seek solutions to the imperfections of the Brazilian and international system, for the consolidation of a dynamic, multifaceted and consensus society.

At the time, the Editors pay their respects and thanks to all who contributed to this commendable initiative of fumec university and, in particular, to all authors who participated in this publication, with emphasis on the commitment and seriousness demonstrated in the research eselaborate the texts of excellence.

It invites the reading and/or pleasant listening of articles presented in a dynamic way and committed to the formation of critical thinking, to enable the construction of a Right aimed at the inclusion and realization of precepts insculpios in the Constitutional Democratic State of Law.

Good reading everyone!

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

LE DROIT A LA REPARATION DES VICTIMES DES CRIMES INTERNATIONAUX DANS LA JURISPRUDENCE DE LA COUR PENALE INTERNATIONALE

KENNEDY KIHANGI BINDU[1]

ABSTRACT

Le système du Statut de Rome de la Cour Pénale Internationale (CPI) a apporté une métamorphose fulgurante dans l'administration de la justice pénale internationale en élevant les victimes au rang de « sujet de droit international pénal ». Son succès n'est pas limité à la répression des criminels mais aussi, et surtout, à l'organisation d'une procédure de réparations (justice réparatrice) au profit des victimes des crimes internationaux relevant de la compétence de la CPI. La jurisprudence disponible révèle des résultats mitigés et des retards inquiétants dus à des entraves d'ordre procédural et administratif. Les ordonnances de réparations semblent n'avoir pas franchi le seuil du prétoire et servent à garnir les vitrines de la Cour ainsi que celles du Fonds au profit des victimes dans son double mandat de réparation et d'assistance. La Cour a encore un long chemin à parcourir. Elle doit relever le défi et dépasser la volonté théorique de prise en compte de besoins des victimes (droit à la réparation) et atteindre la phase effective des réparations.

Mots clefs: Justice réparatrice. crimes internationaux. Cour Pénale Internationale. Fonds au profit des victimes et Statut de Rome. ordonnance de réparation.

I. INTRODUCTION

La création de la Cour Pénale Internationale (CPI) a été une étape décisive dans la promotion de la justice pénale internationale, du droit international humanitaire et du droit international des droits de l'homme. Elle s'est, d'une part, imposée à la conscience universelle comme une nécessité de mettre hors d'état de nuire les auteurs de crimes internationaux et la prévention de nouveaux crimes, et, d'autre part, présentée comme l'expression d'une lueur d'espoir aux victimes des crimes internationaux relevant de sa compétence (Kihangi Bindu K. : 2002, page 235). La répression de ces crimes et la reconnaissance de la justice réparatrice

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aux victimes, faisant bon ménage, sont une des valeurs fondamentalement incontestables du système du Statut de Rome. Deux années avant la célébration de la deuxième décennie de la CPI, son registre des situations et affaires attire la curiosité scientifique centrée sur le régime de réparation prévu dans le Statut de Rome. La jurisprudence disponible a-t-elle rencontré le besoin d'une justice juste et équitable attachant une valeur intrinsèque à la réparation des préjudices subis par les victimes des crimes qui menacent la paix, la sécurité et le bien-être de tous (droit à la réparation) ? Les affaires *Le Procureur c. Mathieu Ngudjolo Chui* ;[2] *Le Procureur c. Thomas Lubanga*[3] ; *Le Procureur c. Germain Katanga*[4] ; *Le Procureur c. Jean Pierre Bemba Gombo*[5] ; *Le Procureur c. Ahmad Al Faqi Al Mahdi*[6] ; The Prosecutor c. William Samoei Ruto and Joshua Arap Sang[7] et les ordonnances de réparation rendues sont des températures ou indices objectivement vérifiables à la portée de toute audience. Car, le succès de la Cour n'est pas seulement lié à la condamnation des criminels mais aussi, dans une certaine mesure, au succès de son système de réparation dans l'administration de la justice.[8]

En effet, le droit des victimes à demander réparation est un principe fondamental du droit international[9] qui influe significativement la mutation observée depuis quelques décennies la justice pénale internationale. Désormais les victimes devant la CPI bénéficient des droits qui n'avaient jamais été accordés devant une juridiction pénale internationale. Elles peuvent demander, entre autres, réparation du préjudice qu'elles ont subi (Cour Pénale Internationale : page 43).

Avant l'établissement de la CPI, aucune juridiction internationale ne permettait aux victimes de demander et recevoir réparation des crimes qu'elles avaient subis. Devant le Tribunal Pénal International pour l'ex Yougoslavie (TPIY)[10] et le Tribunal Pénal International pour le Rwanda (TPIR),[11] les victimes n'étaient pas autorisées à demander réparation, les juges ne pouvant qu'ordonner la restitution de leurs biens.[12] Ne pouvant agir que comme témoin en vue d'éclairer la religion du juge, une victime pouvait, cependant, se prémunir des jugements pour obtenir réparation devant les instances internes. Le contexte post-conflit étant généralement marqué par l'existence d'un système judiciaire en état de faillite et limité, les cours et tribunaux internes sont généralement dans l'incapacité de se prononcer sur des réparations

2 *Le Procureur c. Mathieu Ngudjolo,* ICC-01/04-02/12 ; ICC-PIDS-CIS-DRC-06-006/15-tFra, https://www.icc-cpi.int/CaseInformationSheets/ChuiFra.pdf, (visité le 29/05/2020).

3 *Le Procureur c. Thomas Lubanga Dyilo*, ICC-01/04-01/06, ICC-PIDS-DRC-01-016/17_Fra, https://www.icc-cpi.int/CaseInformationSheets/LubangaFra.pdf (visité, le 29/05/2020).

4 *Le Procureur c. Germain Katanga*, ICC-01/04-01/07, ICC-014/18_Fra, https://www.icc-cpi.int/CaseInformationSheets/KatangaFra.pdf (visité le 14/04/2020).

5 *Le Procureur c. Jean Pierre Bemba Gombo*, ICC-01/05-01/08, ICC-PIDS-CAR-01-020/18_Fra, https://www.icc-cpi.int/CaseInformationSheets/BembaFra.pdf, (visité le 29/05/2020).

6 *Le Procureur c. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, ICC-PIDS-CIS-MAL-01-08/16_Fra, https://www.icc-cpi.int/mali/al-mahdi?ln=fr, (visité, le 29/05/2020).

7 *Le Procureur c. William Samoei Ruto et Joshua Arap Sang*, ICC-01/09-01/11, ICC-PIDS-CIS-KEN-01-12/14_Fra, https://www.icc-cpi.int/CaseInformationSheets/RutoSangFra.pdf, (visité, le 29/05/2020).

8 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre de première instance I, Décision fixant les principes et procédures applicables en matière de réparations, daté du 7 août 2012 cité dans *Le Procureur c. Germain Katanga*, Ordonnance de réparation, N° ICC-01/04-01/07, 24 mars 2017, para. 14 ; *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation modifiée, du 3 mars 2015, traduction enregistrée le 1er août 2016, ICC-01/04-01/06-3129-AnxA-tFRA, Paragraphe 3.

9 Résolution de l'Assemblée Générale des Nations Unies, A/RES/60/147 du 16 Décembre 2005.

10 Résolution du Conseil de Sécurité des Nations Unies 827 du 25 mai 1993 créant le TPIY.

11 Résolution du Conseil de Sécurité des Nations Unies 955 le 8 novembre 1994 créant le TPIR.

12 Articles 24 al. 3 du Statut du Tribunal pénal international pour l'ex- Yougoslavie et 23 al.3 du Statut du TPIR qui disposent que « Outre l'emprisonnement du condamné, la chambre de première instance peut ordonner la restitution à leurs propriétaires légitimes de tous biens et ressources acquis par des moyens illicites, y compris par la contrainte. »

éventuelles (Marchi S. & Kandolo M. cité par Bakama Bope E. & Ingange Wa ingange JD : 2015, page 198).

La victime, longtemps délaissée au profit de l'auteur du dommage, est peu à peu devenue au fil du XXème siècle un objet d'étude privilégié. Jadis, laissé au coupable qui pourrait ou pas indemniser la victime, le droit à la réparation de cette dernière s'est très vite amélioré (Schimitt : 2016, page 1). Ses besoins de soutien, d'assistance et de réparation par des fonds publics ou internationaux ont été soulignés et assimilés à des droits (Pradel J. : 2008, page 426 ; Jeangene V. : 2009, pages 7/8). Cette avancée en termes de prise en compte des droits de la victime se justifie par un certain nombre d'éléments (Marchi S. & Kandolo M. cités par Bakama Bope E. & Ingange wa Ingange J.D. : 2015, page 198/199 ; Pena Maria : 2013, page 251 ; Bititi Gilbert : 2011, page 293) :

> « La pression politique exercée par les ONG ; la valorisation du statut de l'individu sur la scène internationale et l'importance croissante accordée aux droits de l'homme dans le contexte de crimes de masse. … la prise en compte de la victime permettrait de ne plus ignorer le caractère choquant des crimes par leur violence et leurs effets sur la société tout entière. De plus, le nombre de victimes, toujours impressionnant, constitue une pression politique pour la prévention de ces crimes. Enfin, … la victime demeure un témoin crucial pour la manifestation de la vérité, la vérité étant bien sûr la condition *sine qua non* si l'on veut espérer la pacification d'une société profondément meurtrie ».

Les éléments introductifs de cette réflexion (I) mettent à surface l'intention qui a animé les délégations à Rome d'accorder une attention soutenue au droit à la réparation reconnu aux victimes des crimes relevant de la compétence de la CPI. Ce droit mérite d'être circonscrit clairement dans le système du Statut de Rome (II) et présenter sans ambiguïté la *ratio legis* du « Fonds au profit des victimes » (III). En vue de dépasser tout sentiment d'autosatisfaction théorique du droit à la réparation des victimes des crimes relevant de la compétence de la CPI, il sied d'interroger les recettes jurisprudentielles disponibles de la CPI (IV) avant de tirer les remarques conclusives en la matière (V).

II. LE DROIT A LA REPARATION DANS LE SYSTEME DU STATUT DE ROME DE LA CPI

La théorie classique sur la responsabilité pose le principe que « tout dommage causé soit réparé par l'auteur du fait dommageable ». Trois conditions sont ici posées pour qu'un préjudice soit réparable : Le fait générateur de réparation ou la faute, le dommage ou préjudice et le lien de causalité ou l'exigence de la cause à effet. Tout en considérant la nécessité du préjudice pour qu'il y ait responsabilité civile, la faute apparaît ici comme un élément constitutif de la responsabilité à établir. En matière des crimes internationaux, l'auteur de la faute ne peut réparer que lorsque l'acte criminel qu'il a posé a causé préjudice à autrui. Tel est le cas de l'affaire *Le Procureur c. Ahmad Al Faqi Al Mahdi,* l'accusé reconnaît « avoir le remord des préjudices causés à sa famille, à sa communauté à Tombouctou, à son pays et à la communauté internationale … et fait la promesse solennelle que la faute qu'il a commise

envers eux sera la première et la dernière ».[13] Ce qui traduit l'expression de la faute intentionnelle commise par ce dernier et l'oblige à réparer.

La notion de la faute a été fortement critiquée par différents doctrinaires suite à ses limites pour engager la responsabilité civile de son auteur. Vers la fin du XIXème siècle, Saleilles et Josserand vont, ainsi, proposer la théorie de la responsabilité civile objective qui repose sur la notion du risque créé et le risque profit (Mubalama Zibona : 2015). La théorie du risque viserait seulement qu'aucune victime ne reste sans être indemnisée (Savatier R. : 2000, page 45). Tout en prenant acte de cette évolution doctrinale, « La faute était maintenue comme condition et fondement de la responsabilité civile. Là est le principe : pas de responsabilité civile sans faute. On peut cependant admettre que, dans certaines conditions, il soit urgent de secourir les victimes en établissant une responsabilité en dehors de toute faute » (Geneviève V. : 1965, page 12 ; Starck Boris : 1958, page 475).

Dans un autre registre, Boris Stack (1958, page 475)[14] va s'appesantir sur la théorie de la garantie comme une solution idoine à l'antagonisme des pensées des théories de la faute et du risque. La victime retrouve ici sa place car désormais l'attention n'est plus portée uniquement du côté de l'auteur du dommage. La victime a des droits qui doivent être garantis notamment le droit à la réparation de toute atteinte à sa personne ou à son patrimoine. Dans le cas d'espèce, il n'y a pas de faute à exiger du responsable, la faute qui, jusque-là, permettait l'identification du responsable était devenue un obstacle à l'indemnisation de la victime. Car, si la victime n'arrivait pas à prouver la faute, elle se retrouvait sans réparation. Au final, le domaine de la responsabilité subjective s'est considérablement restreint au profit des cas de responsabilité objective qui continuent à se multiplier (Kangulumba Mbambi : 2002). Aujourd'hui, c'est bien plus le dommage qui engendre la responsabilité civile que le comportement du responsable. Il va alors apparaître le souci corollaire de ne plus faire peser le poids de la réparation sur les seuls responsables. On va se mettre à assister au déclin de la responsabilité individuelle parallèlement à la socialisation des risques. C'est la thèse que défend Geneviève V. (1965, page 12). Cette socialisation des risques a contribué à répartir le poids de l'indemnisation des dommages sur la collectivité tout entière, elle s'est mise en place par les mécanismes de l'assurance et de la socialisation des risques. Ainsi, parmi les mécanismes de socialisation des risques, on épingle le fonds de garantie (ou indemnisation) qui en vue d'éviter que les victimes ne supportent le poids de l'insolvabilité du responsable (lorsque le responsable n'est pas assuré ou lorsqu'il n'est pas identifié, ou lorsque quoiqu'identifié, le responsable n'est pas en mesure de supporter le poids de la réparation) ; et la sécurité sociale qui est une expression et un symbole de la solidarité sociale en matière de responsabilité civile. L'idée derrière cette grande réflexion est de renforcer la responsabilité objective, une responsabilité non attachée à la faute. La protection de la victime a désormais pris une ampleur significative en garantissant son indemnisation.[15] « Pas de préjudice, pas d'actions » (Letourneau P. : 1982, page 156) sans dommage, pas de réparation, le préjudice ou le dommage est une des conditions substantielles pour engager la responsabilité de quelqu'un. Cependant, tous les dommages que suscite la vie en société ne donnent pas lieu à réparation. Toute réparation exige que le dommage ait un caractère certain (Esmein V. : 1962, page

13 Affaire *Le Procureur c. Ahmad Al Faqi Al Mahdi*, N° ICC-01/12-01/15, 27 septembre 2016, Paragraphe 103.

14 La responsabilité fondée sur le risque et le garantie, cours de droit.net, https://cours-de-droit.net/la-responsabilite-fondee-sur-le-risque-et-la-garantie-a126822778/

15 *Idem.*

151 ; Boré J. : 1974, page 34), direct (Terré F. : 1999, page 635 ; Montanier J. : 1981, page 45 ; Nguyen J. : 1976, page 1), légitime de l'intérêt (Vidal J. : 1971, page 23), et ne doit avoir été déjà réparé (Vidal J. : 1980, page 23).

Répondant aux caractéristiques sus présentées, on enregistre plusieurs sortes de dommages réparables en matière des crimes internationaux. Les victimes des crimes internationaux (crimes contre l'humanité, crimes de guerre, crimes de génocide et crime d'agression) peuvent avoir subi des atteintes touchant leurs corps, leurs patrimoines (Guidon M. : 2006, page 45)[16] ou encore à apprécier sur le plan moral comme l'affirme Nyabirungu R. (2013, page 8) : « A l'occasion des événements tragiques qui ont bouleversé le monde (…), les victimes ont subi plusieurs sortes des dommages tels les viols, pillages, destructions des champs et des récoltes, la démolition des maisons que la paisible population a subi, sont des dommages physiques, moraux ou matériels et nécessitent réparation pour établir une justice et une paix sociale entre les humains ». Le dommage corporel est, d'abord et avant tout, toute atteinte portée à l'intégrité physique de la personne : les blessures plus ou moins graves et à plus forte raison la mort. Ces dommages appellent, bien entendu, à l'indemnisation de la victime. Mieux vaut dire indemnisation que réparation, car on ne ressuscite pas les morts, et il est malaisé, c'est le moins qu'on puisse dire, de rendre à l'amputé son bras ou sa jambe (Terré F. : 1999, page 640 ; Assale C. : 1990, page 12 ; Lambert Y. : 1990, page 5 ; Gasigwa H. : 2000, page 34). La réparation du préjudice est due même si la victime est tombée dans un état de totale inconscience. Pour le préjudice corporel, la notion semble être trop étendue car relève aussi de la catégorie des dommages corporels, des souffrances physiques, passées ou futures, subies par la victime (Guidon M. : 2006, page 45). Le préjudice matériel est celui qui se traduit par une perte évaluable pécuniairement, il s'agit d'un préjudice patrimonial (Chabas F. :1965, page 405).

Le préjudice moral, en revanche, ne se traduit point par une perte en argent, par ce qu'il porte atteinte à un droit extrapatrimonial.[17] Lorsque le préjudice subi cesse d'être corporel ou matériel et revêt un caractère extrapatrimonial, sa réparation peut susciter des objections, soit d'une manière générale, parce qu'il est alors singulièrement difficile d'aménager une réparation adéquate, soit de manière plus particulière, lorsqu'il s'agit d'une douleur morale car il peut être choquant d'aller en quelque sorte monnayer ses larmes devant les tribunaux (Ripert G. : 1948, page 3). Une lecture fouinée de l'affaire *Katanga révèle que* les victimes ont affirmé avoir subi des préjudices moraux résultant de la perte des décès des parents et d'autres proches. Elles ont rappelé les traumatismes, les stress moraux et cauchemars auxquels elles sont exposées toutes les fois qu'elles pensent aux êtres chers perdus.[18] En considération de ces allégations, le représentant légal des victimes notera que l'indemnisation du préjudice moral doit tenir compte de trois catégories des victimes :

> « En premier lieu, les parents très proches (père, mère, époux, enfants et assimilés) ; en second lieu, les parents proches (frères, sœurs, et assimilés) ; en troisième lieu, les autres parents plus éloignés. Pour la première catégorie, il suggère une fourchette de 25.000 à 50.000 USD, pour la seconde, une fourchette de 12.500 à 25.000 USD, pour la troisième, une fourchette de 6.000

16 Affaire *Le Procureur c. Ahmad Al Faqi Al Mahdi*, N° ICC-01/12-01/15, 27 septembre 2016, Paragraphe 103.

17 *Le Procureur c. Germain Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut de Rome, N° ICC-01/04-01/07, Paragraphe 239.

18 *Le Procureur c. Germain Katanga*, Ordonnance de réparation, ICC-01/04-01/07 du 24 mars 2017, ICC-01/04-01/07-3728 du 24 mars 2017, Paragraphes 227 et suivants.

> à 12.000 USD ».[19] Partageant la même lecture, la Défense a aussi suggéré pour « la première catégorie une somme de 10.000 USD, pour la seconde une somme de 6.000 USD et pour la dernière un montant de 4.000 USD ».

C'est en référence aux pratiques observées en France, en Belgique, en RDC (juridictions militaires), devant la Commission des Nations Unies en matière d'indemnisation et devant la Cour Interaméricaine que la Chambre de première instance II de la CPI va retenir deux catégories de décès ayant un impact sur chacune des victimes : « D'une part, des parents proches (conjoints, parents, enfants, grands-parents, petits-enfants), et, d'autre part, celui des autres parents plus éloignés (autres parents). Le préjudice psychologique lié au décès d'un parent proche est évalué *ex æquo et bono à 8.000 USD et le préjudice psychologique lié au décès d'un parent plus éloigné est évalué ex æquo et bono à 4.000 USD ».*[20] La chambre a particulièrement pris en considération l'affaire *Puerto Bello massacre v. Colombia*[21], dans laquelle la Cour Interaméricaine :

> « … réaffirme que la souffrance causée à une victime concerne les membres de la famille les plus proches, particulièrement ceux qui avaient des relations affectives proches avec la victime. De plus, la (Cour Interaméricaine) a présumé que les souffrances ou la mort d'une personne entraine pour ses enfants, son époux ou son compagnon, sa mère, son père ou ses enfants un préjudice non-pécuniaire qui n'a pas besoin d'être prouvé ».[22]

La réparation des dommages n'est pas subordonnée uniquement à la double existence d'un dommage (matériel, corporel ou moral) et d'un fait générateur de responsabilité (fait personnel) ; encore faut-il que ce dommage se rattache à ce fait générateur de responsabilité par un lien de causalité (Marty G. : 1939, page 685 ; Chabas F. : 1965, page 70). Il faut que le fait générateur de responsabilité ait été la cause du dommage, sa cause efficiente. Dans l'affaire *Katanga*, la Chambre d'appel II a jugé que « la norme applicable au lien de causalité entre le préjudice et le crime est le critère dit du « *but/for » en common law à savoir que n'eût été la commission du crime, le préjudice n'aurait pas été* constitué, et il est en outre requis que les crimes dont Thomas Lubanga a été reconnue coupable aient été la « cause directe » du préjudice pour lequel des réparations sont demandées ».[23]

Le droit à la réparation est protégé par les articles 75 et 79 du Statut de Rome de la CPI et la Résolution 60/147 adoptée par l'Assemblée Générale des NU du 16 décembre 2005. La Cour établit des principes applicables aux formes de réparation, telles que la restitution, l'indemnisation ou la réhabilitation, à accorder aux victimes ou à leurs ayants droit. Une réparation adéquate, effective et rapide permet de promouvoir la justice en remédiant aux violations flagrantes du droit international des droits de l'homme ou aux violations graves du droit international humanitaire.

Dans son étendue, le droit à la réparation en matière des crimes internationaux conduit à l'idée de la réparation intégrale (Fofe Djofia Malewa : 1998, pages 31/48). Selon Viney et

19 *Le Procureur c. Germain Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut de Rome, N° ICC-01/04-01/07, Paragraphe 239, P. 227.

20 *Le Procureur c. Germain Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut de Rome, N° ICC-01/04-01/07, Paragraphe 230-232.

21 Cour Interaméricaine, *Puerto Bello Massacre v. Colombia (Merits, Reparations and Costs*), Paragraphe 257.

22 *Le Procureur c. Germain Katanga,* Ordonnance de réparation en vertu de l'article 75 du Statut de Rome, N° ICC-01/04-01/07, Paragraphe 231.

23 *Le Procureur c. Thomas Lubanga,* Chambre d'appel, Ordonnance de réparation, n°01/04-01/06-3129-AnxA-tFRA, Paragraphe 59.

Jourdain, le principe de la réparation intégrale est annoncé par une formule classique, quasi dogmatique, selon laquelle :

> Le propre de la responsabilité civile est de rétablir aussi exactement que possible l'équilibre détruit par le dommage et de replacer la victime dans la situation où elle se serait trouvée si l'acte dommageable n'avait pas eu lieu (Mestre G. : 2005, page 161 ; Telomono M. : 2014, page 380). Le dogme de la réparation intégrale est souvent résumé par l'expression « Rien que le dommage, tout le dommage » (Geneviève V. : & Jourdain 2010, page 154).

De cette finalité, la doctrine déduit habituellement deux conséquences : d'une part, la victime ne doit pas s'enrichir du fait de la réparation. D'autre part, la réparation doit porter sur la totalité des préjudices subis, nonobstant les difficultés d'évaluation qui pourraient éventuellement surgir (Geneviève V. : & Jourdain 2010, page 154). Telle est aussi la position de la jurisprudence Française selon laquelle « les dommages-intérêts alloués à une victime doivent réparer le préjudice subi sans qu'il en résulte pour elle ni perte, ni profit ».[24]

Si l'idéal est que le préjudice soit réparé intégralement, il faut avouer qu'en certaines matières, la réparation intégrale se bute à une difficulté d'être appliquée. Souvent, le juge ne sait pas apprécier intégralement le préjudice subi, qu'il recourt à l'équité pour allouer les indemnités à la victime. Matthieu Telomono (2014, page 23) soutient qu'en cas de la mort d'un être cher ou du préjudice moral subi résultant de la mort du conjoint, de l'ami, aucune réparation intégrale ne peut être conçue car il est impossible de ramener à la vie la personne morte. En matière particulière des crimes internationaux et des violences sexuelles, focalisant l'attention sur la situation de la RDC, tantôt les juridictions accordent des dommages-intérêts de manière superficielle et sans motivation quelconque, tantôt, elles prononcent les dommages intérêts qui reflètent les préjudices subis. Tout cela dépend des humeurs et des attitudes des juges. Il a été observé, par exemple, en RDC, en matière des violences sexuelles et de crimes contre la paix et la sécurité de l'humanité, *la Cour d'Appel du Haut Katanga a, dans deux affaires différentes, faisant application de l'équité et du bon sens, accordé respectivement à titre de réparation sous le RPA 6301/010 un pagne premier choix, un costume, les souliers pour papa et maman, un sac à main et deux chèvres tandis que sous le RPA 6298/010, 10.000 USD*. Visiblement, la valeur pécuniaire d'un cas des violences sexuelles et de crime contre la paix et la sécurité de l'humanité (crime international) en termes de dommages intérêts ne suit aucun barème préétabli (PNUD : 2018, pages 5&45).

Quelques hauts magistrats réunis à Lubumbashi en RDC en atelier, le 7 juillet 2018, ont affirmé que : « Même si la victime postule pour les dommages-intérêts, le juge considère aussi la coutume locale en termes d'exigences relativement au versement de la dot pour déterminer le taux des dommages intérêts à prononcer ». Toutes considérations faites, il n'y a aucune constance dans les allocations qui sont faites par les juridictions civiles et militaires en RDC PNUD : 2018, pages 5 & 45).

Cette réflexion n'est pas éloignée des pratiques auxquelles la Chambre de première instance I dans l'affaire *Katanga* a fait recours dans l'appréciation des dommages-intérêts à allouer aux victimes des crimes graves.[25] Dans certaines circonstances où le juge ne sait pas apprécier la gravité du préjudice subi par les victimes, il peut être amené à procéder unique-

24 Cassation civile française 2ème, 5 Juillet 2005, Bulletin civil II n°4.

25 *Le Procureur c. Germain Katanga*, Chambre de première instance II, Ordonnance de réparation, ICC-01/04-01/07-3728, 24 mars 2017, Paragraphes 230, 231.

ment à des réparations collectives (article 97 du Règlement de procédure et de preuve de la CPI). L'inconvénient des réparations collectives demeurant le fait que la réparation ne tient pas compte de l'évaluation vraie du préjudice que chacune des victimes a subi. Le préjudice enduré n'étant pas le même ou le degré de souffrance étant différent, l'idéal serait que la réparation en matière des crimes internationaux soit individualisée. C'est en veillant sur le sort des victimes qui doivent bénéficier des réparations, que le Statut de Rome a institué le Fonds au profit des victimes.

III. PRESENTATION ET PORTEE JURIDIQUE DU FONDS AU PROFIT DES VICTIMES CONSACRE PAR L'ARTICLE 79 DU STATUT DE ROME

Contrairement aux tribunaux militaires internationaux (Nuremberg et de Tokyo) et aux tribunaux *ad hoc* (TPIY et TPIR), la CPI a apporté une métamorphose fulgurante dans l'administration de la justice pénale internationale quant à ce qui est du sort réservé aux victimes devant elle. Le système du Statut de Rome et celui des juridictions pénales "internationalisées" ou tribunaux mixtes créés dans sa suite (particulièrement les Chambres extraordinaires au sein des tribunaux Cambodgiens et du Tribunal spécial pour le Liban, TSL) élèvent les victimes au rang ou au statut de « sujet de droit international pénal ». Ce passage marque une « prise de conscience accrue en droit international pénal de la nécessité de dépasser la notion de justice punitive, pour tendre vers une solution plus inclusive, qui encourage les victimes à participer au processus et reconnaît le besoin de leur offrir des recours utiles. »[26]

Cette dynamique portée par l'état d'esprit des délégations réunies à la conférence diplomatique à Rome « … des millions d'enfants, de femmes et d'hommes ont été victimes d'atrocités qui défient l'imagination et heurtent profondément la conscience humaine » a conduit à la création de deux institutions indépendantes : la CPI et le Fonds au profit des victimes (Tshibuyi wa Tshibuyi : 2009 ; Kihangi Bindu K. : 2010 ; 2015, page 162).

L'article 79 du Statut de Rome esquisse les contours du Fonds tout en laissant à l'Assemblée des Etats Parties le soin de fixer les principes de sa gestion. Il est un instrument de la Cour (mandat de réparation) et pose des actions de manière largement indépendante des activités judiciaires de la Cour (assistance aux victimes). Selon la Cour, « les réparations ont deux objectifs principaux consacrés par le Statut : elles obligent les responsables de crimes graves à réparer le préjudice qu'ils ont causé aux victimes et elles permettent à la Cour de s'assurer que les criminels répondent de leurs actes ».[27]

La structure du Fonds au profit des victimes est déterminée par les articles 1 et 17 du Règlement du Fonds d'affectation spéciale au profit des victimes.[28] L'analyse de ces disposi-

26 Préambule du Statut de Rome de la CPI ; *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation (modifiée), 3 mars 2015, traduction enregistrée le 1 août 2016, ICC-01/04-01/06-3129AnxA Paragraphe 1.

27 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation (modifiée), 3 mars 2015, traduction enregistrée le 1 août 2016, ICC-01/04-01/06-3129AnxA, paragraphe 2.

28 ICC-ASP/1/Res. 6 portant création d'un fonds au profit des victimes de crimes relevant de la compétence de la Cour et de leurs familles, adoptée par consensus, à la séance plénière, le 9 septembre 2002, paragraphes 1 – 7.

tions débouche sur le fait que le Fonds au profit des victimes a deux organes qui assurent sa gestion : Le Conseil de direction et le Secrétariat du Fonds au profit des victime.[29] Le Fonds au profit des victimes assure les fonctions de réparation et d'assistance au profit des victimes. Ce Fonds peut agir dans l'intérêt des victimes de crimes, que soit intervenue ou non une condamnation par la CPI. Il coopère avec la Cour afin d'éviter toute interférence dans les procédures judiciaires en cours (Cour Pénale Internationale : 2011).

Le pouvoir de gestion du Fonds est confié au Conseil de direction, il dispose d'un financement propre, distinct du budget général de la Cour. Les points 22, 23 et 25 du Règlement du Fonds d'affectation spéciale au profit des victimes précisent respectivement que

> « Dans son rapport annuel à l'Assemblée des États Parties sur les activités et projets du Fonds, le Conseil de direction soumet un appel de contributions volontaires au Fonds.
>
> Avec l'appui du Secrétariat, le Conseil de direction prend contact avec les gouvernements, les organisations internationales, les particuliers, les entreprises et d'autres entités afin de solliciter des contributions volontaires au Fonds.

Le Fonds reçoit toutes les contributions volontaires versées par les sources citées à l'alinéa a) du paragraphe 2 de la résolution ICC-ASP/1/Res.6 de l'Assemblée des États Parties et prend note des sources et des montants reçus ».[30]

Bien que fonctionnant avec des contributions volontaires, le Fonds a la latitude à pouvoir refuser certaines contributions. La Règle 30 du Règlement du Fonds d'affectation spéciale au profit des victimes est précis en ces termes :

Le Fonds refuse les contributions volontaires :

a) Considérées comme n'étant pas compatibles avec les buts et les activités du Fonds ;

b) Considérées comme étant affectées à une destination d'une manière incompatible avec la règle 27 (avant de refuser de telles contributions, le Conseil de direction peut s'efforcer d'obtenir du donateur qu'il renonce à cette destination ou qu'il la modifie dans un sens qui soit acceptable) ;

c) Qui affecteraient l'indépendance du Fonds ;

d) Qui entraîneraient une répartition manifestement inéquitable des ressources et biens disponibles entre les différents groupes de victimes.

Janet Chan (2013, page 12) précise que le Fonds au profit des victimes est une institution non judiciaire et indépendante de la CPI. Il administre, d'une part, les ordonnances de réparation de la CPI lorsqu'un accusé est déclaré coupable, et, d'autre part, fournit de l'assistance générale aux victimes et à leurs familles grâce aux contributions volontaires. Par son financement et projets, il tente de répondre à leurs besoins physiques, psychologiques et matériels. Il faut noter que le Fonds peut exercer son mandat d'assistance même en l'absence d'une condamnation par la CPI.

29 ICC-ASP/3/Res7, Création du Secrétariat du fonds d'affectation spéciale au profit des victimes, adoptée le 10 ; Septembre 2004 ; articles 18 et 19 du Règlement du Fonds au profit des victimes.

30 ICC, Résolution ICC-ASP/4/Res.3 relative au Règlement du fonds d'affectation spéciale au profit des victimes, adoptée le 3 décembre 2005.

La phase des réparations apparaît ici comme une étape essentielle de l'administration de la justice car le succès de la Cour, dans une certaine mesure, est lié au succès de son système de réparation.[31] En vue de présenter la valeur intrinsèque de cette deuxième institution créée par le Statut de Rome « Fonds au profit des victime », la Chambre de Première Instance II dans l'Affaire *Katanga* affirme sans ambages que :

> « La procédure en réparation est à la fois liée à la procédure pénale et séparée de cette dernière. Elle est liée à la procédure pénale, car la responsabilité en matière de réparations est étroitement liée aux crimes pour lesquels la personne a été reconnue coupable. Elle est séparée de cette procédure, car elle constitue une procédure en soi, dans le cadre de laquelle des preuves spécifiques sont produites par les victimes qui peuvent être, lorsque cela est possible et avec les expurgations qu'il convient d'appliquer, contestées par la personne reconnue coupable. A cette occasion, des observations et des arguments oraux et écrits sont échangés par les parties sur les différents aspects juridiques et factuels de la procédure. L'ensemble de ces échanges trouve son aboutissement dans l'ordonnance de réparation … comme toute procédure devant la Cour, la phase des réparations est une procédure judiciaire. Partant, la Chambre doit assurer un juste équilibre entre les droits et intérêts divergents des victimes et ceux de la personne déclarée coupable ».[32]

Abordant l'aspect d'assistance, Motoo Noguchi, Président du Conseil de direction du Fonds au profit des victimes lors de la séance de la 12ème session de l'Assemblée des Etats parties de la CPI a salué le rôle joué par le Fonds dans son mandat d'assistance dans le Nord de l'Ouganda et en RDC depuis 2008.[33] John Bolton note que « depuis 2008, le Fonds a apporté son aide à plus de 450.000 victimes directes et indirectes en RDC et en Ouganda, en assurant une réadaptation physique et psychologique ainsi qu'un soutien socioéconomique aux survivants des crimes les plus graves. Le Fonds est également au stade de la mise en œuvre des trois ordonnances de réparation dans les affaires *Lubanga* et *Katanga* en RDC et

31 *Le Procureur c. Germain Katanga*, Chambre de Première Instance II, Ordonnance de réparation, ICC-01/04-01/07-3728 du 24 mars 2017, Paragraphe 14 ; *Le Procureur c. Thomas Lubanga Dyilo,* Chambre de première instance I, Décision fixant les principes et procédures applicables en matière de réparations, daté du 7 août 2012 et traduction enregistrée le 19 février 2013, ICC-01/04-01/06-2904-tFRA, Paragraphe 178 (« *Lubanga*, Chambre de Première Instance I, Décision sur les réparations ») ; *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation (modifiée), 3 mars 2015, traduction enregistrée le 1 août 2016, ICC-01/04-01/06-3129AnxA, paragraphe 3 (*Lubanga*, Chambre d'appel, Ordonnance de réparation, ICC-01/04-01/06-3129AnxA-tFRA »).

32 *Le Procureur c. Germain Katanga*, Chambre de Première Instance II, Ordonnance de réparation, ICC-01/04-01/07-3728 du 24 mars 2017, paragraphes 16 & 18 ; *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, *Decision on the admissibility of the appeals against Trial Chamber I's « Decision establishing the principles and procedures to be applied to reparations » and directions on the further conduct of proceedings*, 14 décembre 2013, ICC-01/04-01/06-2953, paragraphe 70 : « *the reparations proceedings are a distinct stage of the proceedings and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings* » ; *Lubanga*, Chambre d'appel, Arrêt sur les réparations, ICC-01/04-01/06-3129, Paragraphe 237 : « *the Appeals Chamber considers it to be beyond question that a person subject to an order of court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effective appeal such an order, and that the exten of those obligations must be determined by a court in a judicial process* » ; Lubanga, Chamber d'appel, Ordonnance de réparation, ICC_01/04_01/06-3129-Anx-tFRA, Paragraphes 20, 22, 45 et 49. Ces principes applicables aux réparations ne sauraient être interprétés de façon préjudiciable ou contraire aux droits de la personne déclarées coupable et aux exigences d'un procès équitable et impartial ; Article 97-3 du Règlement de Procédure et de Preuve de la CPI.

33 M. Motoo Noguchi, Rapport à l'Assemblée des Etats parties sur les activités et les projets du conseil de direction du Fonds d'affectation spéciale au profit des victimes pour la période du 1er juillet 2012 au 30 Juin 2013, Paragraphes 39 et 46, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-14-FRA.pdf ; Fonds au profit des victimes, Assistance et réparations, réalisations, enseignements tirés et évolution, Rapport sur l'état d'avancement des programmes, Septembre 2015.

dans l'affaire *Al Mahdi* au Mali, où plus de dix mille victimes bénéficieront des programmes de réparations ».[34]

En tant qu'innovation pionnière spécifique à la CPI, le Fonds au profit des victimes doit intervenir au profit des victimes dans les limites établies des ordonnances de réparation ou de son programme d'assistance aux victimes. Il s'agit ici d'une mise en œuvre effective du droit à la réparation reconnue aux victimes en droit international des droits de l'homme et en droit international humanitaire.

IV. COMPRENDRE LE DROIT A LA REPARATION DANS LA JURISPRUDENCE DE LA CPI

Depuis l'entrée en vigueur en 2002 du Statut de Rome de la CPI adoptée en 1998, le nombre des situations et des affaires n'a cessé d'augmenter. Sans vouloir verser ou alimenter les controverses et reproches variés faits à l'endroit de la CPI sur différents aspects notamment les durées trop longues d'instruction des affaires, les critères de sélection des situations et affaires selon les zones géographiques, l'éventuelle instrumentalisation de la Cour par certaines puissances Etatiques, la politique de poursuite de chefs d'Etats Africains en fonction, d'aucuns notent des efforts notables de la Cour en faveur des victimes. La jurisprudence disponible au stade actuel fait école quant aux réparations et assistances accordées aux victimes des crimes relevant de sa compétence.

LES RÉPARATIONS DANS L'AFFAIRE LUBANGA

Après avoir déclaré Thomas Lubanga Dyilo coupable des crimes de conscription et d'enrôlement d'enfants de moins de 15 ans au sein de l'Union des Patriotes Congolais « UPC » et des Forces Patriotiques pour la Libération du Congo « FPLC » et du fait de les avoir fait participer activement à des hostilités, au sens des articles 8-2-e-vii et 25-3-a du Statut, de septembre 2002 à août 2003 en en Ituri/RDC,[35] la Chambre a tenu d'autres audiences sur la peine et les réparations conformément aux articles 76-2 du Statut et 143 du RPP. Les audiences des réparations ont connu un parcours riche en termes des principes et procédures applicables aux réparations et au plan de mise en œuvre des réparations accordées aux victimes :

> *Le Procureur c. Thomas Lubanga*, Chambre de Première Instance I, Décision Fixant les principes et procédures applicables en matière de réparations, ICC-01/04-01/06 du 7 août 2012, ICC-01/04-01/06-2904-tFRA, le 19 février 2013.
>
> *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation modifiée, du 3 mars 2015, ICC-01/04-01/06-3129-AnxA-tFRA, le 1er août 2016.

34 Le Conseil de direction du Fonds au profit des victimes affirme que la justice réparatrice prévue par le Statut de Rome revêt une importance incontestable pour les victimes, Déclaration du 14 Septembre 2018, https://www.icc-cpi.int/Pages/item.aspx?name=180914-stat-tfv&ln=fr, (visité le 5 mai 2020).

35 *Le Procureur c. Thomas Lubanga Dyilo,* ICC-01/04-01/06 du 14 mars 2012, ICC-01/04-01/06-2842-tFRA 31/08/2012, paragraphe 1358.

> *Le Procureur c. Thomas Lubanga Dyilo*, Chambre de Première Instance II, Rectificatif de la « Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu », version publique expurgée, ICC-01/04-01/06 du 21 décembre 2017, ICC-01/04-01/06-3379-Red-Corr du 21 décembre 2017.

Par ces ordonnances, la Cour rappelle la portée des réparations en insistant sur le fait qu'il est du droit des victimes de demander et d'obtenir réparation. Ce droit a déjà trouvé une consécration importante sur le plan international.[36] En cela, la Cour a la latitude d'accorder aux victimes une réparation individuelle ou collective et, lorsqu'elle l'estime appropriée, elle peut accorder les deux concurremment car elles ne s'excluent pas mutuellement.[37] Les réparation individuelles à accorder ne doivent, cependant pas, constituer une source des tensions et de divisions au sein des communautés. Lorsqu'il est envisagé des réparations collectives, on doit s'assurer qu'elles remédient au préjudice que les victimes ont subi aussi bien individuellement que collectivement.[38]

Cette première décision de la CPI en matière de réparations, accueillie dans différents milieux notamment diplomatiques, de la société civile et du savoir, apparaît comme une innovation notable en matière de réparations au profit des victimes des crimes internationaux. Elle était cependant entachée ou teintée de certaines faiblesses ayant conduit la Chambre d'appel au devoir de rappeler ce qu'une ordonnance de réparation se doit de contenir :

- être prise à l'encontre de la personne condamnée, Mr Lubanga le cas échéant ;
- établir la responsabilité financière de Mr Lubanga et l'en informer, ainsi que du fait que, exceptionnellement, le Fonds d'aide au profit des victimes se chargeait de son évaluation ;
- stipuler les types de réparation – individuelle et/ou collective – qui sont octroyés ;
- définir les types de préjudice qui peuvent faire l'objet d'une réparation, en gardant à l'esprit la nécessité d'un lien entre le préjudice subi et les crimes pour lesquels Mr Lubanga a été condamné ;
- Identifier les victimes susceptibles d'être éligibles à la réparation ou énoncer les critères d'éligibilité (Redress Trust : 2017, pages 6 & 7).

Il a fallu attendre le rectificatif de la « Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu » de la Chambre de première instance II, du 21 décembre 2017, dans sa traduction enregistrée du 21 décembre 2017 pour qu'elle fixe le montant des réparations, le nombre des victimes, déclare son indigence et enjoint au Conseil du Fonds d'indiquer s'il est en mesure d'affecter un montant supplémentaire à la mise en œuvre des réparations collectives dans la présente affaire en ces termes :

> « Rend, à l'unanimité, la présente Décision fixant le montant des réparations auxquelles M. Thomas Lubanga est tenu ;

36 Résolution de l'Assemblée Générale des Nations Unies, A/RES/60/147 du 16 Décembre 2005, voir le texte en annexe du chapitre I, Evolution de l'accès des victimes à la justice.

37 *Le Procureur c. Thomas Lubanga*, Chambre de Première Instance I, Décision Fixant les principes et procédures applicables en matière de réparations, ICC-01/04-01/06-2904-tFRA du 7 août 2012 et traduction enregistrée le 19 février 2013, paragraphes 217 – 221.

38 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation modifiée, du 3 mars 2015, ICC-01/04-01/06-3129-AnxA-tFRA, le 1er août 2016, paragraphe 33.

> Constate que 425 des 473 victimes potentiellement éligibles issues de l'échantillon ont démontré au standard de preuve de l'hypothèse la plus probable être une victime directe ou une victime indirecte des crimes pour lesquels M. Lubanga a été déclaré coupable ;
>
> Décide, par conséquent, que les 425 victimes doivent bénéficier des réparations collectives approuvées par la Chambre dans la présente affaire ;
>
> Constate que les 425 victimes ne constituent qu'un échantillon de victimes potentiellement éligibles et que des centaines voire des milliers de victimes additionnelles ont subi de préjudice résultant des crimes pour lesquels M. Lubanga a été condamné ;
>
> Fixe le montant des réparations auxquelles M. Lubanga est tenu à la somme totale de 10.000.000 USD, ce qui comprend à la fois sa responsabilité à l'égard des 425 victimes issues de l'échantillon, soit 3.400.000 USD, et sa responsabilité à l'égard des autres victimes qui pourraient être identifiées, soit 6.600.000 USD ;
>
> Déclare que M. Lubanga est indigent aux fins des réparations au jour de la présente Décision ;
>
> Enjoint au Conseil de direction du Fonds de lui indiquer s'il est en mesure d'affecter un montant supplémentaire à la mise en œuvre des réparations collectives dans la présente affaire, dans le respect des dispositions de la règle 56 du Règlement du Fonds, ou de poursuivre ses efforts visant la collecte de fonds supplémentaires, au plus tard le 15 février 2018 ;
>
> Enjoint à la Présidence, avec l'assistance du Greffier, de surveiller de manière continue la situation financière de M. Lubanga conformément à la norme 117 du Règlement de la Cour ;
>
> Enjoint au Fonds de prendre contact avec le Gouvernement de la RDC en vue d'établir la manière dont il pourrait contribuer au processus des réparations et tenir la Chambre informée à ce sujet ;
>
> Enjoint au Fonds de déposer des observations sur la possibilité de poursuivre la recherche et l'identification des victimes avec l'assistance du BCPV et des Représentants légaux des victimes V01 et V02, au plus tard le 15 janvier 2018 ;
>
> Décidera sur la suite de la mise en œuvre des réparations collectives en temps opportun ;
>
> Invite le Fonds à envisager la possibilité d'inclure les personnes qui ne remplissent pas le critère requis afin de bénéficier des réparations ordonnées dans la présente affaire dans les programmes d'assistance mis en place dans la zone de situation en RDC ;
>
> Enjoint au Greffier de prendre toutes les mesures nécessaires pour donner une publicité adéquate à la présente décision ».[39]

Près de huit ans après, depuis le déclenchement de la procédure de réparations dans l'affaire *Lubanga*, est-il encore permis de croire à son aboutissement au profit des victimes ? Les victimes craignent pour l'effectivité de la réparation suite à la libération de *Lubanga* intervenue le 15 mars 2020 après avoir purgé une peine d'emprisonnement : « Comment peut-on

39 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre de Première Instance II, Rectificatif de la « Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu », version publique expurgée, ICC-01/04-01/06 du 21 décembre 2017, ICC-01/04-01/06-3379-Red-Corr du 21 décembre 2017, paragraphes. 123/124.

le libérer alors que la réparation n'est pas encore effective ? Pour Bosco [Ntaganda], nous pensons que la cour va le détenir jusqu'à la réparation des victimes car il est co-auteur de Thomas »,[40] s'est exclamée une des victimes ayant entendu parlé de la libération de Thomas Lubanga.

Visiblement, la situation est au point mort, la procédure est dans l'impasse et les victimes attendent toujours la pleine exécution de l'ordonnance de réparation (Redress Trust : 2016, page 8 ; 2019, 26). Depuis lors, le Fonds au Profit des victimes aura certainement de la peine à identifier et à localiser les victimes suite à la reprise des hostilités dans les zones cibles entre les groupes armés et les forces armées gouvernementales. A cela, il faudra aussi une politique bien ficelée pour qu'au moment venu, les opérations de réparations ne suscitent pas de nouvelles tensions entre les communautés locales directement concernées et ne soient pas aussi une nouvelle forme de traumatisme psychologique des victimes obligées aujourd'hui d'accueillir leur bourreau qui vaque librement à ses occupations ?

LES RÉPARATIONS DANS L'AFFAIRE KATANGA

La Chambre de première instance II a déclaré, en date du 7 mars 2014, Germain Katanga coupable, au sens de l'article 25-3-d du Statut, de complicité des crimes, commis le 24 février 2003, d'un chef de crime contre l'humanité (meurtre) et de quatre chefs de crime de guerre (meurtre, attaque contre une population civile en tant que telle ou contre des personnes civiles ne participant pas directement aux hostilités, destruction des biens et pillage) en lien avec l'attaque de Bogoro (Ituri/RDC).

Après une procédure fouillée, la Chambre de Première Instance II a rendu son ordonnance de réparation à l'encontre de M. Germain Katanga en vertu de l'article 75 du Statut :[41]

> « Constate que deux cent quatre-vingt-dix-sept des trois cent quarante et un Demandeurs ont démontré au standard de preuve de l'hypothèse la plus probable être victime des crimes commis pour lesquels M. Katanga a été coupable ;
>
> Décide, par conséquent, que ces deux cent quatre-vingt-dix-sept victimes doivent bénéficier des réparations octroyées dans la présente affaire ;
>
> Evalue l'ampleur du préjudice subi par les deux cent quatre-vingt-dix-sept victimes à une valeur monétaire totale de 3.752.620 USD ;
>
> Fixe le montant incombant à M. Katanga en matière de réparations à 1.000.000 USD ;
>
> Déclare que M. Katanga est indigent aux fins des réparations au jour de la présente Ordonnance de réparation ;
>
> Ordonne des réparations individuelles, à savoir une indemnisation sous forme d'un montant symbolique de 250 USD ainsi que des réparations collectives ciblées au bénéfice de chaque victime, sous forme d'une aide au

40 Joachim Unegi, Directeur de la Radio Colombe de Mahagi (180 km au nord de Bunia, à la frontière avec l'Ouganda), Les victimes des crimes craignent pour l'effectivité de la réparation suite à la libération de Thomas Lubanga, 25 mars 2020, https://french.lubangatrial.org/2020/03/25/les-victimes-des-crimes-craignent-pour-leffectivite-de-la-reparation-suite-a-la-liberation-de-thomas-lubanga/

41 *Le Procureur c. Germain Katanga*, Chambre de Première Instance II, Ordonnance de réparation, ICC-01/04-01/07-3728 du 24 mars 2017.

> logement, d'un soutien à une activité génératrice de revenus, d'une aide à l'éducation et d'un soutien psychologique ;
>
> Enjoint au Fonds de préparer un projet de mise en œuvre, à la lumière des décisions de la Chambre relatives aux types et modalités de réparations, qu'il déposera le 27 juin 2017 au plus tard et dans lequel il proposera un programme décrivant les projets qu'il entend développer ;
>
> Enjoint au Représentant légal et à la Défense de déposer des observations sur le Projet pour le 28 juillet 2017 au plus tard ;
>
> Enjoint à la Défense de contacter le Fonds afin de discuter de la contribution de M. Katanga, s'il le souhaite, aux modalités de réparations ;
>
> Enjoint au Fonds de prendre contact avec le Gouvernement de la RDC sur sa possible collaboration à la réalisation et à la mise en œuvre des réparations ;
>
> Enjoint à la Présidence, avec l'assistance du Greffier, de surveiller de manière continue la situation financière de M. Katanga conformément à la norme 117 du Règlement de la Cour ;
>
> Enjoint, au vu de la situation financière actuelle de M. Katanga, au Conseil de direction du Fonds de lui indiquer s'il est disposé à utiliser ses « autres ressources » afin de permettre le financement et la mise en œuvre des réparations individuelles et collectives, et de l'informer dudit montant dans le Projet ;
>
> Invite le Fonds à tenir compte, dans le cadre de son mandat d'assistance, chaque fois que cela lui sera possible, des préjudices qu'ont subis les Demandeurs du fait des violences à caractère sexuel ou du fait d'un traumatisme psychique transgénérationnel ainsi que des préjudices qu'ont subis les anciens enfants soldats, que la Chambre n'a pas été en mesure de considérer dans la présente affaire ; et
>
> Enjoint au Greffe de prendre toutes les mesures nécessaires pour donner une publicité adéquate à la présente Ordonnance de réparation ».

Par cette Ordonnance de réparation, la Chambre a fait preuve de quelques améliorations contrairement à l'Affaire *Lubanga*.[42] Des centaines des victimes ont été identifiées par le Greffe et Représentant légal des victimes, des propositions concrètes sur l'évaluation monétaire du préjudice subi par les victimes ont été soumises à la Chambre. Toute la procédure a permis aux victimes de se manifester et de présenter leurs perspectives en spécifiant leur demande de réparation avant que celles-ci ne soient octroyées (Redress trust : 2016, page 9).[43] Cela, pour éviter toute indifférence de la part de victimes et des tensions entre communautés, les réparations doivent s'inspirer de la culture et des coutumes locales qui ne sont pas discriminatoires ou d'exclusion.[44] L'affaire *Katanga* rencontre tous nos suffrages par le fait que la Cour, « pour la première fois, a accordé des réparations à des victimes individuelles

42 L'Affaire *Lubanga* a connu trois ordonnances de réparation dont la dernière est : *Le Procureur c. Thomas Lubanga Dyilo*, Chambre de Première Instance II, Rectificatif de la « Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu », version publique expurgée, ICC-01/04-01/06 du 21 décembre 2017, ICC-01/04-01/06-3379-Red-Corr du 21 décembre 2017. Les améliorations sont notamment la qualité de l'ordonnance sous examen et d'autres aspects comme les réparations individuelles accordées tout en s'inspirant de la culture et des coutumes locales non discriminatoires des victimes.

43 CPI, Katanga, ICC-01/04-01/07-3711, 30 septembre 2016, Observations de la Défense sur l'évaluation monétaire du préjudice subi par les victimes ; CPI, Katanga, ICC-01/04-01/07-3713, 30 septembre 2016, Observations des victimes sur la valeur monétaire des préjudices allégués.

44 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation modifiée, du 3 mars 2015, ICC-01/04-01/06-3129-AnxA-tFRA, le 1er août 2016, paragraphe 47.

… Elles ont ainsi, à la fin de la procédure, obtenu une indemnisation financière symbolique en plus d'une aide au logement et d'un soutien à une activité génératrice de revenus, ainsi que des réparations collectives » (Redress Trust : 2016, page 9 ; 2019 : page 27). Visiblement, ces réparations ont aussi été orienté vers des programmes autonomes en vue de permettre aux victimes, à leurs familles et à leurs communautés de bénéficier de ces réparations sur le long terme.[45] Les premières actions individuelles faites par la CPI à Bogoro[46] méritent de faire l'objet d'une évaluation soutenue tant du côté de la Cour que des victimes bénéficiaires sur la valeur des montants alloués individuellement par rapport au pouvoir d'achat de la population, du contexte sécuritaire, de la réparation individuelle directe et de la réparation individuelle indirecte .

Tout en rappelant les principes établis en matière de réparation (article 75-1 du Statut), en appréciant les efforts de la Chambre d'appel dans l'affaire *Lubanga* et sous réserve des modifications contenues dans l'Ordonnance de réparation dans l'affaire *Katanga* (Ordonnance de réparation sous examen ici), la Chambre rappelle en particulier que :

> « Pour toutes les questions liées aux réparations, elle « … doit traiter les victimes avec humanité et respecter leur dignité et leurs droits humains ». La Chambre doit également traiter toutes les victimes … équitablement et de la même manière, qu'elles aient participé ou non au procès ayant débouché sur la décision rendue en application de l'article 74 du Statut … La Chambre rappelle en outre que, tel qu'énoncé à l'article 68 du Statut et à la règle 86 du Règlement de Procédure et de Preuve, elle doit tenir compte des besoins de toutes les victimes. La Chambre rappelle également que, conformément aux règles 87 et 88 du Règlement de Procédure et de Preuve, des mesures appropriées doivent être mises en œuvre afin de garantir la sécurité, le bien-être physique et psychologique et la protection de la vie privée des victimes. Il est, par ailleurs, primordial que les réparations soient accordées et accessibles aux victimes sans distinction défavorable fondée sur le sexe, l'âge, la race, la couleur, la langue, la religion ou la conviction, les opinions politiques ou autres, l'orientation sexuelle, l'origine nationale, ethnique ou sociale, la fortune, la naissance ou toute autre qualité ».[47]

La Chambre a aussi tenu à rappeler qu'une ordonnance de réparation rendue en vertu de l'article 75 du Statut doit répondre, au minimum, à cinq critères essentiels :

- l'ordonnance de réparation doit être rendue à l'encontre de la personne déclarée coupable ;
- la Chambre doit indiquer quelles sont les victimes admises à bénéficier des réparations accordées ou fixer les critères d'admissibilité sur base du lien entre le préjudice subi par les victimes et les crimes dont la personne a été déclarée coupable ;
- la Chambre doit définir le préjudice causé aux victimes du fait des crimes dont la personne a été déclarée coupable. À cet égard, la Chambre note que l'évaluation de l'ampleur du préjudice causé aux victimes, aux fins de définir la nature et/ou l'importance des réparations à octroyer, peut

45 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Ordonnance de réparation modifiée, du 3 mars 2015, ICC-01/04-01/06-3129-AnxA-tFRA, le 1er août 2016, paragraphe 48.

46 Fonds au profit des victimes, Assistance et réparations, réalisations, enseignements tirés et évolution, Rapport sur l'état d'avancement des programmes, Septembre 2015, Page 65.

47 *Lubanga*, Chambre d'appel, Ordonnance de réparation, ICC-01/04-01/06-3129-AnxA-tFRA, paragraphes 15, 12, 34, 18 et 16 ; *Le Procureur c. Germain Katanga*, Chambre de Première Instance II, Ordonnance de réparation, ICC-01/04-01/07-3728 du 24 mars 2017, paragraphe 30.

être effectuée par une Chambre de première instance, dans l'ordonnance de réparation, ou être effectuée par le Fonds une fois l'ordonnance de réparation rendue ;

- la Chambre doit établir la responsabilité de la personne coupable en matière de réparations et l'informer de cette responsabilité. Cela signifie que la chambre doit préciser la portée de cette responsabilité en fixant le montant monétaire qui lui incombe à ce titre. A cet égard, la Chambre note que la responsabilité en matière de réparations d'une personne déclarée coupable se fonde sur et est limitée aux préjudices causés par les crimes pour lesquels la personne a été reconnue coupable …
- la Chambre doit préciser et motiver le type de réparations ordonnées, qu'elles soient collectives, individuelles ou les deux, conformément aux règles 97-1 et 98 du Règlement de procédure et de preuve. Elle doit aussi indiquer les modalités de réparations que la Chambre juge appropriées sur la base des circonstances particulières de l'affaire en l'espèce.[48]

Rappelant aussi la notion de « victime » au sens de l'article 85 du Règlement de Procédure et de Preuve, la Chambre est revenue sur quatre conditions présentée par la Chambre d'appel dans l'affaire *Lubanga*[49] avant d'accorder le statut de victime participant au stade du procès pour toute personne ayant présenté une demande de participant, à savoir : « le demandeur doit être une personne physique ou morale ; doit avoir subi un préjudice ; que le crime ayant causé préjudice relève de la compétence de la Cour et qu'il existe un lien de causalité entre ledit préjudice et le crime. La notion de victime implique nécessairement l'existence d'un préjudice personnel, mais aussi n'implique pas nécessairement l'existence d'un préjudice direct ».[50]

La libération de Germain Katanga avant l'effectivité de réparations des victimes en Ituri soulève aujourd'hui beaucoup d'inquiétudes dans les milieux des victimes. Elles sont très désemparées quant à leur sort tant sur le plan psychologique que sécuritaire. Comment garantir les droits des victimes conformément aux prescrits des articles 87 et 88 du Règlement de Procédure et de Preuve après la libération du coupable ayant purgé sa peine ? Est-ce que la Cour a communiqué des mesures appropriées afin de garantir la sécurité, le bien-être physique et psychologique et la protection de la vie privée des victimes ? Quelle appréciation faire de la lenteur qui caractérise le processus d'indemnisation des victimes ? Toutes considérations faites, et si aucune action n'est entreprise dans le meilleur délai, d'aucuns seraient tenté à voir le travail de la Cour sous un œil d'une « pièce de cinéma » sans impact réel sur le sort des victimes en termes de réparation et de garantie de non répétition particulièrement.

LES RÉPARATIONS DANS L'AFFAIRE AL MAHDI

En date du 27 septembre 2016, Ahmad Al Faqi Al Mahdi a été reconnu par la CPI coupable du crime de guerre d'avoir intentionnellement dirigé des attaques contre des monuments

48 *Le Procureur c. Germain Katanga*, Chambre de Première Instance II, Ordonnance de réparation, ICC-01/04-01/07-3728 du 24 mars 2017, paragraphe 31.

49 *Le Procureur c. Thomas Lubanga Dyilo*, Chambre d'appel, Arrêt relatif aux appels interjetés par le Procureur et la Défense contre la Décision relative à la participation des victimes rendues le 18 janvier 2008 par la Chambre de première instance I, daté le 11 juillet 2008 et traduction enregistrée le 27 août 2008, ICC-01/04-01/06-1432-tFRA, paragraphes 61-65.

50 *Le Procureur c. Germain Katanga*, Chambre de Première Instance II, Ordonnance de réparation, ICC-01/04-01/07-3728 du 24 mars 2017, paragraphes 36/37 & 39.

historiques et dédiés à la religion à Tombouctou, au Mali, entre fin juin et début juillet en 2012.[51] Dans son Ordonnance de réparation, la Chambre de première instance VIII :

> « Ordonne l'octroi de réparations individuelles, collectives et symboliques en faveur de la communauté de Tombouctou, comme précisé aux paragraphes 56, 67, 71, 83, 90, 106 et 107 de la présente ordonnance,
>
> Reconnaît que la destruction des Bâtiments protégés a causé des souffrances à toute la population du Mali et à la communauté internationale,
>
> Evalue la responsabilité d'Ahmad Al Mahdi aux fins de ces réparations à 2,7 millions d'euros,
>
> Encourage le Fonds au profit des victimes à prendre des mesures pour compléter les réparations ordonnées et à proposer aux victimes au Mali une assistance plus large, comme précisé aux paragraphes 108 et 138 de la présente ordonnance,
>
> Ordonne au Greffe de prendre immédiatement les mesures symboliques définies au paragraphe 71 de la présente ordonnance,
>
> Fixe au 16 février 2018 la date limite de dépôt du projet de plan de mise en œuvre préparé par le Fonds au profit des victimes, et
>
> Donne instruction au représentant légal des victimes et à la Défense de déposer toute observation concernant le projet de plan de mise en œuvre dans un délai de 30 jours à compter de sa notification ».[52]

A l'instar des affaires *Lubanga* et *Katanga*, la Chambre reconnaît l'état d'indigence d'Ahmad Al Mahdi tout en encourageant le Fonds au profit des victimes à compléter les mesures de réparation individuelles et collectives et à s'employer à collecter des fonds dans la mesure nécessaire pour compléter la totalité des mesures ordonnées.[53]

Par son rapport, *The Redress Trust* (2016, page 11), estime que l'affaire *Ahmad Al Faqi Al Mahdi (Al Mahdi)* se présente en un modèle d'efficacité et de rapidité (bien qu'il faille tenir compte de la circonstance particulière que constitue l'admission de culpabilité). Il a fallu seulement un an à la Cour pour conduire les procédures préliminaires et le procès après la présentation de *Ahmad Al Faqi Al Mahdi* devant elle, et produire une Ordonnance de réparation le 17 août 2017. En revenant sur la question des victimes dans cette affaire, la Chambre « reconnaît que la destruction des Bâtiments protégés a causé des souffrances à toute la population du Mali et à la communauté internationale ». Les victimes ne sont pas seulement Maliennes mais aussi toute la communauté internationale, ce qui fait que le nombre des victimes devient plus important et nécessitant des réparations significatives. L'indigence du coupable ne constitue pas un obstacle à la réparation des victimes. Ainsi, la Chambre a alloué des réparations individuelles, collectives et symboliques aux victimes. Il a aussi été considéré que les descendants des personnes dont les membres de la famille avaient été enterrés dans les mausolées endommagés pouvaient recevoir une indemnisation pour le préjudice mental. Pour le fait que la destruction des sites avait engendré de l'angoisse et des souffrances morales chez les victimes individuelles et la communauté de Tombouctou, une compensation symbolique de 1 euro a été octroyé au Mali et à l'Unesco pour les dommages subis

51 *Le Procureur c. Ahmad Al Faqi Mahdi,* ICC-01/12-01/15-171-tFRA, 2 Septembre 2016.

52 *Le Procureur c. Ahmad Al Faqi Al Mahdi,* Ordonnance de réparation, ICC-01/12-01/15-236-tFRA du 17 août 2017, VII, paragraphes 66/67.

53 *Ibidem,* paragraphe 138.

par le Mali et la communauté internationale. Il s'agit ici d'une avancée aussi importante de reconnaissance et de réparations des torts causés au Mali et à la communauté internationale (Redress Trust : 2019, page 27), car les biens inscrits sur la liste du patrimoine commun de l'humanité bénéficient d'une protection à juste titre.

LES RÉPARATIONS DANS LES AFFAIRES NGUDJOLO, BEMBA ET RUTO

Par le jugement d'acquittement du 18 décembre 2012 et confirmé par la Chambre d'appel, le 7 avril 2015, aucune ordonnance de réparation n'a été rendue dans l'affaire *Ngudjolo*. Tel est aussi le cas des affaires *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*,[54] dans laquelle le juge avait décidé de mettre fin au procès suite à l'insuffisance des moyens à charge ; et *Le Procureur c. Jean Pierre Bemba*,[55] où la Chambre d'appel a considéré que les crimes visés au paragraphe 116 du jugement attaqué (jugement de condamnation) n'entraient pas dans le cadre des faits et circonstances décrits dans les charges. Par voie de conséquence elle a procédé à l'annulation du jugement attaqué et acquitté Jean Pierre Bemba de toutes les autres charges contre lui.

> « … aucune ordonnance de réparation ne peut être rendue à l'encontre de Jean Pierre Bemba en vertu de l'article 75 du Statut. La Chambre se doit de respecter les limites de la Cour et rappelle qu'elle ne peut ordonner l'octroi de réparations pour le préjudice subi du fait de crimes que si la personne jugée pour sa participation à ces crimes a été déclarée coupable. Toutefois, la Cour a été créée pour remplir une fonction aussi bien punitive que réparatrice (article 68-3 du Statut), … il relève de son pouvoir de rendre une décision finale relative à la procédure en réparation, ayant elle-même mené l'ensemble des procédures en première instance et en réparation dans cette affaire. Elle considère qu'il convient de prendre acte des vues et préoccupations des victimes, conformément à l'article 68-3 du Statut, et juge que la Décision finale n'est ni préjudiciable ni contraire aux droits de Jean Pierre Bemba ».[56]

Contrairement aux autres affaires devant la CPI, le cas Jean Pierre Bemba est un cas d'école lorsqu'on se permet de s'intéresser au sort des victimes. Tout au long de la procédure en premier degré avant de délivrer une « ordonnance relative à la réparation », plus de 5.000 victimes avaient participé au procès *Bemba*, une quantité importante des biens/fonds appartenant à Mr Bemba venaient d'être identifiés et gelés. Il était donc hors de question d'envisager une situation d'indigence dans la situation Bemba comme cela était les cas respectivement dans les affaires *Lubanga* et *Katanga*. Considérant le sort du prévenu condamné en 1er ressort et acquitté en appel, Redress Trust (2019, page 27 ; 2016, Page 11) a soulevé une préoccupation fondamentale dans son rapport : Est-il prudent pour la Cour de commencer à auditionner les parties concernant les réparations avant d'avoir déterminé les dernières questions d'appel ? Les résultats des consultations réalisées par Redress Trust (2019, page 65) révèlent que

54 *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, trial Chamber V (A), Decision of Defense Applications for Judgment of Acquittal, ICC-01/09-01/11, 5 april 2016, ICC-01/09-01/11-2027-Red-Corr du 16 june 2016, P. 1, paragraphe 149 ; *Le Procureur c. Jean Pierre Bemba*, Chambre d'Appel, ICC-01/05-01/08-3653-tFRA du 3 août 2018, paragraphe 3.

55 *Le Procureur c. Jean Pierre Bemba*, Chambre d'Appel, ICC-01/05-01/08 A, 8 Juin 2018, ICC-01/05-01/08-3636-Red-tFRA du 16 juillet 2018, page 5.

56 *Le Procureur c. Jean Pierre Bemba*, Chambre d'Appel, ICC-01/05-01/08-3653-tFRA du 3 août 2018, paragraphe 3.

> « Les réparations peuvent et devraient être intégrées à la procédure au stade préliminaire et en première instance. Les parties et participants seraient en mesure de formuler des observations plus ciblées, et le Greffe et le Fonds au profit des victime pourraient fournir plus d'informations utiles sur les détails pratiques de l'affaire particulière en question. Et surtout, de tels principes donneraient aux victimes une idée de ce à quoi elles peuvent s'attendre, que ce soit sur le plan procédural et sur le plan fond ».

Tout en saluant le souci de protection de victimes au cours de toute la chaine de la procédure pénale, il n'est pas aussi indiqué d'ignorer la pertinence de respect du droit de l'accusé à un procès juste et équitable. La décision d'acquittement de la Chambre d'appel dans l'affaire *Bemba* éclaire notre religion quant au besoin de protection et de respect des droits de toutes les parties au procès et le sort des victimes reconnues en faisant appel à la mise en œuvre du deuxième mandat du Fonds au profit des victimes (mandat d'assistance). Le représentant légal des victimes a entre autres comme devoir d'informer les victimes sur la procédure en réparation qui est à la fois liée à la procédure pénale et séparée de cette dernière pour ne pas alimenter toute spéculation inconsidérée.

Le caractère *sui generis* de l'affaire *Bemba* porte particulièrement ici sur le fait que les victimes ont existé mais le coupable des crimes ayant causé des préjudices n'existe pas. Ainsi, la Chambre n'a pas hésité à reconnaître les victimes en ces termes :

> « … la décision rendue par la Chambre d'appel ne reposait sur un quelconque doute quant au préjudice subi par les victimes ayant participé à la procédure … La Chambre d'appel a reconnu que certains crimes ont eu lieu en RCA entre 2002 et 2003 et n'a donc pas remis en question le statut des victimes en tant que tel … La Chambre reconnaît que d'autres personnes, qui n'ont pas été admises à participer en tant que victimes en l'espèce, ont pu subir un préjudice du fait des crimes relevant de la compétence de la Cour en RCA entre 2002 et 2003 et devraient donc également être considérées comme des victimes aux fins du mandat d'assistance du Fonds. Au vu du nombre élevé de victimes en l'espèce et de la situation difficile en matière de sécurité en RCA, la mise en œuvre par le Fonds d'un programme relevant de son mandat d'assistance sera sans doute une tâche délicate. La réussite de tout programme dépendra largement de la capacité du Fonds d'obtenir, entre autres, des données à jour sur les victimes, comme les renseignements leur permettant de les joindre et le lieu où elles se trouvent, et de bénéficier des réseaux de partenaires sur place. Étant donné que bon nombre de ces informations ont déjà été recueillies tout au long de la procédure en réparation par les représentants légaux et les sections concernées du Greffe, la Chambre encourage fortement toutes les parties prenantes à coopérer avec le Fonds ».[57]

Le Fonds au profit des victimes devrait s'engager dans l'exécution de son deuxième mandat d'apporter assistance aux victimes en République Centrafricaine (RCA). Les victimes ont non seulement crié à l'impunité entretenue par la Cour en RCA, selon elles, en perdant ainsi confiance en la justice de la Cour après l'acquittement de Jean Pierre Bemba.[58] Une telle lecture serait réductrice de la mission de la Cour appelée à rendre une justice juste et équitable en respectant les droits de toutes les parties au procès. La reconnaissance des

57 *Le Procureur c. Jean Pierre Bemba*, Décision finale relative à la procédure en réparation, ICC-01/05-01/08 du 3 août 2018, ICC-01/05-01/08-3653-tFRA du 3 août 2018 paragraphes 6, 12.

58 *Ibidem*, paragraphe 6.

victimes a été une manifestation correcte de la réelle volonté de la Cour à ne pas abandonner les victimes à leur triste sort, le Fonds au profit des victimes dans son mandat d'assistance apparaissant ici comme un mécanisme solide de leur prise en charge.

La phase de la réparation est marquée par des entraves de plusieurs ordres qui ne permettent pas une mise en œuvre effective des réparations dans le meilleur délai. Cet état des choses est aussi critiquable au point que « pour les victimes, ces longues et pénibles années d'attente pour obtenir justice ont été une succession d'espoirs et de déceptions, de craintes et de joies. » (Redress Trust : 2019, page 9). Une simple impression conduirait à penser que la Cour a été « chaussée » par les Etats parties au Statut de Rome au-delà de sa taille, n'ayant pas tous les moyens de sa politique en matière de réparation, elle court le risque d'un déshonneur ou d'une considération de « théâtralisation » aux yeux des victimes. Au-delà du cliché financier, elle rencontre des difficultés énormes à conjuguer aisément avec le Fonds au profit des victimes spécifiquement sur la question de plan de mise en œuvre de la réparation. A cela, il faut ajouter toute l'impasse autour du moment de la formulation et de l'introduction d'une demande en réparation, l'identification des victimes potentielles bénéficiaires de la réparation, l'évaluation des demandes déclarées recevables par la Cour, l'évaluation du préjudice subi et l'établissement de la responsabilité civile du coupable, le manque d'homogénéité dans les décisions rendues, l'absence de stratégies en matière de réparations à l'échelle de la Cour (Redress Trust : 2019, page 11-14 ; 2016, pages 11 – 22). Considérant le caractère aussi complexe de la procédure en matière de réparation qui peut conduire au risque d'exclure certaines victimes, et, susciter par ce fait, des nouvelles tensions entre les communautés locales, la Cour devra renforcer son programme de sensibilisation auprès des victimes.

V. CONCLUSION

Le droit à la réparation en matière des crimes internationaux est aujourd'hui consacré en droit international pénal par le système du Statut de Rome de la CPI et par d'autres instruments juridiques internationaux à titre d'un droit fondamental. Ce qui n'avait jamais été accordé devant une juridiction pénale internationale est désormais une réalité devant la CPI. Les victimes des crimes relevant de sa compétence jouissent de leur droit à la réparation. Cette évolution permet aux victimes de partager des informations au Procureur de la Cour et lui demander d'ouvrir des enquêtes, de témoigner au cours d'un procès, de participer aux procédures en exprimant leurs vues et préoccupations aux juges et formuler des demandes de réparation du préjudice qu'elles ont subi. La participation à la procédure n'est cependant pas un préalable pour avoir droit à la réparation. Une victime qui n'a pas participé à la procédure, peut très bien faire une demande de réparation. La Cour peut même accorder une réparation d'office. Il est envisagé un mécanisme approprié mettant les victimes à l'abris de l'insolvabilité ou de l'indigence du coupable, ou alors, en cas d'acquittement du prévenu après avoir reconnu l'existence des victimes. Le Fonds au profit des victimes est l'institution établie en vue de procéder aux réparations conformément aux ordonnances rendues par la Cour ou alors d'assister les victimes reconnues.

Le Fonds au profit des victimes, un mécanisme du système des réparations, a été sollicité en réparation comme en assistance aux victimes dans les différentes ordonnances de réparation prononcées par la Cour. Il a été fait recours notamment à des compensations monétaires, de restitution des biens, des mesures de réhabilitation, des mesures symboliques telles que des excuses ou des commémorations. Il a été accordé soit une réparation individuelle, soit une réparation collective, soit les deux concurremment selon ce qui convient le mieux aux victimes dans l'affaire considérée.

Dix-huit ans après la création de la Cour et près de huit ans après la publication de la première ordonnance de réparation en 2012 (Affaire *Lubanga*), la Cour vient de réaliser des avancées notables en termes de consolidation d'une jurisprudence qui fait école en matière des réparations. Néanmoins les résultats des réparations (affaires *Lubanga, Katanga* en RDC et *Al Mahdi* au Mali) et d'assistance aux victimes (affaire *Bemba* en République Centrafricaine) sont très mitigés. L'exécution effective et rapide des réparations en faveur des victimes est indûment retardée (Redress Trust : 2019, page 14). La procédure pénale semble l'avoir emporté sur la procédure en réparation au point que les victimes s'interrogent sur la *ratio legis* de toutes les ordonnances de réparation rendues. La mise en œuvre de ces ordonnances n'est plus à négocier, il s'agit d'un droit reconnu aux victimes. Visiblement, les ordonnances n'ont pas franchi le seuil du prétoire, elles demeurent des simples chapelets d'intentions sans impact réel sur les victimes dans leurs milieux de vie. Le retard observé dans la réalisation effective des réparations (droit à la réparation) devra attirer l'attention des représentants légaux des victimes et du Bureau du conseil public pour les victimes (BCPV). Le mandat de représentation et d'assistance juridique aux victimes confié aux avocats et au BCPV n'arrive à terme qu'après une réparation effective du préjudice causé aux victimes et l'assistance à accorder. Toute manœuvre dilatoire doit être dénoncée au plus haut niveau devant les instances habilitées. Le dépassement excessif de délai serait compromettant au point que les victimes seraient encore exposées au châtiment de leurs anciens bourreaux qui reviennent après avoir purgé leurs peines sans que des mesures de sécurité des victimes n'aient été envisagées ni par la Cour ou ni par l'Etat. La libération de Germain Katanga et de Thomas Lubanga et leur éventuel retour en Ituri en RDC avant que les réparations ne soient effectives alimente un sentiment d'abandon de victimes au profit des bourreaux.

L'espoir des milliers des victimes en RDC comme en RCA à la justice réparatrice annoncée « tambour battant » à Rome, les victimes ne pouvant désormais obtenir réparation, semble être une coquille vide. Le retour à la case de départ quant au sort des victimes devant les juridictions pénales internationales semble redevenir une réalité, car « chassez le naturel, il revient au galop ». Le succès de la Cour tient, certes, non seulement au fait de condamner les criminels, mais aussi, à sa capacité à mettre en place un système de réparations solide dans sa manière de rendre la justice. Le renforcement des unités de sensibilisation dans les pays membres, particulièrement où on enregistre des situations et des affaires pendantes devant la Cour s'avère une nécessité. Tout en fustigeant les faiblesses et le retard observés dans la procédure des réparations devant la CPI, Redress Trust (2019, pages 15-16) présente un menu des recommandations à mettre à profit. Les représentants légaux des victimes (avocats) doivent jouer en amont comme en aval un rôle proactif veillant à la réalisation effective de la réparation dans un « délai raisonnable », dénoncer les obstacles éventuels et garantir leur protection lors de la libération des bourreaux. La Cour a encore un long chemin à parcourir. Elle doit relever le défi de dépasser le simple slogan et la volonté théorique de prise

en compte de besoins des victimes (droit à la réparation) et atteindre la phase effective des réparations des victimes ayant subi des préjudices des crimes relevant de sa compétence. Le tableau ci-dessous[59] est un miroir ou une vitrine jurisprudentielle de la Cour (jurisprudence) dans sa phase de mise en œuvre des réparations au profit des victimes des crimes internationaux relevant de sa compétence.

N°	Affaires	Décisions	Niveau d'exécution : Total/partiel-raison	Lieu d'exécution	Observations/commentaires
01.	Le Procureur c. Mathieu Ngudjolo	- Jugement d'acquittement - Pas d'ordonnance de réparation, recours au mandat d'assistance du Fonds au Profit des victimes	Aucune ordonnance de réparation n'ayant été prononcée, aucune réparation n'est en cours.	Ituri/RDC	Le mandat d'assistance du Fonds s'étend à toutes les victimes des crimes tombant sous la compétence de la Cour, sans considération de leur auteur. Le recours au mandat d'assistance du Fonds n'est pas alternatif à l'absence de réparations accordées dans une affaire. Il s'exécute indépendamment des procédures de réparation.
02.	Le Procureur c. Thomas Lubanga Dyilo	- Jugement de condamnation - (Indigent) - Ordonnance de réparation disponible	L'ordonnance de réparation est en cours d'exécution. Le Fonds au profit des victimes a présenté un projet de plan de mise en œuvre de l'ordonnance de réparation et diverses informations additionnelles. La Chambre de première instance compétente a approuvé la mise en œuvre de réparations collectives symboliques ainsi que des réparations collectives sous forme de services apportés aux victimes. Le Fonds a entamé les démarches administratives nécessaires à la mise en œuvre concrète de ces activités. L'identification des victimes est bien avancée. Aucune information publique supplémentaire ne permet d'établir le niveau d'exécution des réparations avec précision.	Ituri/RDC	Les informations sont confidentielles afin d'assurer le succès de la mise en œuvre et garantir la sécurité des victimes concernées qui sont informées du niveau d'exécution.

59 Niveau d'exécution des ordonnances de réparation de la CPI en RDC, République Centrafricaine et au Kenya à la date du 27 mai 2020.

03.	Le Procureur c. Germain Katanga	- Jugement de condamnation - (Indigent) - Ordonnance de réparation disponible	L'ordonnance de réparation est en cours d'exécution. La Chambre a accordé des réparations individuelles symboliques ainsi que des réparations collectives ciblées aux individus qu'elle a reconnu comme victimes. Le Fonds au profit des victimes a présenté un projet de plan de mise en œuvre de l'ordonnance de réparation et diverses informations additionnelles. Le Fonds a entamé les démarches administratives nécessaires à la mise en œuvre concrète de ces activités. Aucune information publique supplémentaire ne permet d'établir le niveau d'exécution des réparations avec précision.	Ituri/RDC	Les informations sont confidentielles afin d'assurer le succès de la mise en œuvre et garantir la sécurité des victimes concernées qui sont informées du niveau d'exécution.
04.	Le Procureur c. JP Bemba	- Jugement d'acquittement - Pas d'ordonnance de réparation, recours au mandat d'assistance du Fonds au Profit des victimes	Aucune ordonnance de réparation n'ayant été prononcée, aucune réparation n'est en cours.	RCA	Le mandat d'assistance du Fonds s' étend à toutes les victimes de crimes tombant sous la compétence de la Cour, sans considération de leur auteur. Le recours au mandat d'assistance du Fonds n'est pas alternatif à l'absence de réparations accordées dans une affaire. Il s'exécute indépendamment des procédures de réparation. Le Fonds finalise les préparatifs pour la mise en œuvre d'activités spécifiques au profit des victimes de crimes tombant sous la compétence de la Cour en RCA.

05.	Le Procureur c. Ahmad Al Faqi Al Mahdi	- Jugement de condamnation - Ordonnance de réparation disponible	L'ordonnance de réparation est en cours d'exécution. Le Fonds au profit des victimes a présenté un projet de plan de mise en œuvre de l'ordonnance de réparation et diverses informations additionnelles. La Chambre de première instance compétente a approuvé la mise en œuvre de réparations individuelles et collectives. L'identification des victimes est bien avancée. Le Fonds a entamé les démarches administratives nécessaires à la mise en œuvre concrète de ces activités. Aucune information publique supplémentaire ne permet d'établir le niveau d'exécution des réparations avec précision.	Mali	Les informations sont confidentielles afin d'assurer le succès de la mise en œuvre et garantir la sécurité des victimes concernées qui sont informées du niveau d'exécution.
06.	The Prosecutor c. William Samoei Ruto and Joshua Arap Sang	- Pas de jugement, les juges ayant mis fin au procès	Aucune ordonnance de réparation n'ayant été prononcée, aucune réparation n'est en cours.	Kenya	Le mandat d'assistance du Fonds s' étend à toutes les victimes de crimes tombant sous la compétence de la Cour, sans considération de leur auteur. Le recours au mandat d'assistance du Fonds n'est pas alternatif à l'absence de réparations accordées dans une affaire. Il s'exécute indépendamment des procédures de réparation. Le Fonds a indiqué son intention de mettre en œuvre des activités spécifiques au profit des victimes de crimes tombant sous la compétence de la Cour au Kenya.

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DATA PROTECTION AND CONSUMER PROTECTION: PRIVATE AUTONOMY IN FRONT OF PRIVACY

A PROTEÇÃO DE DADOS E A DEFESA DO CONSUMIDOR: AUTONOMIA PRIVADA FRENTE À PRIVACIDADE

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ABSTRACT

In the midst of the advances of the Internet, we saw it repagining relations and opening new commercial perspectives. In this context, consumer protection, which dates back to the constitutional bases of 88, crystallized by the Consumer Protection Code, is challenged to contemplate new business models developed within the Internet, especially within the theme of Data Protection. In this step two specific legislation on Digital will be analyzed: initially the Civil Framework of the Internet and, after, the General Data Protection Law, in order to bring key concepts to identify consumer elements within these devices, as well as understand how both legal acts operate to ensure consumer protection in the subject of data protection, considering mainly the private autonomy of users. To this end, the research was developed through the deductive and exploratory method, supported in the bibliographic review and comparative analysis of legislation. The aim was finally to demonstrate the importance of private autonomy in the face of possible violations of fundamental rights, such as privacy, as well as the abuse of personal data.

Keywords: Consumer Protection Code. Civil Landmark of the Internet. General Data Protection Act.

RESUMO

Em meio aos avanços da Internet a avistamos repaginando relações e abrindo novas perspectivas comerciais. Neste contexto, a defesa do consumidor, que remonta às bases constitucionais de 88, cristalizadas pelo Código de Defesa do Consumidor, se vê desafiada a contemplar novos modelos de negócios desenvolvidos dentro da internet, sobretudo dentro da temática da Proteção de Dados. Neste passo serão analisadas

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duas legislações específicas sobre matéria Digital: inicialmente o Marco Civil da Internet e, após, a Lei Geral de Proteção de Dados, com o intuito de trazer conceitos chaves para identificar elementos consumeristas dentro destes dispositivos, bem como compreender de que modo ambos os diplomas legais operam para garantir a proteção do consumidor na temática da proteção de dados, considerando principalmente a autonomia privada dos usuários. Para tanto, a pesquisa foi desenvolvida por meio do método dedutivo e exploratório, lastreado na revisão bibliográfica e análise comparada de legislações. Pretendeu-se demonstrar, por fim, a importância da autonomia privada em face de eventuais violações de direitos fundamentais, como a privacidade, bem como o abuso no tratamento de dados pessoais.

Palavras-chave: *Código de Defesa do Consumidor. Marco Civil da Internet. Lei Geral de Proteção de Dados.*

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1. INTRODUCTION

In the light of contemporaneity, celebrated thirty years of its edition, it is quite clear that the Brazilian Constitution of 1988 was promulgated in order to become the cornerstone of a State of strong social character, insofar as it elects the citizenship and dignity of the human person as the foundations of the Federative Republic of Brazil.

In this regard, the particular concern of the constituent legislator in aspects related to consumer law is undeniable, being the subject of specific analysis in more than one point of the constitutional text, with special attention to the listing of the theme next to the list of Fundamental Rights listed next to the body of art. 5th, in your inc. XXXII.

Notwithstanding the material recognition of the scope and weight played by the consumerist question, it was also kept in mind the imperative need of editing a specific codification to address and contemplate the theme, a fact verifiable by art. 48 of the Acts of Transitional Constitutional Provisions (ADCT), which provided for a short deadline for the edition of a specific legislation to cover consumer matters.

Thus, the Consumer Protection Code (CDC), Law n. 8,078, was published in 1990, designed in line with the protective bias and human focus, a tonic emanated by the constitutional text. In addition, the CDC is an introduction to a series of basic concepts that guide the specific intelligibility of consumer relations, signalling the insertion of clear concepts of supplier and consumer, in addition to recognizing the vulnerability of this second group as a general principle that permeates the entire systematic of Consumer Law in Brazil.

It is, therefore, an imperative element to understand the consumerist legislation the observance of its incidence in concrete, embodied with a contemporary analysis of the society in which it operates, with the aim of addressing changes in business models performed by suppliers.

In this step, new business models emerge continuously, operating and monetizing new economic activities, wrapped up in technological advances - and new possibilities of earning a profit. This leads to disruptive consumption relationships when compared to conventional consumption: in addition to selling a product, the consumer becomes the product.

This is the case observed in every industry driven by data mining, whose presence is almost ubiquitous in digital environments, formatting a billion dollar industry operationalized

through the opening of privacy and the capture of users' personal data - which are, to the same extent, consumers.

The weight of the issue regarding the protection, management and protection of data did not go unnoticed by the legislator, who edited specific acts to address the intersection between law and the Internet, which are, at first, the Civil Framework of the Internet, Law n. 12.965/2014, and, in a second opportunity, the General Data Protection Law, Law n. 13,709/2018.

In view of this, the article was developed based on the deductive and exploratory method, supported in the bibliographic review and comparative analysis of legislation and is subdivided into two main parts, referring (i) the implementation of the CDC in the digital environment and its dialogue with the ICM and the LGPD; and (ii) consumer protection in the digital environment, considering their private autonomy.

How do the specific laws that address the Internet, the example of the Civil Framework of the Internet and the General Data Protection Law, dialogue with the Consumer Protection Code? Are they complementary instruments, capable of guaranteeing the protection of consumer relations in the digital environment, especially with regard to data protection?

2. THE CONSUMER PROTECTION CODE IN THE DIGITAL ENVIRONMENT: THE CIVIL FRAMEWORK OF THE INTERNET AND DATA PROTECTION

Although it is common knowledge the substantive changes that the Internet has been promoting in Brazilian society in recent years, with reverberations in the social, economic and political fields, it is important to note that the digital environment is not found, absolutely, stripped of Brazilian jurisdiction and jurisdiction.

Such an understanding undertakes to understand the Internet under the legal lens, especially regarding human relations between subjects within the large computer network, regardless of the specifics or objectives of this interaction. In the same way that the Constitution of the Republic emanates and links subjects and acts in Brazilian territory since 1988, its jurisdiction reaches the totality of the digital environment understood in Brazil.

In this way, it is completely possible, even if completely reprehensible, to foist third-party rights in the digital environment. It is also noted that crime soon flourished within the Internet, both on a global scale and in Brazil, including abusive consumer practices.

This is a natural consequence of the digitization of relationships, due to the increasing gradient in the number of people with access to the large computer network (CARDON, 2012, p. 22). Urges to emphasize, therefore, that the digitization of the Brazilian society occurs in two hands: both in the increase in the number of users, emphasizing, for example, that between the years 2016 to 2017 there was an increase from 69.3% to 74.9% of people with internet access (BRASIL, 2017, p. 5); as well as increasing the relevance, presence and volume of transactions that occur in the network, also called e-commerce, which designates *the sale*

purchase of goods or services, which is "conducted through computer networks and methods specifically designed for the receipt or delivery of orders." (OECD, 2011, p. 72) or

With regard to the figure of the consumer in digital media, it can be seen that he is already digitised, that is to say, even if he does not carry out the transaction via the Internet, "this does not mean that the way to collect information about goods and services no longer occurs massively over the web". That is, with the advent of the Brazilian Consumer Protection Code, there is the maturing of consumer relations and the consumer himself (PINHEIRO, 2018, p. 157).

Although the Constitution of the Republic, the Consumer Protection Code and the scattered legislation apply in a digital environment, the everyday reality and the difficulty of applying classical legislation led the legislator to debate about a specific legislative charter to address issues relating to the digital environment from all angles: this is the Civil Framework of the Internet (ICM), Law 12.965/2014.

Because it is originated due to the need to update the Brazilian legal compound regarding internet-related issues, often the MCI is considered as the "Constitution of the Brazilian Internet", for bringing a long list of definitions of two-dimensional technical order, juridical--computational, besides presenting the whole range of principles that regulate digital activities in Brazil.

It is also noted that, because the ICM is the first legislation of specific nature of regulation of the Internet, and corroborating with its "constitutional" facet on the subject, its body of articles does not deserve to detail specificities on such matters, but is concerned, in particular, with outlining general grounds which gave rise to the subsequent legal construction.

Thus, art. 2º of the said diploma presents the basis of foundations that discipline the internet in Brazil. In your inc. V, in turn, makes explicit mention of consumer protection, to discipline that the use of the Internet in Brazil is based on respect, including, free initiative, free competition and consumer protection.[4]

In sequence, the art. 3º lists the basis of principles that support and discipline the use of the internet in Brazil, highlighting its potential dialogue with economic activities performed by suppliers in the digital environment, ensuring its operation, but delimiting responsibility.[5]

It can be seen, therefore, from the analysis of the aforementioned legislation, that the elements focused on Consumer Law did not pass by the lawmaker when publishing the Civil Framework of the Internet, in three fundamental points: (i) recognises consumer protection in the digital environment as a foundation; (ii) acknowledges the responsibility and accountability of agents, a fact that, combined with a consumer reading, indicates the incidence of objective and joint liability of suppliers on the Internet; and (iii) conditions business models on the Internet on compliance with the principles of the Law.

In the meantime, it is appropriate to highlight the existing dialogue between the CDC and the MCI, in the search for a functional efficiency of the legal system from a constitutional nor-

4 Art. 2 The discipline of using the internet in Brazil is based on respect for freedom of expression, as well as: [...] V - free initiative, free competition and consumer protection (BRASIL, 2014).

5 Art. 3 The discipline of internet use in Brazil has the following principles: [...] VI - accountability of agents according to their activities, under the terms of the law; [...] VIII - freedom of business models promoted on the internet, as long as they do not conflict with the other principles established in this Law (BRASIL, 2014).

mativity, insofar as the State will promote, in the form of law, consumer protection, pursuant to art. 5th, XXXII, of the Constitution of the Republic. In addition, it is noted that the scope of the CDC rules includes transactions on the Internet.

In view of this, when it comes to the processing of personal data of consumers on the Internet, the CDC and the MCI apply, considering that the duty of protection must involve several dimensions, as highlighted by Laura Mendes (2016):

> the obligation of interpretation in accordance with the Constitution to take account of the consumer's vulnerability and need for protection; the administrative duty to protect the consumer; the duty to develop a regulatory architecture for the effectiveness of such protection.

In this sense, such analysis becomes palpable in bringing to light issues involving the protection of personal data, with elements related to personality rights, especially in the intimacy and privacy species, whose guarantee dates back to the constitutional matrix. Therefore, considering that intimacy and privacy were clearly and immediately put on a collision course with data-processing practices, the legislator endorsed his defence in the Marco Civil (KRETSCHMANN; WENDT, 2018, p. 22).

Moreover, it is remarkable the attention spent in the Civil Framework for the topic of Data Protection, which was not strict, but systematic, treating it at various times, besides having the whole section II directed to the consideration of the theme.[6] The special relevance of the treatment given by art is highlighted. 7th of the MCI, which sets out the rights of the user and establishes that access to the Internet is essential to the exercise of citizenship.[7]

In addition, the list of Internet user rights has an intimate relationship with aspects of Consumer Law, being possible to identify convergence of digital rights and consumerist, mainly with inc. VIII of the aforementioned provision, with a clear reference to the Right of Information, enshrined in the Consumer Protection Code.

In turn, the art. 43 of the CDC already expressed concern about the protection of personal data, providing that the consumer should have access to "information existing in the records, records, and personal and consumer data filed on it, as well as their respective sources" (BRAZIL, 1990).

Nevertheless, the introduction of a positive legal debate between the juridical universe and the Internet took place through the advent of Law n. 12.965/14, which brought principles and foundations to discipline the subject. However, specific topics, such as Data Protection, were addressed in general lines, delegating their regulation to the edition of Specific Law, pursuant to art. 3, Inc. III, of the ICM.

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6 Da Proteção aos Registros, aos Dados Pessoais e às Comunicações Privadas.

7 Art. 7º O acesso à internet é essencial ao exercício da cidadania, e ao usuário são assegurados os seguintes direitos: [...] VII - não fornecimento a terceiros de seus dados pessoais, inclusive registros de conexão, e de acesso a aplicações de internet, salvo mediante consentimento livre, expresso e informado ou nas hipóteses previstas em lei; VIII - informações claras e completas sobre coleta, uso, armazenamento, tratamento e proteção de seus dados pessoais, que somente poderão ser utilizados para finalidades que:
a) justifiquem sua coleta; b) não sejam vedadas pela legislação; e c) estejam especificadas nos contratos de prestação de serviços ou em termos de uso de aplicações de internet;
IX - consentimento expresso sobre coleta, uso, armazenamento e tratamento de dados pessoais, que deverá ocorrer de forma destacada das demais cláusulas contratuais; X - exclusão definitiva dos dados pessoais que tiver fornecido a determinada aplicação de internet, a seu requerimento, ao término da relação entre as partes. essalvadas as hipóteses de guarda obrigatória de registros previstas nesta Lei.

In addition, the ICM, as it is not one of a general data protection law, does not cover issues such as international data transfer, data leakage, anonymized data, among other topics (VIOLA; ITAGIBA, 2017, p. 19). Thus, only in 2018 was the General Data Protection Law (LGPD), Law 13.709/2018, in order to give continuity to the issues introduced by the MCI, bringing to the focal point the regulation of capture practices, storage, storage and effective processing of data.

It is also *clear* that the LGPD edition has met the requirements of the United Nations, together with the United Nations Guidelines for Consumer Protection (2016), in the sense that it is recommended that "companies must protect the privacy of consumers through a combination of appropriate control, security, transparency and consent mechanisms related to the collection and processing of personal data". This law, therefore, represented a strengthening of the individual and collective rights arranged in the CDC.

Thus, in relation to consumer protection, the LGPD takes it back as a foundation, in the same terms adopted by the MCI. Its effects and implications assume more practical contours, in that it is a thematic legislation, regulating a specificity of use - and economic exploitation - of the internet, which further strengthens the protective traits of the digital environment user as a consumer. This is because "a service can be offered free of charge to the consumer and, even so, be considered remunerated, given that it obtains indirect gains" through advertising and marketing of user navigation data (MENDES, 2016).

Notwithstanding this concern with consumer protection, the LGPD established with art. 18 that the data subject has the right to obtain from the controller, in relation to the data of the data subject processed by him, at any time and by requesting access to his data; among other hypotheses foreseen in the device.

In addition, the legislator has guaranteed to the data subject the right to petition his data against the data controller before the national authority, as well as the right to object to the processing carried out on the basis of one of the hypotheses of waiver of consent, as prescribed by the Art §§1º and 2º. 18 of the LGPD.

On the other hand, it is absolutely important to enter into an even more seminal debate, namely the identification of the central figures of consumer relations - consumer and supplier - in particular the second, within this new consumer engineering, in order to understand precisely and specifically what are the negotiating elements and legal assets relevant to this debate.

In this sense, it is possible to glimpse that the advances designed by the internet have driven a legiferante process imbued with the task of providing legal documents able to contemplate and ensure constitutional guarantees in a digital environment. Stems from this enterprise both the MCI and the LGPD, being the first introductory and general, and the second specific character, with clear and strict object.

Despite the differences, both bring consumer protection as a basis. In this meander it is assertive to turn again attention to the Consumer Protection Code, in order to understand the nuclear concept of supplier, as well as its framework, to, in a second moment, counteract these ideas with similar concepts of digital legislation.

That being said, the CDC conceptualizes the figure of the supplier as being any natural or legal person that develops activity of production, construction, import, export, distribution

or commercialization of products or services, in accordance with the terms of art. 3 of the abovementioned legislation. This concept is based on some basic predicates, such as the professional supply of product or service within a consumer market, through a consideration of value or economically valuable element.

To carry the concept to the digital environment and format it to the reality of data protection, it is necessary, in the first step, to resume the legal analysis of the MCI, since key concepts of professional activity in digital environment are described in its text.

Thus, according to Law 12.965/14, there are two forms of Service Providers, which, potentially, can perform the function of supplier, as arranged by the CDC. These are: (i) Connection Provider, considering a connection under the law "enabling a terminal to send and receive data packets over the Internet by assigning or authenticating an IP address"; (ii) Application Provider, considering it to be an application, or, as determined by the legal text, "the set of functionalities that can be accessed through a terminal connected to the internet".

Decanting such concepts, it is evident that the connection provider will be played by an autonomous system administrator, or, under the terms of art. 5º, IV, of the ICM by a "natural or legal person who manages specific IP address blocks and the respective autonomous routing system, duly registered in the national entity responsible for the registration and distribution of IP addresses geographically referring to the Country". They are thus companies, usually telephony companies, which provide access to the Internet.

The relevance for the present study, however, lies in the scope of the Application Provider, a very aggregating category that encompasses numerous activities - economic or not - that have a direct impact on the issue of data protection.

In art. 15 of the ICM, on the other hand, it is possible to identify a cutout that the legislator makes on application providers for framing in the form of supplier proposed by the CDC, to the extent that it establishes that it is constituted in the form of a legal person and that it carries out that activity in an organised, professional and economic manner. For this, it must "keep the respective records of access to internet applications, under secrecy, in a controlled and security environment, for the period of 06 (six) months, in accordance with the regulation" (BRASIL, 2014).

It is interesting to note how vendor characterization assumptions are explicitly cited, such as activity performance in an organized, professional and economic way, to impute a specific responsibility of record keeping and access, a fact that may lead one to believe that, although the CDC is not cited or referenced, it is, with accuracy, the figure of supplier, now transposed to the digital area.

3. THE PRIVATE AUTONOMY OF THE CONSUMER AND THE USE OF DATA

Given the notorious relationship between the CDC and the data protection legislation - MCI and LGPD - it is valid to raise some relevant points to understand, in general lines and with exemplifying purpose, what is the professional and organized nature of the activities

to which art. 15 of the MCI makes reference, especially those who work directly with data mining.

Nevertheless, it is important to point out that in relation to data mining, it has been a "search for valuable information in large databases" (WEISS; INDURKHYA, 1998). That is, it is not enough to have the information, it is necessary to transform it into knowledge.

Thus, some of the activities in which data mining is satisfactorily applied stand out: (i) credit cards, in order to identify turnover patterns and market segments; (ii) telemarketing, allowing easy access to customer data; (iii) identification of consumer patterns and consumer profiles, from which it is possible to select and direct the sending of promotional advertisements, among other factors (CAMILO; SILVA, 2009, p. 2).

In addition, it is noted that:

> An example of the application of Data Mining techniques was stated in the news "The potential of Whatsapp for use in data mining: Data mining is the process of exploiting large amounts of data looking for consistent patterns." Such news explains that Target, the second largest retail network in the US, was using the data mining process to understand the shopping habits of its customers and that Facebook "knows when you will date" cross-referencing data about user interactions on the social network. It also shows that there is enormous potential to be explored by techniques that "scavenge" text data, such as those used in Whatsapp or Voip (BOFF; FORTES; FREITAS, 2018, p. 193).

Also, another example of an instrument capable of exploiting data is the use of cookies, which are "digital markers, inserted in the hard disks of the Internet user's computer by the websites visited, which allow the identification and storage of the navigation of the internet user" (MENDES, 2016).

This is an example of how the technological advances of the last fifty years have allowed a recomposition of the major economic players in the global market. Over the years the computer technology industry has become extremely profitable, a fact supported by numbers demonstrated by research conducted by Brandztm.

It can be seen that most brands keep data mining within their portfolio of activities. Google and Facebook, in turn, have in their ad engine their largest source of revenue (LUCIAN; DORNELAS, 2018, p. 195) - service that is only possible through the Data Processing. This is because, when using the services offered by Google, for example, the user adheres to the collection of data, which are used to offer services more efficiently, maintain and improve them, develop new services, provide personalized services, including advertisements and content, among other functions (GOOGLE, s.d.,). In turn, Facebook uses the personal data of your users to determine which ads or products should display in exchange for the free use of the application (FACEBOOK, s.d.).

In addition, regarding the processing of data as an economic engine, it is noteworthy that the position that the "processing of personal information has in its products [...], corroborates the fundamental importance of personal data in the foundation of its business model" (DONEDA, 2010, p. 10).

The fact is that data processing constitutes a very lucrative business for its agents. The breadth represented by the issue of economic exploitation of personal data gained a key

episode when Cambridge Analytica, a British company specialized in data processing for strategic communication in election campaigns, was accused, and later pleading guilty, of improperly accessing the data of 87 million Facebook users during the US presidential campaign, in favor of the then presidential Donald Trump (PRESSE, 2019).

This event sparked the debate on Data Protection and Security on a global scale, driving to a large extent the approval of the Global Data General Protection Regulation (GDPR) in the European context, which entered into force on 25 May 2018 in that continent. Undeniable the influence of the GDPR edition on the international context, causing an intense movement of companies and States, a fact that is also observed about Brazil, with the edition of the LGPD (Law n. 13,709/2018).

Despite the strong material and formal influence of the GDPR, the LGPD has a very national point of support, in that it reproduces in literality the provision of consumer protection punctuated by the Civil Framework. n order to achieve this protective model, the central task of the LGPD is to cover the complexity of data-related issues, following the same structural basis as the Civil Framework, explaining legal definitions for technical elements and aspects, in addition to demonstrating a general grounding trend, when designing new principles to be observed and respected in data processing practices.

Once these findings are noted, it is important to note that the LGPD understands the issue of data protection in a very comprehensive and expansive way, comprising not only the data in digital media; it follows from this the recognition of the existence of various forms of processing agents, in accordance with art. 3º.

Despite this open reading, it is especially important to observe the provisions of art. 4º, with special emphasis to its inc. I, which states that the LGPD does not apply to the processing of personal data when performed by "natural persons for exclusively private and non-economic purposes" (BRASIL, 2018).

The importance of reading both articles in a conjugated way is decisive for the understanding of the LGPD as a regulatory diploma, whose focus is especially on the economic exploitation of data processing, as a means or end to the offering of goods or services, which refers to an explicit framework of the content of the Law in the consumer arena.

Sobre a aplicação da Lei na observância de fins econômicos, se assevera:

> The delimitation of the applicability of the Law in relation to the types of data that are considered regulated by the LGPD demonstrates that the processing of personal data must follow a certain and functional purpose, but that it does not exceed freedom of information and expression, the sovereignty, security and defence of the State. Likewise, the domestic use for non-economic purposes does not receive the application of the law, considering that one of the focuses of action of the device is to regulate activities whose objective is the supply of goods or services (PINHEIRO, 2019, p. 57).

Thus, from the edition of the European GDPR and Brazilian LGPD, giving special attention to conjecture protective measures to users, it is remarkable that these end up becoming, by the economic nature of the data processing activity, consumers.

It therefore remains to address the figure of the consumer in the digital environment in terms of data protection. Of course, although its treatment in the text of the Law is not given

nominally, the consumer condition must be extracted through a systematic reading of the LGPD, keeping it in line with the Consumer Protection Code.

The constitution of the consumer figure takes shape from an analogous reading of art. 5th of the LGPD, in which are the definitions used in the Ordinance. Therefore, under the terms of inc. V of the aforementioned article, the owner is the "natural person to whom the personal data that are the object of processing refer" (BRASIL, 2018).

In addition, among the many dialogues that are undertaken through debate originated from the intersection between Consumer Law, supported by Law 8078/90, and the general elements that guide data protection, a point gains special outline refers towhether the topic of how the link between consumer and supplier originates in a digital environment.

It is clear that the question goes a long way in this maelstrom, passing at first hand the question of consumer vulnerability in all consumer relations, one of the most expensive postulates to consumer matters, operating as the cornerstone supporting the entire protective spectrum emanating from such a diploma.

Also, notable that the issue also encompasses elements relating to personality rights, primal matter of any debate that deigns to address issues relating to personal data on the Internet, his and possibility of availability, topic that refers from the Constitutional Law to the Civil field of contractual nature.

In the meantime, specific attention will be paid to the protective bias of the duty of information, sustains of good faith in the midst of consumer relations, which is imported in a very poignant way by the LGPD. Nevertheless, the CDC, in its art. 6º, inc. III provides that it is the basic right of the consumer "adequate and clear information on the different products and services, with correct specification of quantity, characteristics, composition, quality, taxes incident and price, as well as on the risks they present" (BRASIL, 1990).

It is therefore noted that it is the obligation of the supplier to present all the information concerning the products and services in a clear way to the consumer, recognized its intrinsic condition of vulnerable, so that it allows the formation of its judgment of choice, qualifying it. However, the determinations of this device may be potentially incomplete to encompass a new type of relationship between consumer and supplier in digital media.

It should be noted that such a relationship occurs through a digital contract, signed at a distance, with the use of electronic devices (PINHEIRO, 2018, p. 408). In such a way, one is faced with a contract that, by reason of its object, addresses eminently technical issues, such as specific language of technology and the like, a fact that can hinder the intelligibility of the consumer when exercising an act of contracting, which may also negotiate your personal data in this type of enterprise.

Moreover, this form of digital hiring hardly allows any form of debate with the supplier. Are, Starte, membership contracts in its essence and form, so as to further vulnerabilize the consumer user, which has only the option to accept or not the contractual terms (DI LORIO; GIACCAGLIA, 2018, p. 222).

This issue emerged as one of the main elements of analysis by the legislator when he edited the LGPD, largely weighing the consumerist character of the relations, in order to make legislation capable of filling the possible gap left by the CDC's general approach.

Initially, the question is illustrated in the body of art. 6º, inc. I and IV respectively, in so far as it provides that personal data processing activities must comply with good faith and principles such as the purpose (processing for legitimate, specific, explicit and informed purposes to the holder, without the possibility of further processing incompatible with those purposes) and transparency (provision of clear, accurate and easily accessible information to data subjects on the conduct of processing and their processing agents, in compliance with business secrets and industrial).

While emphasizing the imperative to work with clear information about the mode of treatment, the legislator has paid particular attention to the requirement of clarity in contractual acts, in which the consumer expresses his will, in the clear intention of qualifying their power of choice.

Therefore, it should be noted that the LGPD evaluated with special attention the real possibility of suppliers operating in the data mining sector to act with potential lack of good faith and incurring information bias when determining explicit rules to rule out such possibility. That remains clear next to art. 44 of the law, providing that the processing of personal data is irregular when it ceases to observe the legislation or when it does not provide the security that the holder of it can expect (BRASIL, 2018).

Indeed, faced with possible damage caused by the controller or personal data operator, the aforementioned law establishes in its art. 42 the obligation to repair it, whether it is patrimonial, moral, individual or collective, in violation of the legislation of protection of personal data. Still, the concern of the legislator extended in art. 45, which provides that in case of violation of the right of the holder in the scope of consumer relations, the liability rules provided in the relevant legislation apply, because the information has economic value (BRASIL, 2019).

Also, it is noteworthy that, although the LGPD has provided that as a rule the responsibility of the controller and the operator is not joint, art. 45 ensured the application of the objective and joint responsibility of the CDC for the case of consumer relations, as in the case of defects or defects of a product, for example (BRAZILIAN CHAMBER OF ELECTRONIC COMMERCE, 2019, p. 3).

From the given panorama, it is reasonable to believe that the incidence of Consumer Law on issues related to data protection is massive and extremely present, even if direct mentions are rare in specific laws, and consumer protection is umbilically attuned to and embodied in the LGPD edition.

In addition, it addresses the understanding of private autonomy that is understood as the power of the individual to establish legal rules for their own behavior (AMARAL NETO, 1988, p, 10), self-regulation. Also according to Francisco dos Santos Amaral Neto (2003, p. 348), "private autonomy is the power that individuals have to regulate, by the exercise of their own will, the relations that participate, establishing the content and the respective legal discipline".

In fact, there should be a stimulus to "adopt standards for services and products that facilitate the exercise of control of the owners over their personal data, considering the specificities of the activities and the size of the responsible ones" (SILVA, 2019, p. 98). That is, actions that guarantee the exercise of private autonomy by consumer users.

In this sense, when the data processing is carried out in breach of the legislation, the supervisory and sanctioning activities of the National Data Protection Authority may be triggered, in accordance with art. 18 of the LGPD. Likewise, in order to qualify decision-making and effectively promote the autonomy of users' will to the national authority, it is incumbent to disseminate knowledge about the protection of personal data and privacy to the population, according to art. 58-B, V, of the LGPD.

In turn, with major social changes, Doneda states the emergence of a second generation of laws, in the sense that the provision of personal data has become a requirement for "their effective participation in social life", that is, the third generation of laws now protect not only the supply of consumers, but beyond: "[...] which involves the individual's own participation in society and takes into account the context in which he is asked to disclose his data" (DONEDA, 2010, p.42). Thus, means of protection should be in order to understand the complexity of data provision and capture and develop effective protections.

As pointed out, when one understands the processing of the data in this way, the consumer is guaranteed the permission or not of the use, but also the information and barragem of the uses and purposes of the storage of their data. In this way, private autonomy resumes its position of importance, by allowing the consumer to have full knowledge of how his data will be and are being used, which must necessarily be accompanied by a free clarification.

4. FINAL CONSIDERATIONS

Every day digital technology advances on contemporary society, flooding human relations and changing its classical paradigms; at this point we find the Law, challenged daily to update themselves in the face of the new challenges that reverberate from this new and complex universe.

One of the legal elements that has been affected in a more profound and poignant way is the Consumer Law, which gradually must reinvent itself to continue playing the protective role to the Consumer, always vulnerable, so as not to neglectin the face of possible new abuses.

This situation found a critical turning point in relation to the Protection of Personal Data, in that, in addition to the digital products and services offered, the consumer - and his personal data - became the largest product. The Consumer Protection Code had been taken to its interpretative extreme, requiring the edition of specific legislation on the Brazilian digital environment.

In this sense, the first topic addressed the dialogue of sources in order to ensure a functional efficiency of the legal system based on a constitutional normativity of consumer protection. To this end, a joint analysis was made of the devices of the CDC, the Civil Framework of the Internet, as well as the General Data Protection Law regarding consumer protection.

In addition, it was pointed out that through the Civil Framework of the Internet and, second-hand, with the advent of the General Data Protection Law, consumer protection in the digital environment has found new points of support, with legislative innovations that have

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allowed the issue to be materially oxygenated, in order to assist the Consumer Protection Code.

Nevertheless, the need and importance of autonomy for the control of personal data of consumer users was highlighted, in order to avoid the abuse of their use and the violation of privacy by the controller, which can be held objectively and jointly accountable to the principle of vulnerability that guides consumer relations.

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OMBUDSMAN: THE POPULATION'S RIGHTS ADVOCATE IN THE INSPECTION OF PUBLIC ADMINISTRATION

OMBUDSMAN OU OUVIDOR: DEFENSOR DOS DIREITOS DA POPULAÇÃO NA FISCALIZAÇÃO DA ADMINISTRAÇÃO PÚBLICA

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ABSTRACT

The research intends to analyze the Ombudsman institute as the population's rights advocate in the inspection of Public Administration and the guardian of legality against impropriety and abuse of power in administrative activities. Although the 1988 Constitution has resumed democracy and the rule of law, the National Constituent Assembly rejected the proposal that would institute the Ombudsman. The method adopted is the hypothetical-deductive one, based on legislation, doctrine and jurisprudence. Even though there is no explicit reference to the Constitution, the study concludes that the Ombudsman, as an external part of Public Administration, has the mission of impartially inspecting it in defense of fundamental rights, through the Constitution, the principles and the rules that govern the Brazilian Democratic State.

Keywords: Public Administration. Advocate of Population's Rights. Inspection of Public Administration. Ombudsman.

RESUMO

A pesquisa tem por objeto analisar o instituto do Ombudsman ou Ouvidor como defensor dos direitos da população na fiscalização da Administração Pública e guardião da legalidade contra a improbidade e os abusos de poder no exercício da atividade administrativa. Com a Constituição Federal de 1988 o Brasil retomou o caminho tradicional da Democracia e do Estado de Direito. Todavia, apesar do clima democrático instaurado, a Assembleia Nacional Constituinte rejeitou a proposta que instituiria a figura do Ombudsman no País. O método adotado é o hipotético-dedutivo, com base na legislação, doutrina e jurisprudência. Conclui que o Ombudsman ou a Ouvidoria, como órgão externo da Administração Pública, embora não esteja pre-

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visto expressamente na Lei Maior, tem a missão de fiscalizar de forma imparcial a Administração Pública, em defesa dos direitos fundamentais, à luz da Constituição Federal e dos princípios e normas que regem o Estado Democrático de Direito Brasileiro.

Palavras-chave: *Administração Pública. Defensor dos Direitos da População. Fiscalização da Administração Pública. Ombudsman. Ouvidoria.*

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INTRODUCTION

The exercise of individual and collective rights must not be dissociated from the Democratic State and, for its preservation, particularly in a globalized world, it is necessary to establish mechanisms to fulfill them.

Currently, States "are not limited to guaranteeing minimum rights to individuals, but also to acting in the promotion of individual, social and collective fundamental rights" (REMEDIO; FARIA, 2019, p. 723).

Among the existing instruments available to the citizen for the protection and implementation of fundamental rights, the Ombudsman normally acts in the control of Public Administration activities, although it can also control private activities.

The Ombudsman appeared almost two centuries ago in Sweden as an integral part of public administration's control and gained wide acceptance, especially after the Second World War, as a democracy and inspection mechanism of Public Administration.

According to the São Paulo's Brazilian Association of Ombudsman, there are Ombudsmen in many countries, with different nomenclatures but similar attributions, such as the *provedor de justiça* in Portugal, the *defensor of the Pueblo* in Hispanic-speaking nations, the *meditér de la republique* in French-speaking countries, the *procurador de los derechos humanos* in Guatemala (ABO SÃO PAULO, n.d).

Ombudsman is a Swedish word that means citizen's representative. In Scandinavian countries, the referred term designates the Ombudsman-General, with "the public function created to channel population's problems and complaints" (UNIVERSIDADE, n.d).

The Brazilian Constitution of 1988 resumed the path of democracy and the rule of law after a long period of exception started in 1964. However, despite the established democratic climate, the National Constituent Assembly rejected the proposed amendment, which would expressly institute the figure of the Ombudsman.

The Ombudsman was decentralized by the Constitution of 1988 enabling any Executive Power to establish, by law or decree, its Ombudsman. Thus, the Ombudsman was converted into a direct representative of the citizen, which means the figure became the defender of the citizen, identifying whether the public service is good or bad (SÃO PAULO, n.d).

In order to have an idea of its dimension, in the State of São Paulo, considering the public area only, there are about 165 ombudsmen, 26 of which are public service concessionaires. At the same time, numerous private companies noticed the need to move beyond basic customer service and also started to use the Ombudsman (SÃO PAULO, n.d).

At the Brazilian private initiative, the Ombudsman position was created in 1986 by the *Folha de São Paulo* newspaper. Among other attributions, this professional used to receive, to investigate and to forward the complaints of readers and to conduct the internal criticism of the newspaper. The Ombudsman, in that case, could not be dismissed during his respective term (UNIVERSIDADE, n.d).

Currently, the Ombudsman is an instrument that enables popular participation in the control of governmental action, contributing to the exercise of citizenship.

The research intends to analyze the Ombudsman's institute, sometimes also entitled Population's Advocate or just Ombudsman. It is underpinned on the concept of being one of the guardians of legality in defense of citizens and against the impropriety and abuses practiced by the Public Administration in the exercise of its functions. Also, it seeks to investigate the historical trajectory, the importance, the scope of operation and the application of the Ombudsman in the Brazilian legal system.

Although there is no uniformity in this point, the most of authors, according to Wanderley Batista Silva[3] (n.d), and Gustavo Costa Nassif (2010), there is no difference amid the meanings of Ombudsman, understanding that is adopted in this research.

Among the Ombudsman's actions, one of the most important is the assistance given to citizens in their relations with the State, representing a link between the people and the Public Administration. It is worth mentioning that the Brazilian Public Prosecutor's Office has been operating with an emphasis on the defense of public assets, through an act of administrative impropriety and criminal actions against managers and public administrators, acting in relation to these activities as a true Ombudsman.

On the other hand, the Ombudsman's individualized role as an impartial population's advocate, who acts on behalf of fundamental rights and controls of public activity.

Since the political system must guarantee the participation of citizens in Public Administration, the role of the Ombudsman in the Democratic State is essential. However, the figure has not come to replace the contentious, administrative and political means of conflict resolution, but to contribute to fill the deficiency of such means.

In 1995, the Brazilian Association of Ombudsmen was created with the initial purpose of "stimulating the implantation of new Ombudsmen (public and private) based on the defense of citizen rights". Its performance was broadened due to "the promotion of citizenship and social participation in the conduction of state actions and also in its concessions as the most legitimate form of control and inspection" (NASSIF, 2010), idea which underpins the Ombudsman.

Regarding the structure, the research begins with an analysis of the emergence and history of the Ombudsman and then focuses on the concept and importance of the institute; following that, it deals with its scope of action and ponders on the possibility of its implantation in Brazil. Continuing, it addresses its relationship with the Federal Court of Accounts, the Executive Branch, the Public Ministry and the Judiciary Branch.

The method used is the hypothetical-deductive, based on legislation, doctrine, and jurisprudence.

3 Wanderley Batista Silva is Attorney General and Ombudsman-General of the Public Ministry of *Paraná*/Brazil

It is hypothesized that the Ombudsman, as an external body of the Administration, has the mission of impartially inspecting the Public Administration in defense of fundamental rights, through the Constitution, the principles and the rules that govern the Brazilian Democratic State.

1. THE EMERGENCE AND HISTORY OF OMBUDSMAN

The Ombudsman first appeared in Sweden, in 1809[4], when the King Gustavo Adolfo was dethroned, and the role of the Ombudsman took action to inspect the organs of Public Administration (NAPIONE, 1969).

Finland was the second country to adopt the figure of the Ombudsman, with an interval of more than one hundred years compared to its Swedish predecessor. The country lived under Swedish rule until 1809, because of the Napoleonic wars. Until 1917, Finland was governed by a Governor-General appointed by the Emperor; this prevented the establishment of the Ombudsman. It was only during the government of Karlo Castrén, in July 1919, that the role of the Ombudsman was introduced in Finland (AMARAL FILHO, 1993, p. 44).

In Norway, 1912, the Armed Forces were restructured, establishing the creation of representative bodies. However, the role of the Armed Forces' authoritarian organizational structure has become increasingly complex, as always, the last voice on any matter of interest to a soldier was conditioned by the goodwill of his superior authorities. In 1946, a special commission was created to investigate the functioning of the military administration and its system of representation. Marcos Jordão Teixeira de Amaral Filho (1993) states that this commission started to elect the Ombudsman not only with the role of knowing the complaints of recruits or officers, but also of knowing matters on their own initiative, of acting as an advisory body to the main military authorities and civilians, as to maintain close contact with the representative commissions (AMARAL FILHO, 1993 p.63).

In Germany, 1952, the creation of the Ombudsman was proposed by deputy Ernst Paul, of the Social Democratic Party, who was exiled to Sweden during the Nazi period. However, only five years later, in 1957, the constitutional law, called the German Military Ombudsman Law, was passed, with the aim of monitoring the facts that would violate the fundamental rights of soldiers (FONSECA, 2000).

Denmark, with the end of World War II, also felt the need to expand individual guarantees against State abuses. Thus, on September 11th of 1954, the Ombudsman Law was enacted, supplemented by Instructions from Parliament on March 22, 1956 (FONSECA, 2000).

In Great Britain, 1964, the Ombudsman was created following the pattern of Sweden and the Nordic countries, to control the administration of the United Kingdom (VENTURA, 2008). It had the competence to investigate cases of maladministration arising from purely executive activities of the government (AMARAL FILHO, 1993, p. 88).

4 The birthplace of the Ombudsman, for Walter Gellhorn (1966), is the Swedish Constitution of 1809, which relied on Montesquieu's theory of separation of the Executive, the Parliament and the Courts, and thus to supervise the fulfillment of their official duties. (GELHORN, 1996, p.194).

In the United States, despite the presentation of projects to create an Ombudsman, the proposal hasn't progressed, and the American experience has been restricted to some States, such as in Hawaii, 1967, in Nebraska, 1969, in Iowa, 1972, in New Jersy,1974 and in Alaska, 1975 (FONSECA, 2000).

In Portugal, with the Carnation Revolution, of April 25, 1974, along with the democratic transformations demanded by Portuguese society, an Ombudsman was introduced. It acts as an officer or mediator, receiving complaints against any administrative employee, aiming to correct errors and illegal administrative acts and to improve services (AMARAL FILHO, 1993, p. 106). The establishment of the Ombudsman has become indispensable in Portugal, in order to prevent and to promote the defense of rights in general as well as public and private freedoms (VENTURA, 2008, p. 5).

In Brazil, although there is no formal Ombudsman, a similar figure emerged in 1823, in a constituent project of José de Souza Mello, who created the People's Court, so that the population could complain of oppression and injustice before the Court.

The first concrete Brazilian experience took place in 1986, with the creation of the General Ombudsman's Office of the Municipality of Curitiba, with the purpose of acting in the defense of individual and collective rights against illegal acts and omissions committed by the Municipal Public Administration. In 2007, the General Ombudsman's Office of the State of Paraná was created, through State Complementary Law number 117 of 2007, with the objective of contributing to raise the standards of transparency, promptness and security in the activities of the Institution's members, bodies and auxiliary services (SILVA, n.d.).

The Federal Law number 13.460 of 2017, which provides on the participation, protection and defense of the rights of users of public services of the direct and indirect Public Administration of the Union, the States, the Federal District and the Municipalities, under the terms of subsection I of paragraph 3º, article 37 of the Federal Constitution, stipulates that the user may submit statements to the Public Administration regarding the provision of public services (article 9), which will be addressed to the ombudsman's office of the responsible body or entity and will contain the identification of the applicant (article 10), and the ombudsman's office must forward the final administrative decision to the user, within a period of thirty days, extendable for an equal period, in a justified manner and for a single time (art. 16).

The Decree number 9.492 of 2018, which regulates Law number 13.460 of 2017, instituted the Federal Executive Power Ombudsman System, integrating, as central body, the Ministry of Transparency and the Office of the Comptroller General of the Union, through the Office of the Union Ombudsman, and as sectoral units, the ombudsman of the organs and entities of the federal administration covered by the Decree itself, having as objectives (article 5): to coordinate and articulate the ombudsman activities to which this Decree refers; propose and coordinate actions with a view to developing social control of users over the provision of public services, and facilitating the access of public service users to instruments for participation in the management and defense of their rights; ensure the effective dialogue between the user of public services and the agencies and entities of the federal public administration responsible for these services; and monitor the implementation of The Letter of Services to the User referred to in article 7º of Law number 13.460 of 2017, according to the procedures adopted by the Decree number 9.094 of 2017.

The Federal Ombudsman's Office is linked to the Ministry of Transparency and the Brazilian Office of the Comptroller General (CGU), and is responsible for "receiving, examining and forwarding complaints, complaints, compliments, suggestions and requests for information regarding procedures and actions of agents, organs and entities of the Federal Executive Branch" (CONTROLADORIA-GERAL, n.d).

Currently, the Ombudsman institute, despite the inapplicability of the term in the legislation in an explicit way, is a reality in Brazil, usually called *Ouvidoria*, being used by several entities, including a National Association and various state associations at its disposal, as it occurs in the State of São Paulo.

2. CONCEPT AND IMPORTANCE OF THE OMBUDSMAN

The word Ombudsman is of Germanic origin and means "the one who makes the procedure" or "the intermediary". The figure is known for being the people's advocate, who is not limited to just listening, but also to solving problems related to the Public Administration. The Ombudsman is an independent body from the Public Administration. It is endowed with functional independence to supervise the performance of public servants (BEZERRA, 2010).

According to Antonio Rovira Viñas (2002):

> That is the reason of the Ombudsman's necessity, because in advanced democratic societies every day more instances are needed with authority that limits and controls this all-encompassing trend of power, which, although constitutionally divided, is very concentrated, and this could be one of the reasons to explain the news and its rise in the world (VIÑAS, 2002, p.67)

According to Catarina Sampaio Ventura (2008), the "Ombudsman is defined as an independent and impartial public body (tending to be one-person), based on its creation, as a rule, as a parliamentary legislative act"(VENTURA, 2008, p.34). It is instituted as a control mechanism of the Public Administration, in order to ensure the legality and justice of administrative behaviors. For Jorge Carlos Fonseca (2000), the Ombudsman is guided by informality, and the sayings of this body contribute decisively to the strengthening of the protection of citizens, by implementing mechanisms of legal protection present in the Constitution or in the law.

Regarding the Ombudsman, Celso Barroso Leite (1975) asserts that

> Since this is an instrument of defense of the people against the Public Administration, it is placing itself in front of the administrated, in benefit of both, both protecting the citizen against public investments, and defending the legal fulfillment of its activity (LEITE, 1975, p. 64).

In the States that adopt the Ombudsman's legal and administrative institute, "it overcomes its maximum function, consisting in preventing and filling gaps and omissions of other types of administrative and /or judicial control, concerning the three Powers, especially the Executive Branch (Public Administration)" (GUALAZZI, 1991, p. 146).

Ana Fernanda Neves (2005) reports that the institution of the Ombudsman assures each citizen the certainty of the power to live in conditions of freedom and security, insofar as, with

total independence, it censors and controls the errors, excesses and abuses of constituted powers (NEVES, 2005)

According to Gustavo Costa Nassif (2010), Ombudsman of Finance, Patrimony and Public Tenders of the State of Minas Gerais, the organ is responsible for constructive criticism within entities and corporations, acting in defense of the rights of citizens /consumers, receiving and investigating complaints and denounces regarding the quality of services provided by the government or private companies and, after filtering the information, it must recommend and influence the sectors involved to take measures to promote the correction of dysfunctions.

Catarina Sampaio Ventura (2008) highlights the duality of Ombudsman models, in the following terms:

> In outlining two Ombudsman models - one focused on the rule of law and good administration, the other focused on the protection and promotion of human rights - and finally suggested a delusional tension between the two, as far as the protection of human rights is concerned, without prejudice to the narrower delimitation, in on case, of the respective function, in the other, let us now consider some of the possible dimensions of relevance of human rights in the activity of the Ombudsman, including those institutions that are closer to the classic model of strict administrative surveillance of public authorities. [...]. The Ombudsman, the guardian of human rights, the defense of social order, and popular democracy. (VENTURA, 2008, p.101).

Since the ancient Greek democracy, "passing through the nineteenth-century Scandinavia, finally reaching modern democracies, it is evident the importance of the Ombudsman for the improvement of the political system, producing maximum satisfaction for the largest number of citizens" (FERRES, 2019, p. 53).

It is important to highlight that the Ombudsman is one of the most important channels for the exercise of popular participation and for social control in favor of citizens and the protection of individual rights (BASTOS; PEREIRA, 2029, p. 34).

The Ombudsman, in essence, endowed with functional independence, acts as a supervisory entity of the Public Administration, with special emphasis on the protection of fundamental rights and democracy itself.

3. SCOPE OF ACTION OF THE OMBUDSMAN

The competence of the population's advocate should be as broad as possible, and may even act in an official capacity, on any matter related to the civil administration of the country, which they deem of interest to be investigated (AMARAL FILHO, 1993, p. 128).

For the Office of the Comptroller-General of the Union, while the ombudsman is a space where suggestions, compliments, requests, complaints, and denunciations can be presented. Thus, the Ombudsman "acts in the dialogue between the citizen and the Public Administra-

tion, so that the manifestations arising exercise of citizenship lead to continuous improvement of the public services provided" (CONTROLADORIA GERAL, s.d).

Intervening based on complaints from citizens or on its own initiative, the Ombudsman's scope of action covers, generally, the administrative function of the State. However, the control of political, legislative, and judicial powers is out of its purview (VENTURA, 2008, p. 34).

Francisco Ferreira de Almeida (2003) complements:

> The Ombudsman, therefore, has no power to modify, revoke, or annul the acts of public authorities. [...] It is strictly bound by its behavior, the cases brought to his appreciation, or that he itself understands that he must analyze. [...] Ombudsman "who watches over the watchman" (ALMEIDA, 2003, p.31).

Hence, regarding its scope of action, the Ombudsman is limited to the control of the Public Administration and must present annual reports, especially in order to bring the behaviors that prompted the intervention to public knowledge and judgment. Therefore, the Ombudsman's reports assume an important function of providing the examination and analysis of the state of the Administration (VENTURA, 2008, p. 38).

However, for Marcos Jordão Teixeira de Amaral Filho (1993):

> Although the Ombudsman's competence may not affect the activities carried out by the National Congress and its members in the exercise of their functions, the advocate of the population shall also have the prerogative of investigation when a deputy or senator is exercising functions within the administration, including in ministerial functions (AMARAL FILHO, 1993 p.121).

In order to guarantee the proper functioning of the Ombudsman, one must assure and guarantee the success of its functions, among which are the following:

> Direct access by every citizen, without the mediation of parliamentarians; access to all documents necessary for the investigation, including the possibility of summoning officials to testify and witnesses; simple motivation of your decision and quick referral to the competent authority for measures; in the event of resistance from the authority, the possibility of filing a complaint against the employee or asking the top hierarchical authority to modify the decision. (AMARAL FILHO, 1993, p. 127)

Ana Fernanda Neves (2005) explains that the Ombudsman, with or without prior notice, visits the facilities of the entire Public Administration sector, aiming to ensure that all activities are being carried out with due care and following the guidelines for their operation.

In accordance with art. 2nd of the Statute of the Brazilian Association of Ombudsmen – ABO, a national institution, the Association aims, among others, to stimulate and to promote the reconciliation and relationship between all those who exercise the Ombudsman function in Brazil. The *ouvidor*/ombudsman, in turn, has the duty to defend the rights and legitimate interests of citizens, whether in public administration bodies of any level or power, or in a private company, "acting, always, with autonomy to ascertain the questions that are presented to him and independence to express what he sees fit to the institution to which he is linked"(ABO NACIONAL, 1995).

4. IMPLEMENTATION OF OMBUDSMAN IN BRAZIL

The Brazilian National Constituent Assembly rejected the amendment by Congresswoman Raquel Capiberibe, of PMDB of Amapá, which proposed the creation of the people's defender or Ombudsman in Brazil. For Hugo Nigro Mazzilli (2007), the people's defender was included in the Draft of the 1986 Constitution, indicated by Senator Afonso Arinos. The Ombudsman would be chosen by the Chamber of Deputies, among the candidates nominated by the population.

According to Marcos Jordão Teixeira de Amaral Filho (1993), powerful corporate lobbies arose against its creation, such as those of the Federal Court of Accounts and the Public Ministry. Still, the pressure exerted by sectors of public opinion and the experience of the Council for the Defense of Citizen's Rights and the ombudsman-general in Curitiba were not enough to convince the constituents, many of whom were ex-public prosecutors or identified in some way with the interests of the Administration.

Wallace Paiva Martins Júnior (2002, p. 78) adds that it was preferred to assign the Ombudsman's duties to the Public Ministry, which was already present in all Brazilian territory, than to create a new body.

According to Cândido Mendes (1987):

> The figure of the People's Defender disappeared in the constituent proposal, transferring the task of scrutinizing and promoting responsibility for the abuse of power of any government to the Public Ministry. [...]. Nothing is said about the worst of them, which is exactly the omission of public authorities increasingly protracted by bureaucratic inertia, tied to their strict and immediate dynamic of interests. [...]. There is still time to return to the people's defender. No careers, no perks, no reelections. (MENDES, 1987, p.03)

The 1988 Federal Constitution stipulates that the "Legislative Power is exercised by the National Congress, which comprises the Chamber of Deputies and the Federal Senate" (art. 44). Among the attributions of the National Congress, outlined in Section II of Title IV, Chapter I, lies the possibility of summoning the President of the Republic and his Ministers of State, to personally provide information, in a previously determined matter, regardless of the absence, without justification crime of liability (art. 50). Still, it is privately up to the Chamber of Deputies, under the terms of art. 51, "to authorize, by two thirds of its members, the initiation of proceedings against the President of the Republic and the Ministers of State" (item I) and "to proceed to the accountability of the President of the Republic, when they are presented to the National Congress within sixty days after the opening of the legislative session "(item II). The National Congress may set up permanent and temporary commissions, being their responsibility, under the terms of art. 58, § 2, "to call on ministers of state to provide information on matters inherent to their duties" (item III) and "to receive petitions, complaints or complaints from anyone against acts or omissions by public authorities or entities" (item V) (BRASIL, 1988).

It is noticed that, although the National Congress does not have government responsibility, since the presidential system was maintained by the 1988 Constituent, there was an expansion of its political control action over the ministers and the head of government.

Marcos Jordão Teixeira de Amaral Filho (1993, p. 119) already asserted that the introduction of the right to petition citizens against acts or omissions by public authorities or entities also revealed the concern of our constituents with the preservation of individual rights, a function traditionally delegated to the Ombudsman.

At this point, the creation of the Defender of the People must consider the new Brazilian constitutional reality, and it would be very convenient, in order to avoid conflict of attributions between Parliament and the Ombudsman, that the control of the President of the Republic and his ministers, due to the more political character of its functions, be restricted to the performance of the National Congress, or that the Ombudsman could act, due to the provocation of the National Congress itself, because its role is in function of the people and democracy (BEZERRA, 2010).

It is important to note that the Ombudsman, in the view of Wallace Paiva Martins Júnior (2002), has neither administrative nor jurisdictional attribution, which is the reason for not intervening in the Judiciary. It is only competent to verify the legality and legitimacy of the administrative act, and to recommend its invalidation in the event of nullity, or revocation due to convenience or opportunity.

The Ombudsman also has a relationship with the Parliamentary Commissions of Inquiry.

Brazil adopted the form of presidential government, inspired by the North American model, which came to know the traditional parliamentary commissions of inquiry as a form of parliamentary control. However, despite the indisputable merits of some of these committees in their supervisory work, they are conditioned to parliamentary majorities, not always willing to create them, and cannot deal with individual cases, since they must be focused on more general administration. In this way, the defender of the people has a wide field of inspection activities, without removing from Parliament their traditional inspection prerogatives, including giving them *status* higher in the exercise of his activity (AMARAL FILHO, 1993, p.124).

As seen, although the Federal Constitution of 1988 did not expressly provide for the figure of the Ombudsman with this nomenclature, the institute is a reality in the country, being provided for in several infra-constitutional norms, under the generic name of Ombudsman.

5. OMBUDSMAN, FEDERAL COURT OF ACCOUNTS, EXECUTIVE POWER, PUBLIC MINISTRY AND JUDICIAL POWER

The Federal Constitution establishes in art. 71 that "external control, under the responsibility of the National Congress, will be exercised with the assistance of the responsible Federal Court of Accounts" (BRASIL, 1988).

Art. 71, § 4, of the Major Law, determines that "the court shall forward to the National Congress, quarterly and annually, a report on its activities". Art. 74, § 2, of the Constitution, states that "any citizen, political party, association or union" is a legitimate party to, in the

form of the law, denounce irregularities or illegalities before the Federal Court of Accounts (BRASIL, 1988).

Marcos Jordão Teixeira de Amaral Filho (1993) analyzes that the 1988 Constituents clearly expanded the list of competencies of the Federal Court of Accounts, which decidedly ceases to be a mere Court of Accounts and becomes the auditor of the Public Power, with great similarities in relation to the classic attributions of the Ombudsman.

Indeed, it is indisputable that the scope of an Ombudsman's activity in Brazil was severely restricted by the text of the 1988 Federal Constitution with regard to the powers of the Federal Court of Auditors. The overload of work that this will result on the Court may lead, in the future, to the possibility of a new development of functions, returning our Court of Accounts to its classic duties and delegating to the defender of the people (Ombudsman) the supervision of administration acts that violate individual or group rights, with the indirect objective of protecting the democratic order (AMARAL FILHO, 1993, p. 123).

According to Helga Maria Saboia Bezerra (2010), in the current condition it would be necessary to revise the constitutional text to avoid a possible conflict of powers between the Federal Audit Court and the Ombudsman.

In Brazil, unlike Sweden, Ministers of State are responsible for the actions of their subordinates, in a hierarchical relationship that is established from the lowest levels up to the President of the Republic. In such a way, with this administrative structure it would be unthinkable that an Ombudsman could not supervise the administrative acts of the ministers of State, who concentrate vast competence in the administrative sphere. In the case of Norway:

> the Ombudsman was given the power to appreciate discretionary aspects of administrative action. In Brazil, which has an administration strongly marked by authoritarian traits, it would be convenient, in the same way, for the defender to have such competence, in which administrative actions, although attempted within the existing legality, escaped the principles of reasonableness and equity with the administrator required by the good Administrative Law. (AMARAL FILHO, 1993, p. 125)

For Francisco Ferreira de Almeida (2003), it would be inconvenient if the defender of the people could intervene in presidential affairs, even so, in cases where the law determines or in those acts in which the President has acted only as the hierarchical superior of the Administration, the Ombudsman of the people must have the competence to act, always preserving the institutional figure of the Presidency of the Republic.

However, there are those who maintain in the doctrine that, in Brazil, the role of the Ombudsman is exercised by the Public Ministry.

In this way, in accordance with Hugo Nigro Mazzilli (2007), the constitutional text assigned to the Public Ministry the role of Ombudsman, to supervise social and individual interests, having no hierarchical link with the powers of the State.

According to Ana Fernanda Neves (2005), it is the Public Ministry' responsibility to defend the legal order, the democratic regime and social and individual interests.

In Sweden, the Ombudsman has similar competence to that of the Brazilian Public Ministry. However, as previously stated, the rejection of the Plenary of the National Constituent Assembly to the creation of the People's Defender was largely due to the pressure exerted by

prosecutors linked to the Public Ministry, who saw in its creation a possible limitation to their functions.

According to Cândido Mendes:

> We squandered the opportunity to take advantage of the Spanish example and to protect civil society against the State through a Public Defender's Office to denounce and prosecute abuses of power, outside the government corporation. We have not taken the decisive step: the task remains within the competence of the Public Ministry. (MENDES,1987, p. 03)

For María José Colchete Martín (2001), the head of the Public Ministry should not be chosen by the Executive Branch. At this point, the European Ombudsman is appointed by Parliament, the body that has the task of inspecting the Executive Power.

From another angle, it should be noticed that the Judiciary is not subject to inspection by the Ombudsman.

In this sense, during the work of the National Constituent Assembly, especially in the appreciation of the chapter dealing with the organization of the Judiciary, a great controversy was established around the creation of the National Council of Justice to exercise external control over that organ. However, the Constituent Plenary chose to preserve entirely the independence of the Judiciary.

In Brazil, without harming the independence of the Judiciary, it would be interesting to have a control restricted to the follow-up of lawsuits and the fulfillment of procedural rites, which would regain the trust of society, especially in the cases of the judicial administration, with regard to the execution of criminal penalties, which would be a role for the Ombudsman, as an important tool for dialogue with detainees. No action would be admitted involving a judicial decision or an act performed in the exercise of its prerogatives, which could harm the relationship between the people's defender and the Judiciary, or in any way limit the magistrate's independence (AMARAL FILHO, 1993, p. 127).

However, although not foreseen in the original wording of the Federal Constitution, the National Council of Justice, ended up being created through EC 45/2004, which included art. 103B in the constitutional text, under the terms of § 4 of the aforementioned art. 103, the control of the administrative and financial performance of the Judiciary Power and the fulfillment of the functional duties of the judges, being responsible for the exercise of several attributions provided for in the core of art. 103, in addition to other attributions conferred on it by the Judiciary Statute.

CONCLUSION

The Ombudsman, also known today as Justice Provider, Advocate of the Population or *Ouvidor*, appeared in Sweden, in 1809, arising and influencing the implementation of the institute in several countries, such as Finland, Norway, Germany, Denmark, Great Britain and Portugal.

Although the term Ombudsman is not expressly used in Brazilian law, it is, in practice, a reality in the country, usually under the name *Ouvidoria*, with several entities that specifically use the institute, such as the Brazilian Association of Ombudsmen, a national organ, and the Brazilian Association of Ombudsmen of the State of São Paulo.

The figure of the Ombudsman or *Ouvidor*, since its advent, has gained respectability, being very important for the improvement of the political system and for the satisfaction of the interests and rights of the citizens nowadays, in particular, regarding the control of the activities performed by the Public Administration.

The Advocate of the Population, for qualities that were confirmed in several foreign legal systems, enables the search for the promotion of fundamental rights and contributes to the control of activities under the responsibility of the State, especially those related to administrative action.

The slowness of administrative procedures, the inadequate jurisdictional control and the need for impartial inspection over state activity are reasons for the creation of the Ombudsman in Brazil.

In this context, and as an instrument for the exercise of democracy, the creation of the Ombudsman could address possible institutional deficiencies of the control bodies currently existing in the country, such as the Public Ministry and the Court of Accounts.

Due to the Brazilian characteristics and the experience of other countries, it is convenient that the creation of the Ombudsman or Advocate of the population should be done preferably through the constitutional route, thereby avoiding their fragility through infraconstitutional normative interferences.

The Ombudsman's success in Brazil is directly related to the democratic openness and the political participation of individuals and of society itself, and the institute can become an important channel aimed at resolving conflicts among citizens and between them and the State itself.

The Ombudsman, which is an external control body, contributes to the impartial inspection of the exercise of the activities and functions that regard the Public Powers.

In conclusion, the initial hypothesis has been demonstrated, clarifying that the Ombudsman, although the term is not expressly found in Brazilian legislation, the practice should be implemented, aiming at inspecting the exercise of the Executive Branch's activities, in particular acting as guardian of the legality and against the abuses of power practiced by the Public Administration.

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AXIOLOGICAL CONSTRUCTION AND ITS APPLICABILITY TO THE RIGHT OF PERSONALITY

A CONSTRUÇÃO AXIOLÓGICA E SUA APLICABILIDADE PARA O DIREITO DA PERSONALIDADE

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ABSTRACT

This article aims to analyze the historical and epistemological construction of the philosophy of values - axiology, its applicability in law, especially to the rights of the personality, and in what way humanity becomes the main source of values in the most diverse times. It also seeks to understand how values are characterized as instituted and instituting for the individual and collectivity. To seek to address these problems, bibliographic review is used as a method, as well as research on laws, articles, books and dissertations, to understand which understanding on the subject in question. Therefore, it appears that the law, whose ultimate purpose is justice, is generated by values, acting on the rights of the personality that protects the values of human essence, understood by human dignity and protecting life in society to maintaining the social harmony.

Keywords: Axiology. Moral Values. Personality Law. Philosophy. Social Values.

RESUMO

O presente artigo possui objetivo de analisar a construção histórica e epistemológica da filosofia dos valores – a axiologia, sua aplicabilidade no direito, em especial aos direitos da personalidade, e de que forma a humanidade se faz a fonte principal dos valores nos mais diversos tempos. Também se busca compreender de que forma os valores são caracterizados como instituídos e instituintes para o indivíduo e coletividade. Para buscar atender a estes problemas, utiliza-se a revisão bibliográfica como método, bem como pesquisa em leis, artigos, livros e dissertações, com objetivo de compreender qual entendimento sobre o tema em questão. Portanto, verifica-se que o direito, cuja finalidade última é a justiça, é gerado pelos valores, atu-

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ando nos direitos da personalidade que tutela os valores da essência humana, compreendido pela dignidade humana e também proteger a vida em sociedade com vistas à manutenção da harmonia social.

Palavras-chave: *Axiologia. Direito da Personalidade. Filosofia. Valores Morais. Valores Sociais.*

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1. INTROUCTION

Since ancient times the history of the evolution of man and society has reflected in the development of values. These corroborate with the construction of human consciousness. The principles provide to conceive not only the distinction between good and evil, but also a method for the construction of a desired ideal. In this way, moral and social values are fundamental to man and are fundamental to him, both in customs and in culture, and these are born as the result of crises that elevate human consciousness.

Values arise within a social group, this demonstrates the importance and relevance of understanding that the value accepted by man is related to social value, where it has its roots. The customs of a given society structure the inner values of the man who lives in it, and it can be understood that moral and social values are structured to the very personal rights of the integral person in such a social group.

Axiology, also called the philosophy of values, and value has a great importance in the legal field. First of all, it should be noted that law is one of the great guides of life in society, permeated and connected with numerous other areas, such as the evolution of society, ethics, culture, and values. It is through the valorous human consciousness that man understands the world in which he lives. Axiological appreciation administers legal interpretation through hermeneutics, and the central purpose is value analysis. The axiological conjuncture, as a cultural datum conditioning the circulation of law, delineates historical evolution.

Values can be considered as property of the fabric of social representations, characterized as instituted and instituting the historical formation of man and society. In this way the values are considered as the north of the options of choices interconnected to the knowledge conceived and also through social representations, but they also possess strength that drives the knowledge and reorganize those knowledge coming from experience.

The law cannot be interpreted in a unique way, for this the importance of legal hermeneutics, and, the same needs to be applied, thus, for there to be consistent applicability, it is necessary to associate the interpretation of the right to values. Regardless of the time when such an act will occur, it is known that a new value will replace the former with social evolution, generating a new right.

In this way, we see that living means giving value to life and cultural construction. In other words, values conceive of man and his conscience and solidified foundations. It is of the value that will flow your behavior, that you will know your character, your actions before the difficulties, and the most distinct episodes of life. And beforehand, it is anticipated that the right of personality protects the inner values of the person because they represent his or her essence.

We will analyze the historical and epistemological construction of axiology since ancient times, its philosophical formation since Socrates, the influence that modern philosophy suffered from modern philosophy, the contribution of Kant and so many other philosophers and jurists. It will be understood in what way man is considered the source of all values, what forms these can justify human actions and how the moral and social values that fundamental the right and social coexistence, can contribute to the own valuation and human ideas.

This research is based on the following questions: is there a relationship between the philosophy of values and the formation of law? And specifically with personality rights? How can moral and social values contribute to the formation and protection of the rights of the personality?

To answer these questions, the deductive and hypothetical-deductive method will be chosen, to achieve a valid and relevant theoretical framework, with the aid of qualitative study, through the collection of bibliographies, doctrines and laws - Federal Constitution, Law of Guidelines and Bases of National Education, National Education Project - from consultations on the Internet, collection of the Library of Unicesumar University and Google Scholar on the subject in question: axiology, rights of personality, human dignity, moral and social values.

2. AXIOLOGY: HISTORICAL-EPISTEMOLOGICAL VIEW

The study of values had its genesis, approximately in 400a.C, with Socrates, corroborating with the golden period of Philosophy, becoming one of the fathers of Philosophy. Axiology is as old as human existence. In Classical Antiquity the Greeks understood that Xios could be explained by what has value, what has dignity to be esteemed, but never measured. Assuming, therefore, the importance of value in history.

In order to understand human values from its birth to the moment where the socio-historical process is more developed, it is necessary to grasp about the constitution of what was understood about Greek man, since the Greek civilization was considered, both, of paramount importance in regard to the means of education, but also "[...] is not only the mirror where reflects the modern world in its cultural and historical dimension or a symbol of its rational self-awareness" (JAEGER, 2013, p. 7).

Socrates vehemently opposed the relativism and subjectivism of the sophists, defending objectivity and the absolutism of ethical values. Followed later by Plato, and also Aristotle; Socrates understood that the conflict with relativism and subjectivism, the struggle for objectivity and the absoluteness of ethical values was the formula of his diligence.

Man's valuation gains a new guise with Greek history. The traditional moral of the time ended up suffering threats because of the rationalization derived from the teachings of the sophists. These ended up not caring for the genesis of the universe, but returned to moral and political values (PLATO, 2002), leading to the emergence of the relativization of values. Plato, in demonstrating about the world of metaphysical standards, points out moral values, and in his work "The Republic" believes that the rational division of labor is a correct way of organizing the ideal city and therefore was seen as a social reformer (PLATO, 2002).

Plato built the theory of ideas - the central core of his philosophy - where in synthesis, the idea of values is maximized by the conception of good, as well as of ethical value and also of aesthetic value; not forgetting that this was guided by metaphysics. (PLATO, 2002). In Aristotle, there is a continuation to the bias of the idea of good in things and in empirical reality, where the valuable acquires abundant cosmic character.

Happiness in Aristotle (1999) was not derived from obtaining pleasure - whatever source it came from - but this would be found by reason, that is, the person who achieves the greatest development of reason will contemplate happiness through virtues, these being a moral excellence and a "intermediate state, because in the various forms of moral disability there is lack or excess of what is convenient both in emotions and in actions, while moral excellence finds and prefers the middle ground (ARISTOTLE, 1999, p. 42), thus for this philosopher, human values are related to what he understands about the ideal of good that subjects man to the encounter of happiness.

Classical Philosophy greatly influenced the formation of Modern Philosophy, and it played a foundational and essential role in the composition of the philosophy of values. Within this period, one cannot fail to mention Immanuel Kant. He categorically confronted the classical ethics that had for years influenced that period, inaugurating a critical philosophy and totally opposed to dogmatism (KANT, 1980).

With a basic distinction between being and being, Kant offered a new perspective on value. This search for a baggage-free philosophical construction of his ancestors, is understood as the core of always questioning about his own faculties of reason, followed by the possible possibilities of a knowledge, followed by its limits, was even with this question that occurred the Copernican revolution in Philosophy (BAMBIRRA, 2008, p. 4905).

Although Kant did not develop properly, an axiology, in its elaboration of an deontology - the so-called 'theory of duties', occurs a transfer from the idea of value to the domain of personal consciousness, "in this world, and even outside it, nothing is possible to think that it can be considered as good without limitation except one thing: a good will. " (KANT, 1980, p. 109) , also explained by Hessen that "moral conscience becomes true homeland of ethical values. " (HESSEN p. 26, 1980).

It was from the middle of the nineteenth century that scientific rigor underwent a greater search for value. With the important pioneering contributions of the philosopher and logician Lotze in relation to axiological studies, he came to be considered as the true father of modern philosophy of values, starting on the theme in his book Mikrokosmos, where distinguishes "being" and "value", ie "world of values" is different from the "world of beings" (HAUBERT, 2018).

In short, the value could be understood from the spiritual realm as well as can be understood through intelligence (HESSEN, 1980, p. 26-27). Along with this idea, it also conceptualizes value and worth, where it will always be something free of reality.

In the aspect of the modern philosophy of values, Franz Brentano, in his work The Origin of Moral Knowledge (1889) brings relevant contribution recognizing the nature of value as a phaenomenon sui generis - ie - phenomenon of own gender, singular. For him, of the three fundamental classes of psychic phenomena "among the intentional references, taking up the theme treated in the Cartesian Meditations, but until then ignored" (BAMBIRRA, 2008, p. 4907)

The first class consists of representations, which can be intuitive or obtained by the senses; the second class is that of judgments, which uninterruptedly provoke a representation, but not always associating one representation to another; the third class is that of emotions. The notion of good is understood to be true, it is only fair to admit such reference. In relation to something that is regarded as good, it will only be understood in that it consists of loving it and then it will be fair. In other words, what is loved with just love, just being loved, is literally good (Brentano, 2002).

Contrary to what is seen from the analysis of objects, where they are always immutable, Johannes Hessen understands that there is the perenniality of values, these do not change with the modification of the objects in which they manifest. Thus, the theory that the values, for example, the aesthetics of the beautiful, the sublime, the graceful, etc., preserved even when all the art objects were shattered. To the understanding of values, Scheller adds the ethical alluded to the personal and the things for the impersonal (PEREIRA, 2000). Beyond these currents, in the 20th century the term value began to be distinguished from the notions of good and from being to assume a sense derived from purely human activities, resulting in the configuration of a recognized theory of values.

The theory of values was recognized after countless currents added with particular conceptualizations, and in the twentieth century the term with its signification came to be differentiated from what was understood as good and as being, and was evidenced with respect to the human. Miguel Reale transfers the verb to the noun to be valid, bringing the pure revelation of value in its own epistemological form, understanding that man obtains knowledge and awareness of value in the most different modalities as from the historical, military, artistic and economic point of view (REALE, 1982). It is clear that there is a multi-faceted understanding of value and, therefore, it is worth noting that value is not only a matter of preference, but of what is preferable and desirable, but value is not just an ideal, but a standard of preferences, or what is meant by judgment.

Value can be considered as a possibility of choice, thus the theory of value inclines to avail of stated possibilities of choices (ABBAGNANO, 2007, p. 993) and that "he who denies all values, seeing nothing more in them than illusion, cannot fail in life. He who has a wrong conception of values will not succeed in giving life its true and just meaning. " (HESSEN, p. 23, 1980).

The general and superficial foundations about the value may even seem easy, however, when it comes to its theorization occurs a clash. Lotze (apud HAUBERT, 2018) and Miguel Reale (1982) argue that just as being is what it is, then value is what it is worth, while Nader (2019) understands that the conceptualization of being and value are irreducible.

According to Lucília Bastos, the philosophy of values is considered a relatively new study, but with some main currents that are worth highlighting: axiological psychologism composes the first, stresses that values can be taken by relativism and subjectivism, after all according to the experience, the values can be experienced; the second is composed by cosmologism, where the value is taken as a determination only of the being; whereas the third current is composed by Neokantism, which has value or validity is inserted here, in which the real order of being is distinguished from the ideal order, and becomes a sphere of things that are valid; and finally, ontologism fills the fourth chain, seen as the objectification of values, that is, values do not determine the way of being of someone, but of entities in themselves

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(BASTOS, 2006, p. 215-6). In fact, one cannot harmonize the most varied currents, so nothing more important than a deeper examination of such questions.

A crucial question as to values is in relation to their subjectivity and relativism or to their objectivism and absolutism. On the one hand there is the relativism of values that understands as a founding point that all value and valuation is consistent with the presumption of a relationship with a valuing subject. Axiological subjectivism, as some of its representatives Ortega y Gasset, Meinong, Christian von Ehrenfels, and argue that "the thesis that values do not have validity by themselves, since the subject attributes meaning to things according to the positive or negative reaction they provoke" (NADER, 2019, s/p).

On the other hand, one has the absolute character of values, which says about those who possess efficacy in themselves for whatever spirit. We can list some important authors who defend the absolute dimension of values understanding that "the existence of values is independent of the subject, because they do not need estimation or knowledge. The values would have existed in and for themselves" (NADER, 2019, s/p), as Max Scheler, Nicolai Hartamann, Joahnnes Hessen.

Axiology is important to philosophy and very noble to it, after all, only through the possibility of reaching solid ground for a renewal of culture or who knows the elaboration of a new culture with increasingly supportive dimensions (MONDIN, p. 159, 1980). Value is not a being in itself, much less a good or bad want, but it is something that comes and establishes itself in subjectivity in the relationship of being with things or world, or with itself, or even in the society in which it is inserted, since "man is the source of all values because it is inherent in his essence to value, criticize, judge everything that is presented to him, whether in the plan of action or in that of knowledge. " (REALE, 2000).

3. MORAL AND SOCIAL VALUES

Values justify actions, and have a depth in them, and, to their realization is admitted numerous degrees - as an example, if you have the "heroism of renunciation and self-sacrifice, worth ethically more than a simple and small moral transformation" (HESSEN, p.60-61, 1980).

For Miguel Reale it would not be correct to say that values are only ethical factors, serving to illustrate about the human experience, however they are also constitutive elements of these experiences, what he calls axiological historicism. Which the human being fulfills in his particular experience, which carries through demonstrations through time, being both exemplary and diverse (REALE, p. 201, 2002). It must also be said that values do not carry ontological essence in themselves, but are manifested in things that have value.

It is not about empirical influence, isolated or who knows individual, but rather about the whole, in universality, "as historical consciousness, in the dialogical process of history that translates the interaction of individual consciences, in a whole of successive overcomings " (REALE, p.201, 2002). It should be emphasized, therefore, that only man, among all beings, is

capable of values, that is, it is in the human being that the foundational value is found, intrinsic to him, which is valid by itself.

Man, in subjugating the earth, formed the world of culture what can be said in his image and likeness (REALE, 2002, p. 209), therefore being is his duty to be. The problem of values has more to do with the difficulty of its understanding, that is, the impediment of perception and not of its elucidation. Thus all that one has about cultural good is only as long as it must be, what Reale calls the "intentionality of consciousness" (REALE, 2002, p. 209), which protects itself as a fundamental axiological constant. In other words, the issuance of a value judgment is understood when man performs acts throughout his life, for it is his very essence to always be Valuing.

This can also be related to wanting something, and doing so because something seems valuable. In this way, to speak about valuing means to everything that somehow enriches the human being, and, something will possess value when it is appropriate to supply certain needs (PAUPÉRIO, 1992). It is the example of moral value, which will possibly always satisfy possible needs and also moral demands.

When one speaks of the values of the person, these can unfold into countless other values, and can be disposed of in moral and social terms, and the rights of the personality are essential values for the human person, since it is the right as an enabling instrument for the realization of values in the moments of social life.

Moral values come from the word "mores" which corresponds to customs. Morals can be understood as norms implicit in codes and laws, but they are contained there regulating the action of man in society. It is common for the word moral to be compared to the word ethical, but later it will be shown that everyone has their specific applicability. For Vázquez (1984), morality derives from the collective need that men have to relate to each other, however, taking care of the good of all, is that mixture of rules and norms whose purpose is to regulate social interactions, not forgetting the probability of mutation according to political and economic evolution.

It is essential to think of them in a changing and flexible way. "Ethics is a science of morality, because it questions why and under what conditions certain action is considered good or bad, to what extent it helps to build the identity of a nation, group or person" (RIBEIRO, 2000, p. 137). For Miguel Reale (2002, p. 42) "the theory of the ethical minimum consists in saying that the Law represents only the minimum of Moral declared mandatory so that society can survive".

Regarding moral values, Kelsen's position reflects that law is a science detached from any value, a legal science that for him is an autonomous reality and therefore, when performing an analysis, must be distinguished from any judgments (KELSEN, 1999, p.45). For the philosopher, dedication should only be to the norm. If there is a morally good law and a morally bad law, only then will there be the justification followed by such opposition of the positive Law by Moral, but it should be noted that this idea no longer finds aegis as stated by Paupério (1992, p. 103), since "objectivity and axiological neutrality constitute values in themselves. And since axiological neutrality is in itself a value, the requirement of a total absence of values, of a complete valorous neutrality is paradoxical".

The positive law in its pure normativity has no force to generate an obligation, but this is generated because it contains value, that is, the obligation occurs exactly because the norm is seen as legitimate and just (VASCONCELOS, 2006). Ronald Dworkin (2010) understands that the principles, with moral aspects and integrates them into the legal system, already Habermas (1997) states that "Dworkian theory is based on the premise that there are moral points of view relevant in jurisprudence, because positive law has inevitably assimilated moral contents".

One way or another, it is adopted in this research that the moral and social values are contained in the law and also in the social life, as said above, is of paramount importance also for the evolution of human ideas themselves, and that the "essence of any society is the moral reunion of men ordered to the common good (...)" and that to achieve this common good it is "necessary that private interests are subordinated to the supreme interests of the community". (PAUPÉRIO, 1992, p.45).

4. THE IMPORTANCE OF VALUES TO THE RIGHTS OF THE PERSONALITY

It is the essence of the human being himself to know and to want, but it is also intrinsic to the act of valuing. Everything is valued, and it is not possible to live life without constantly making judgements (HESSEN p. 40, 1980). For Reale, the choice of something and consequently the existence of a sense is only possible because of the value, it is through this that those are brought about (REALE, p.186, 2002). It is true to say that only man is capable of values and for this reason that axiology is valid, and to live - in other words - is to choose his position before values, applying in their lives as they magnify their personal personality by giving value to what is around them, to objects, to other human beings, and also to their own self.

A practical example of the formation of values brought by Vásquez (2008) is around silver, which initially is a physical property, natural and sensitive, ie a natural object, and over time, as a result of the needs produced to come to possess other qualities, the needs are socio-historically, and the value that comes to man changes according to its social, historical and cultural existence.

Faced with this, "the principles of identity and non-contradiction govern, as universal principles, all science and all possibilities of knowledge. " (REALE, p.59, 2002) and with the legal universe it could not be different. The law also holds principles, after all it is not likely that there is science not based on assumptions, that is, since principles are characterized in truths, these founding judgments are the basis for a tangle of judgments. Reale brings the example of a building, with its master beams, which are the point of reference. Then, when it comes to any science, it will also have its pillars, which will lead to a logical support, which is called principles, for some, for certain purposes, and for others, for other purposes, however, they serve as support in the general structure of human knowledge (REALE, p.61, 2002).

Living will always imply value (NADER, 2019). Man considering the world through valorous perspectives will affect the right, effect of human culture, undoubtedly congruent with values. Therefore, the values are founders for the formation of the Direct and this is the consequence of a polarity, since if materializing axiological elements, satisfying or not the human propensities, achieving or not winning, the intention is to be materialized the positive values (NADER, p. 52, 2019). In other words, it is worth remembering that values are the essence of law, contained in legal systems by means of norms. In the understanding of Norberto Bobbio "the philosophy of law can, consequently, be defined as the study of law from the point of view of a certain value, based on which the past law is judged and is sought to influence the current law" (BOBBIO, 1995, p. 138).

The essence of law is formed by values (NADER, 2019). The values generate the Law, and this aims to protect life in society, leading it to a social harmony. Thus, it is essential to study the values, because the norms are the effectiveness of the value (FERMENTÃO, p.623, 2011). Human values act in the human dignity and ethics of the person, and in the interim they are the rights of the personality that safeguard what is understood about the values of the human essence: its dignity. The right, in addition to implementing values, also establishes about them, that is, the right has as one of its components the value.

Man will always be giving value to everything around him, and living will always cherish "act of creation of means that enable existence; creativity is selective, discriminating, because man seeks to get rid of what seems to him evil and realize what seems to him good" (NADER, 2019, s/p) and human action, as a cultural object generates value, in this way, the law will always have a value judgment when disciplinary human actions and their relationships, for this, an ethical basis is necessary.

Not all values derive from ethics, based on their moral principles, such as the rights to health, culture, and sports (NADER, 2019, s/p). However, for the most part, in order to ensure the integrity of the formation of society, judgements of value will always be in the future juridical realities aiming at the just. For example, the right to life, to freedom, to heritage are essential rights to humanity, so when law projects values, it will always yearn for the protection of human dignity.

If it is only possible to know man when we know the values that govern his life (HESSEN, 1967), we can also understand the law, analyzing which ends his standards aim to achieve. Regulating human conduct, for the right, is also taken as an implementation of the ethos, ie the product of culture (SALGADO, 2006), in this same sense Paupério, (1992, p.47) also understands that "the law is cultural work and therefore also aims, as ethics, to the creation of values".

As far as the right of personality is concerned, it can be understood as the innate right of the human person, intrinsic to it, that is, it is considered the first good of the person, as Elimar Szaniawski states:

> Under the name of personality rights, we understand the personal rights and the rights essential to the development of the human person that modern doctrine advocates and discipline in the body of the Central Committee as absolute rights, but lacking the faculty of disposition. They are intended to protect the eminent dignity of the human person by preserving it from the attacks that other individuals may suffer. (SZANIAWSKI, 2005, p.71)

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Helmut Coing understands the principle of the dignity of the human person according to two concepts: in the first instance it is assumed that the protection of the human person with regard to his or her integrity, in other words, it serves as a deterrent against physical and mental practices or offenses against the human being, generally protecting his life; secondly, it concerns the expression of the right of the human being to be respected as an intellectual being, which then represents the guarantee of the right to self-determination, to come and go, to choose where to live, etc. (SZANIAWSKI, 2005, p.140).

The dignity of the human person is the first and last foundation of the human person who guards individual rights in life and death, since it is not only considered as a principle above, but also the most important of all systems. With the promulgation of the Federal Constitution of 1988, numerous values and principles were established which brought a new time for a new legal order (MOARES, p.233, 2006), the dignity of the human person was elected as the foundation of the democratic rule of law itself. The integral and primordial tutelage of the person brought paradigmatic change, possessing constitutional value, being fundamental principle and considered as links of the whole system (CANTALI, 2009, p.86).

According to Kant, "in the realm of the ends everything has a price or a dignity" or "when one thing has a price, one can put in its place any other as equivalent; but when one thing is above all price, and therefore does not allow equivalent, then it has dignity" (KANT, 1986, p. 77).

It is possible to consider numerous dimensions on dignity as: ontological, communitarian or social, historical-cultural, and also negative and helpful. The first, it means that dignity is something inherent to the human being, the second is that all people are equal in dignity and right, the third, it understands being unequivocal, since the concept is always in a process of construction in itself, and also to meet social needs, and finally, it is taken into account that dignity can be manifested at the same time with what is called the autonomy of the person, or in other words, what is meant by the right of self-determination for decision-making that is proper to the person (SARLET, 2007, p.30-33).

The general right of personality protects man in every circumstance, taking into account that the protection of such protection aims to preserve, in all situations, the dignity of the human person (PERLINGIERI, 1972, p.186). With the valorization of the human person, it is perceived that the conceptualization of personality has undergone changes, not only in relation to its ability to be subject to rights, that is, personality must be considered as an intrinsic expression and of the person itself, that is, therefore related to the person, then also to the value.

Law is a value and remains in what is called the state of the imaginary until the legal norm incorporates it, bringing to light its validity and effectiveness (FERMENTÃO, 2011, p.624), in the relationship between value and law, One has an intimacy that easily visualizes from the ontological perspective, and whenever values arise, the right is enriched. This is composed of purposes, traditions, meanings, values, etc. Both are born beginning from the social body and only do so when they are instigated by exposed inevitability. It is important to note that "if the values are based on consensus they are changeable according to the social group, time and space" (FERMENTÃO, 2011, p. 624).

It is in the course of time that rights arise based on values, guaranteeing them and protecting them. When it comes to personality rights, it's no different. The values that comprise the human personality are safeguarded by the right of personality, as well as any other human deprivation. The human value is inherent to man, intrinsic to him, therefore to structure morally and ethically, arises the value of law, followed by the value of justice, whose core is equality. The ultimate goal is justice, and the basis of the normative legal order is value and law is the means of justice (FERMENTÃO, 2011, p. 625).

5. FINAL REMARKS

In order to elucidate a theoretical review of studies on the philosophy of values - axiology - and undertake a critical reflective analysis of the texts raised, A bibliographical check was performed that perfects the composition of an epistemological historical condensation of axiology, demonstrating convictions of axiological studies developed in recent years, in the field of the philosophy of values.

All human beings, in their individuality of being and thinking, have values, and these begin their actions as a compass, making such attitudes and development a reflection of what has been guided. Human action will therefore need to be appropriate to the actions of other members of society. Therefore, when it came to moral and social values, it was understood that they became common among all, that is, the adoption of this common form is an axiological premise that concludes the perception of the existence of human life in the world.

Values arise within a social group, the value accepted by man is related to social value, where it has its roots. The customs of a given society structure the inner values of the man who lives in it, and it can be understood that moral and social values are structured to the very personal rights of the integral person in such a social group.

Values are considered as property of social representations, characterized as instituted and instituting the historical formation of man and society. In this way the values are considered as the north of the options of choices interconnected to the knowledge conceived and also through social representations, but they also possess strength that drives the knowledge and reorganize those knowledge coming from experience.

The theory of values was recognized after countless currents added with particular conceptions, and in the twentieth century the term with its signification came to be differentiated from what was understood as good and as being, and was evidenced with respect to the human

Values shape all that there is of actions in society and basic for the social coexistence of man, so it was seen that values deal with cultural elements, previously created and developed by peoples so that there is a quality of life and this is achieved, among these greater justice, greater peace, greater access to social rights. Given this, it was realized that there is no doubt that the values, are social and cultural foundations, and are flexible, liable to change according to the own changes and advances of society. Generations are updated, are transformed, are modernized and with that, one cannot forget that they will always be looking for changes

to adopt better methods of life. The principles are characterized in truths and founding judgments are the basis for a tangle of judgments.

A crucial question as to values is in relation to their subjectivity and relativism or to their objectivism and absolutism. On the one hand there is the relativism of values that understands as a founding point that all value and valuation is consistent with the presumption of a relationship with a valuing subject. On the other hand, one has the absolute character of values, which says about those who possess efficacy in themselves for whatever spirit.

Man considering the world through valorous perspectives will affect the right, effect of human culture, undoubtedly congruent with values. Therefore, the values are foundational for the formation of the Direct and this is the consequence of a polarity, since if materializing axiological elements, satisfying or not the human propensities, achieving or not succeeding, the intention is to be materialized the positive values.

The right of personality is a fundamental right, while the principle of the dignity of the human person is a general clause of personality protection in Brazil. The concept of dignity is multidisciplinary, original, derived, inderrolable, so much so that it is very common to be confused with the concept of personality, is taken as a principle matrix, generator of other fundamental rights.

This article, which has chronologically outlined the evolution and maturing of the concept of value, and especially its acceptance within the juridical universe, has the notion that the Law is not interpreted by itself, and, for its application, must be interpreted and that the human being is a person and as such possesses capacity and personality, whereas the ability to act is what gives the person personality, which distinguishes him. By means of personality, man becomes responsible for obligations and, by means of freedom, attains the "status" of a human being and, as such, has the right to his dignity, as a right of personality protected by the State. For this to happen, it is essential to subjugate them to values.

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(RE)SIGNIFICANCE OF RECIPROCAL TAX IMMUNITY: THE COLLECTION OF IPTU ON PUBLIC GOODS AND THEIR EFFECTS ON TAX COLLECTION IN THE CITY OF IMPERATRIZ-MA

(RE)SIGNIFICAÇÃO DA IMUNIDADE TRIBUTÁRIA RECÍPROCA: A COBRANÇA DE IPTU SOBRE BENS PÚBLICOS E SEUS EFEITOS SOBRE A ARRECADAÇÃO FISCAL NA CIDADE DE IMPERATRIZ-MA

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ABSTRACT

The constant decisions of the Federal Supreme Court are of great importance for the application and interpretation of legislative texts. The purpose of this work is to identify the impacts caused to the municipal treasury of Imperatriz-MA in the face of the change of understanding of the STF in RE 601.720 / RJ, on the inapplicability of reciprocal immunity to public property when ceded to individuals. It is an empirical research, with data collection and preliminary analyzes on the system of collection of the Imperatriz-MA SEFAZGO. The research was carried out with a bibliographical, documentary and field survey, with preordered interviews and having as approach the qualitative and quantitative method. The study on the reciprocal immunity applicable to the IPTU allowed the correct delimitation of the tax incidence field. Likewise, the survey of the concepts and modalities of the transfer of the public goods allowed the perception of the evolution of the supreme court regarding the preservation of the system federative. Although the search for the impacts of RE 601.720 / RJ, in the tax collection of Imperatriz-MA did not achieve the desired results, it was possible to analyze the municipal collection system, identifying its failures, problems and exposure of possible solutions for they.

KEY-WORDS: Mutual immunity. IPTU. Public Goods. Federative System.

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RESUMO

As constantes decisões do Supremo Tribunal Federal são de grande importância para a aplicação e interpretação dos textos legislativos. A finalidade desse trabalho é identificar os impactos causados ao fisco municipal de Imperatriz-MA, frente a mudança de entendimento do STF no RE 601.720/ RJ, sobre a inaplicabilidade da imunidade recíproca à propriedade imóvel publica quando cedida a particulares. Trata-se de uma pesquisa empírica, com levantamento de dados e análises preliminares, sobre o sistema de arrecadação da SEFAZGO de Imperatriz-MA. A pesquisa foi realizada com levantamento bibliográfico, documental e de campo, com entrevistas preordenadas e tendo por abordagem o método qualitativo e quantitativo. O estudo sobre a imunidade recíproca aplicável ao IPTU permitiu a correta delimitação do campo de incidência do tributo, de igual modo, o levantamento dos conceitos e modalidades das formas de concessão dos bens públicos, permitiu a percepção da evolução da suprema corte, quanto a preservação do sistema federativo. Por mais que, a busca dos impactos do RE 601.720/RJ, na arrecadação fiscal de Imperatriz-MA não tenha alcançado os resultados pretendidos, foi possível analisar o sistema de arrecadação municipal, identificando suas falhas, e problemas e a exposição de possíveis soluções para os problemas.

PALAVRAS-CHAVE: *Imunidade recíproca. IPTU. Bens Públicos. Sistema Federativo.*

1. INTRODUCTION

This work has as thematic field the reciprocal tax immunity: the collection of property tax on public goods and its effects on tax collection in Imperatriz-MA. The academic justification for this study came through the judgment of RE 601.720/ RJ by the Supreme Court (STF) where it was decided by the application of the Urban Property and Territorial Tax (IPTU) on a public good that was assigned to the private company, believing that the mutual immunity did not reach the property, in order for the company to pursue a profit-making activity and therefore to obtain a competitive advantage over other companies.

This research is justified by the need to understand the concept of "fiscal justice" so vehemently defended by the ministers of the Supreme Court in the trial of the appeal, the consequent restructuring of the tax collection system, as well as the possibility of increasing the collection of municipalities and the probability of extending the cost of their expenses.

Thus, according to data from the Organization for Economic Cooperation and Development (OECD), in 2012 property taxation corresponded to 6% of the tax collection in Brazil, while consumption amounted to 44% of the total, reality that still directly affects the poorest class of the country, because those who "earn less pay more, in contrast to those who earn more and pay less" (CURI, 2007).

In view of the relevance of the jurisprudential change of the Supreme Court to the tax collection of the property tax by the Municipalities, this study establishes as a research problem: What are the effects produced by the recent change of the Supreme Court jurisprudence, as regards the inapplicability of reciprocal immunity to public property transferred to private individuals? Thus, the general objective is to identify the main challenges that presented to the municipal government regarding the collection of property tax and the applicability of the new interpretation given by the Supreme Court and, for this purpose, will seek to understand the institute of reciprocal tax immunity applicable to the property tax, raise the forms of cession of public goods related to the property tax on the perspective of RE 601,720 RJ and,

analyze its impacts on the inspection and collection of property tax in the Municipal Tax of Imperatriz-MA.

For the effective development of the specific objectives and the consequent analysis and formulation of the argumentation, a

quantitative and qualitative approach, with bibliographic study, document analysis and field research through preordered interviews. Without the longing of

establish a definitive discourse or value judgments on the questions researched, we seek to analyze the basic concepts treated in this research, contributing with new reflections and projections on the object of study.

2. BASIC CONCEPTS: TAX IMMUNITIES AND THEIR RELATIONSHIP TO PROPERTY TAX

Observing the social and institutional relations, one can notice an intense relationship between the State and the collection of taxes. What at the beginning was a simple reward, paid by the tribes to the strongest warriors, at a given moment happened to have an imposing character (MONTEIRO, 2018).

In a Democratic State of Law sovereignty[3] belongs to the people, as well denotes the Federal Constitution (CRFB), in its art. 1st, sole paragraph "All power emanates from the people" (BRAZIL, 2018, p. 22), including the tax power. Operating power of the State, which manifests itself through a legal-tax relationship that delimits its powers and, therefore, its immunities (MARTINS, 2003)

The tax competence is conceptualized as an authorization and constitutional limitation to the exercise of the tax power of the State, that is to say, it is a prerogative that the federative entities are bearers, and that enables them to legislate on the production of tax laws and regulations (CARVALHO, 2012).

However, tax immunity can be conceptualized as the tax jurisdiction in a negative sense, being assured to some people, in certain situations, removing the power of the State on the imposition of certain taxes, including its competence (PERES, 2018). In this way, it conveys itself to a constitutional commandment or the maximum law of a nation, which removes not the incidence of the tax, but the tax jurisdiction itself (RUEDELL, 2013).

The majority doctrine conceptualizes immunity as limitation or exclusion of the jurisdiction to tax. However, Paulo Barros de Carvalho (2012) states that immunity is not a constitutional limitation to tax jurisdiction, but to the power to tax, because what limits jurisdiction comes in the opposite direction to it, seeking to repress or amputate it. Function that does not belong to the immunizing norm, since it collaborates with the design of the field of competence in the constitutional sphere, in which political persons will operate.

3 In the words of the constitutionalist Kildare Gonçalves Carvalho: "It is the sovereignty, therefore, the highest quality, of the state power, and not the state power itself, meaning, on the internal level, supremacy and superiority of the state over other organizations and, on the external level, independence of the state from other states" (CARVALHO, 1999. p. 71).

Thus, the constitutional limitations to tax power, in addition to tax competencies among federal entities, include the principles of legality, precedence, irretroactivity, contributive capacity, isonomy, prohibition to confiscation, and tax immunity itself (SCAFF, 2018).

2.1 PARALLEL BETWEEN IMMUNITY, EXEMPTION AND NON-INCIDENCE

Prior to the continuation of the study of immunities, it is necessary to distinguish it from the exemption and non-inclusion institute.

Tax immunity, according to what was cited, is born from a constitutional rule that establishes the incompetence of tax entities to issue rules establishing generating events (WIESE, 2012, p. 14). In it there is no tax obligation, because the fact that generates the tax described by the hypothesis of incidence does not occur.

The exemption, unlike immunity, is in the infraconstitutional plan, in which the legislator exempts the taxpayer from paying the tax. In this case, there is the occurrence of the generating fact described by the hypothesis of incidence arising from the obligation, however, the tax does not occur, and therefore the tax credit is not constituted.

No incidence is linked to the taxation rule itself, which describes the hypothesis of tax incidence: "This rule describes the actual situation, which when carried out, gives rise to the legal duty to pay the tax. Anything not covered by such a description constitutes a tax-free hypothesis." (WIESE, 2012, p. 24).

In summary, the exemption is legally qualified exception by another Law, the immunity is the constitutional prohibition on taxation and the non-inclusion is fact left out of taxation by the legislator, either expressly or tacitly (WIESE, 2012, p. 25).

2.2 MUTUAL TAX IMMUNITY

The art. 150, VI, the Federal Constitution lists the various types of immunities, such as reciprocal tax immunity, religious immunity, the immunity of political parties, among others.

Reciprocal immunity (art. 150, IV, "a" of CF/88) is the impossibility of collecting taxes by federal entities on each other's incomes, assets and services.

It first emerged with the independence of the American colonies from the British court, in the Federalist project drawn up by Alexander Hamilton, James Madison and John Jay. At its inception, it aimed to instigate the new government's ability to self-finance, because money was and still is considered an essential tool of the political body, it is the one that sustains life, moves and empowers the state in the execution of its essential functions. (HAMILTON, 2003).

Then, in the American context, a "federalism of competition", whose rivalry between the states (strong side) and the central government (frank side), plus the absence of a constitutional rule on certain competences, led to the trial of the Mcculloch v. Maryland case, in 1819, considered as the origin of tax immunity, or in its own terms the principle of reciprocal Immunity of federal and state instrumentalitie (BALEEIRO, 2015).

In 1791, the Bank of the United States of America was established to regulate trade and currency throughout the country. A few years later, the bank established a branch in the city of Baltimore, Maryland.

Thus, the State began to demand from this branch the tax on sealing the stamps, an act that was rejected by the then bank teller Mr James Mcculloch.

The obstacle was brought to the Supreme Court in 1819, then chaired by the Chief of Justice John Marshall. Such a trial sought to answer two diverse questions, the first being whether Congress had the power to create a bank as well as establish branches; the second question was whether the State of Maryland could tax the bank's branch without violating the Constitution.

According to Marshall, the answer to the first question was in the autonomy given the Union to each federal state in the promulgation of its Constitution. For although the powers of the Union were limited, their rule was supreme among the rest, and their laws, as soon as they were drawn up in observance of the Constitution, became supreme in the country.

In this sense, the American Constitution gave Congress the power to draft any laws that were necessary for the full exercise of its powers, a fact that justified the possibility of creating the Bank of the United States as well as its subsidiary.

The understanding of the Supreme Court recalls the theory of implicit powers, a thesis defended by Alexander Hamilton, according to which, although the Constitution does not explain in its normative devices certain powers, these would be subject implicitly to the legal body and its other articles.

In turn, in the search for the answer to the second question (the possibility of taxation), it was established the thesis of reciprocal immunity, created under the following axioms (LIMA, 2011):

a) The power to create implies the power to preserve;

b) The power to destroy, when exercised by a stranger, is hostile and incompatible with the powers to create and preserve;

c) Whenever such an incongruity exists, that authority which is supreme must prevail.

In the Brazilian legal context, the state Federative form came with the proclamation of the republic in 1889. Once the federation is defined as a form of State, this fact brings as a reflection the incidence of the federative principle for the spatial planning (ARENHART, 2013).

Making this relationship between the taxation and autonomy of each federal entity, Almicar de Araújo Falcão (1957, p. 3-4) teaches that the provision of reciprocal immunity in the legal system aims "safeguard the incolumity of the federal system, avoiding that the federated units interfere, through taxation, in the area of competence and autonomy one of the others". Therefore, autonomy is the legal principle driving the duty of reciprocity.

The second principle underlying the existence of reciprocal immunity is the principle of isonomy. Now, if in the taxation relationship, in a first analysis, there is a supremacy of who taxes on who is taxed, then one cannot tax the federative entities. For among the political people reigns the most absolute legal equality. "One does not take precedence over the others. At least not in legal terms. It is enough to remove any idea that they can be subject to taxes." (QUEIROZ, 2017, p. 67).

2.3 OF THE URBAN PREDIAL AND TERRITORIAL PROPERTY TAX – IPTU

The tax incidence rule is also known as the tax rule, being a kind of legal rule, possessing the ability to define the tax incidence of the tax. This is initially configured as a set of hypothetical-conditional judgments (CARVALHO, 2012, p. 171), with a hypothesis in the antecedent and a commandment in the consequent.

In the hypothesis, one finds a material criterion (behavior of a person), conditioned in time (temporal criterion) and in space (spatial criterion). As a result, one encounters a personal criterion (active subject and taxable person) and a quantitative criterion (calculation basis and rate). The joining of these two data results in the possibility of fully displaying the logical-structural core of the standard tax incidence standard (CARVALHO, 2012).

As provided by art. 156, I of CF/88, the property tax will affect the urban property and territorial located in the urban area of the municipality. Thus, the material aspect of the rule-matrix incidence of property tax, as well mentioned by Furlan (2010), is the situation of owning the property.

The spatial aspect is considered to be the set that delimit the place of occurrence of the generating fact. The National Tax Code (CTN) in its art. 32, § 1º brings a general definition of delimitation of the urban perimeter of municipalities throughout the country.

For this, any area that contains at least two improvements made explicit by the incisions of the art §1°. 32 do CTN poderá, as municipal law become urban area and liable to the application of property tax.

The temporal aspect of the incidence rule refers to the moment when the tax obligation is born, having as a rule and, followed by the vast majority of municipalities, the day 1° January of each exercise as the moment of launch of the property tax.

The personal aspect refers to the persons represented in this legal-tax relationship, which according to art. 34 of CTN, has as taxpayer the owner of the property, the owner of its useful domain and the owner of any title.

They compose the quantitative aspect of the rule of incidence the basis of calculation, as provided in the art. 33 CTN is the market value of the property, not including the value of the movable property that is permanently or temporarily in it. It is also composed by the tax rate, being a percentage added to the base, enabling an exact value of the tax. The rates need to be set in municipal law, observing the principle of economic capacity and non confiscation (SÁ, 2013).

The CF in its art §4° . 182, also stresses that the composition of the calculation base may have a progressive character of the property tax, authorizing the Municipal Government by specific law, observed by federal law, require the owner of urban land not built, underused or unused, that promotes its adequacy under penalty of progressive collection of property tax.

Many are the doctrinators who consider the progressive character of the property tax as a regulatory instrument of the social function of property. In this sense, Carrazza (2019) relates the progressivity of the property tax to the ability to pay taxpayers. The author argues that the search for equality between these should be guided by the principle of isonomy, leading to the overcoming of social injustices and inequalities (TRINDADE; RIBEIRO, 2018).

3. THE GRANTING OF USE OF PUBLIC GOODS BY PRIVATE PERSONS

There is no uniformity of thought among the doctrinators regarding the definition of the concept of concession. Most Italian authors, in particular Cino Vitta (1962), attribute to the term concession, the meaning of any act of public administration that grants rights or powers to the individual.

On the other hand, authors such as Santi Romano (2008) have a restrictive perspective, dividing it into two types: translative and constitutive, admitting in addition the existence of public service concession, public works and use of public goods, thought also shared by most French authors. And finally, we have the doctrinators who attribute to the term concession only to the kinds of public services.

Brazilian law allows the following modalities of concession:

a) Concession of public service, in its traditional form, according to Law 8.987 of 1995;

b) Sponsored concession, provided for in Law 11.079 of 2004, is a kind of public-private partnership;

c) Concession of public works, also governed by Law 8.987/95 and Law 11.079/04;

d) Administrative concession established by Law 11.079 as another form of public-private partnership;

e) Granting of use of public property, whether or not increased exploitation of the property, regularized by sparse legislation. This is the subject of analysis in this research.

Therefore, this chapter will be structured in the conceptualization of the concession of use of public good as well as its modalities and in the jurisprudential analysis of the subject, in front of the possibility of collection of property tax under the perspective of RE 601.720/RJ (STF).

3.1 PUBLIC GOOD USE CONTRACT

The concession of use is an administrative contract in which the Public Administration transfers to the private the use of public good, whose nature "is public law contract, sinalagmático, onerous or free, commutative and celebrated intuitu personae." (MELO, 2013).

Celso Antonio Bandeira de Melo (2013), understands that the concession is the product of an agreement of wills between the grantor and the concessionaire, aiming at the formation of a legal link that would be governed by complementary and unilateral rules organized by the grantor, on the means, ways and forms that the legal act would take place, thus stemming from a conventional and non-contractual act.

Similarly, thinks Gaston Jèze (1914), which limits the institute to the contractual aspect, that is, only the concession of a public service, understanding that there is no purpose or an object in the occupation of the public domain, therefore there would be no contract, but a unilateral act of public good management.

Brazilian law shares the contractual thesis, very well represented by the concept of Professor Hely Lopes de Meirelles:

> The concession may be remunerated or free of charge, for a fixed or indefinite period, but it must always be preceded by legal authorization and, normally, by bidding for the contract. Its award is neither discretionary nor precarious, because it obeys regulatory rules and has the relative stability of administrative contracts, generating individual and subjective rights for the concessionaire, in terms of the adjustment. Such contract confers on the holder of the concession of use a personal right of special use over the public good, private and non-transferable without prior consent of the Administration, as it is carried out for personal purposes, although admitting to profit purposes. This is what happens with the granting of paid use of a municipal hotel, market areas or places for bars and restaurants in public buildings or public places. (2016, p. 296)

In this context, the concession of use can be divided into two modalities, the first being administrative concession of use, which only transmits to the concessionaire a personal right non-transferable to third parties. The second as the granting of real right of use, which distributes to third parties by legitimate succession and testamentary or by live inter act, the use of good as a right in rem.

The granting of royal law is regulated in Decree-Law No 271 of 28 February 1967, which in art. 7th provides that the Administration transfers to the private the use of public land remunerated or free of charge, as a real and solvable right, answering the concessionaire for all charges that overflow on the property, be they civil, administrative or tax nature (SANTOS, 2016).

In the meantime, there are some other diversities of modalities of concession of use of public goods, as the concession of exploitation, where the administration confers to the concessionaire the power of management dominial, being able to exploit the good, taking as example the concession of exploitation of ore, oil and plant extractivism.

We also have the temporary concession of public utility, such as water and energy, or perpetual or private utility, such as burial, or the exploitation of algae fields.

Therefore, it is extremely important to identify the legal nature of the existing contract between the Public Administration and the third party, as it is from it that the possibility of the property tax incidence will be verified, being this right real or personal.

3.2 A JURISPRUDENTIAL ANALYSIS OF RE 601.720 / RJ (STF)

The plenary of the Supreme Court on 19 April 2017 judged the extraordinary appeal under the number 601.720/ RJ arising from an annulment of tax debt action, now promoted by the Municipality of Rio de Janeiro to charge property tax on Union property, administered by INFRAERO.

The election was guided in the analysis of the possibility of IPTU collection on a property that although it belonged to the union, It was granted to the private operator of economic activity, Barrafor Veículos Ltda, including this as defendant in the case in question.

In his vote Min. Edson Fachin, rapporteur of the appeal, recalled the legal nature of INFRAERO, being legal entity of private law, constituted in the form of public company under authorization of Law 5.862/72, having as function the administration, operation and operation of airport infrastructure.

The Brazilian Code of Aeronautics (CBA) in its art. 38 affirmed that airports are assimilated to federal public goods, allowing business establishments to be established there. Previously the Supreme Court, in the general repercussion, had extended the tax immunity to INFRAERO, in the capacity of public service provider, in the following terms:

> APPEAL. Extraordinary. Reciprocal tax immunity. Extension. Public companies providing public services. Generally recognized repercussion. Precedents. Reaffirmation of jurisprudence. Impromptu appeal. Is compatible with the Constitution the extension of reciprocal tax immunity to the Brazilian Company of Airport Infrastructure - INFRAERO, as a public company providing public service (STF, BRASIL, 2011)[4]

The rapporteur dismissed the appeal by stating that the concession agreement between the parties is binding in nature. However, even if the concessionaire has direct ownership of the property, it is a precarious relationship, still remaining, the property in the patrimonial sphere of the Federal Union. The concessionaire, by virtue of municipal law, cannot be listed as a taxable person of the tax obligation, because the property is qualified as a federal public good and, although intended for economic exploitation, is immune to taxes as provided by art. 150, VI, "a" of CF/88.

However, Min. Alexandre de Moraes, in arguing the origin of immunity rules, recalled some cases tried by the American court, such as that of Helvering v. Power and Allen v. Regents of University of Georgia, where it was determined that "reciprocal immunities should be applied only in relation to the exercise of governmental competencies, having no impact on commercial issues" (BRASIL, 2017)

The aforementioned minister reaffirmed the interpretation given by the Court to the legal meaning of reciprocal immunity, being a true guarantee of preservation of the federal system, adding that the legitimization of immunity actually takes place through the linkage to the public purposes of the State.

Alluding to the vote of Min. Joaquim Barbosa in the Rapporteur of RE 434.251, and the interpretation given by him to art. 150, VI, a, it is possible to make the application of reciprocal immunity conditional upon the observation of three questions:

1) The immunity shall cover the properties, goods and services of the federal entities that use it to fulfil their institutional objectives;

2) the good, which is used economically and which is intended solely for the purpose of increasing the assets of the State or of individuals, must be taxed;

3) Exemption from payment of the tax may not be to the detriment of the principle of free competition or the exercise of lawful activity.

Therefore, if the concession contract transfers the use of the property to another, and this is used to achieve purposes other than those of public interest, the property will cause

4 This is ARE-RG 638.315, Min. Cezar Peluso, DJe 31.08.2011.

the loss of its social attribute as a public good, ie its disaffection, satisfying the objectives and purposes of private interest, with consequences extended to the economic[5] competitive segment.

It is important to highlight the thought expressed by Min. Luís Roberto Barroso despite the concession contracts. According to him, these contracts, for the most part, are long-term, with an initial term of 15 to 20 years. Giving the concessionaire almost all the inherent powers of the owner, being able to modify the property as he wants, configuring this possession that before was precarious in exclusive, which would result in the possibility of incidence of property tax on the property, as provided by art. 32 from CTN.

> [...] So I understand, first of all, why the taxation of the property belonging to the Union but exploited economically by does not imply any risk to the balance between the entities federated; second, because the defendant demonstrates objective contribution, for dedicating itself to the exploration activity economic activity on a private basis. [...] reciprocal immunity does not benefit individuals, third parties who have real rights in the assets of public entities. [...] Recognizing the applicability of reciprocal immunity to the taxation of property leased to individuals, for the exploitation of economic activity of a private nature, would ultimately result in privileging private economic exploitation, and not the federative pact (BRASIL, STF , 2007).[6]

Finally, the plenary approved the appeal, concluding that the property tax can be released on public property, when in possession of private company exploited economic activity for profit, ruling out reciprocal immunity in light of the art §3° do. 150 of CF/88, prioritizing respect for the federative pact through the search for fiscal justice consistent with social reality (PAULSEN; MELO, 2015).

4. EMPIRICAL APPROACH TO THE CONSEQUENCES OF THE JURISPRUDENCE ON RECIPROCAL IMMUNITY IN THE MUNICIPAL SPHERE: THE CASE OF THE MUNICIPALITY IMPERATRIZ-MA

This chapter has two specific objectives: 1) to present the tax collection system in the City of Imperatriz-MA, in order to recognize the problems, failures and difficulties in the municipal tax structure; 2) verify the possible effects on tax collection in the face of the jurisprudential change generated by RE 601. 729/RJ (STF).

5 Argument expressed verbally by Min. Alexandre de Moraes in the plenary of the judgment of the RE 594,015 and 601,720 on 04/06/17;

6 This is the vote seen by Min. Joaquim Barbosa in RE. 451.152, Rel. Gilmar Mendes, DJE 27.4.2007, Segunda Turma.p.8-17.

4.1 METHODOLOGICAL RESEARCH PROCEDURES

Regarding the methodology of data collection and analysis, this study adopted bibliographic, documentary and empirical research, with a qualitative and quantitative approach associated with preordered exploratory interviews.

The bibliographic and documentary survey was essential for the theoretical construction of this research, providing means that helped in the understanding of the basic institutes that form the theory, now expressed in RE 601/729. Understanding as bibliographic search:

> The survey of all bibliography already published in the form of books, magazines, loose publications and written press. Its purpose is to put the researcher in direct contact with everything that was written on a given subject [...] (MARCONI; LAKATOS, 2011, p. 43-44).

The empirical research, that is, field analysis, was carried out together with the Department of Planning, Finance and Budget Management (SEFAZGO) of the city of Imperatriz-MA, and two tax auditors and an official of the administrative sector were interviewed. The interview was based on a preordered questionnaire whose surveys sought to associate the knowledge cadenciados by bibliographic survey and the reality experienced by the municipal tax in the collection of property tax.

Finally, the information was collected following the ethical rules of the research. The interviewees had their identities preserved and signed the informed consent form. We highlight the innovative character of the empirical research carried out by the structural understanding of the municipal collection system, as well as by the confrontation of the data collected in a theoretical survey with those collected in the field.

4.2 TAX COLLECTION SYSTEM IN THE MUNICIPALITY OF IMPERATRIZ-MA

As provided by the Federal Constitution in its art. 156, it is the competence of the Municipalities the institution of taxes on property and urban territorial property (IPTU), on the transmission "Inter vivo" of real estate and rights on real estate (ITBI) and on services of any nature (ISS). In addition to the taxes already mentioned, the municipal tax revenue is also withheld at source (IRRF), as well as the specific improvement taxes and contributions.

The Municipal Tax of Imperatriz-MA through the Department of Planning, Finance and Budget Management (SEFAZGO) is structured in three sectors, as well stated the interviewee A, tax auditor of the municipality. The first sector is Revenue, responsible for the collection of taxes, followed by the accounting sector, whose main function is to record the collection of previous years and, finally, the budget sector, responsible for the collection forecast for future fiscal years.

The tax laws in force in the municipality are the Municipal Tax Code (CTM) Complementary Law 001/03; the National Tax Code (CTN); the Posture Code Law n° 850/97; the Federal Constitution (CRFB) and the Zoning Law [7]. In the meantime, there is still legislation in the

7 Verbal information granted by the interviewee B. 08/11/18. Interview conducted by the authors. Empress: 2018.

municipal tax sphere, such as LC No 04/2007 on the granting of tax benefits and exemptions, Law 923/2000 defining the urban area of Imperatriz and LC n° 001/2003 establishing the tax recovery programme - PROFIS.O Código Tributário Municipal possui a seguinte redação:

> Art. 6° The municipal tax system consists of:
>
> I- Taxes:
>
> [...]II- fees:
>
> a) by virtue of the exercise of police power:
>
> 1- monitoring of location, installation and operation;
>
> 2- for health surveillance;
>
> 3- monitoring of notices;
>
> [...] III- contributions:
>
> a) improvement resulting from public works;
>
> b) the cost of the lighting service;

As provided by CTM in its art. 14 the property tax "will be due annually and calculated by applying to the market value of the respective properties, the rates established in this Law". Regarding the normative fatigue, interviewee C states that the tax launch in Imperatriz takes place in March of the respective financial year, through the SAT and STAR systems with the issuance of a physical charge distributed to taxpayers in their homes, the whole procedure being approved by the mayor.

In the municipal system, according to the latest 2019 update, is broken down as buildings subject to tax incidence: houses, shacks, apartments, houses, warehouses, temples, industries, land, among others.

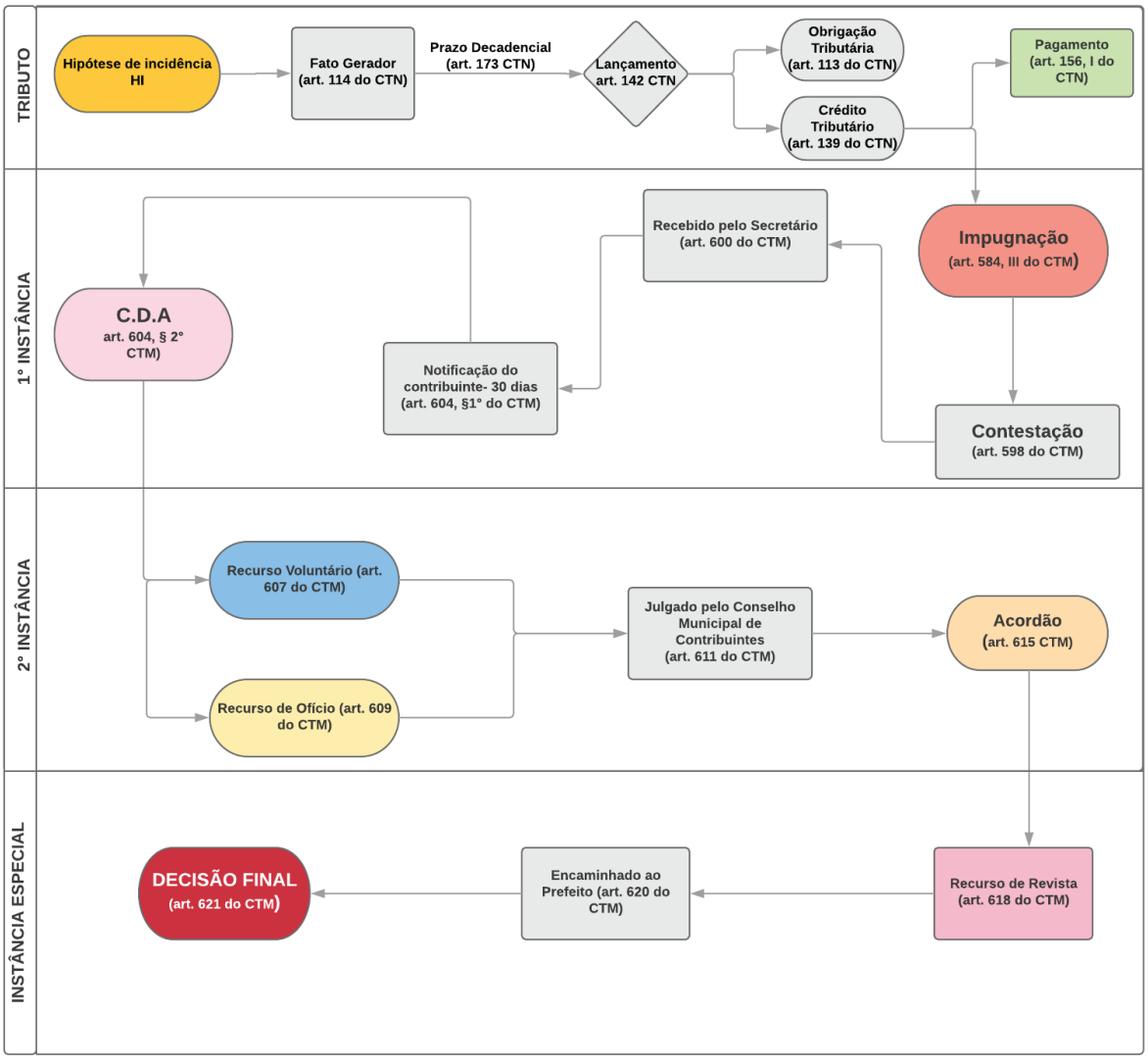
According to interviewee A, in the entire existence of the municipal tax office, SEFAZGO has never conducted administrative trials of appeals or petitions, even if the CTM had granted him such a procedure. Remaining, to the taxpayer or third party, only the appeal in judicial way. However, this situation has changed, from the organization and choice of personnel, in order to allow the trial of tax litigation processes.

It is noteworthy that, although the CTM has determined in its art. 600, [8]that the appeal in the first instance would be received by a Prosecutor, currently it is analyzed by the Secretary of SEFAZGO. Another important aspect raised by interviewee A is the composition of the Municipal Council in second instance, whose renewal takes place every two, being composed of two representatives of civil society or entities of classes, two auditors, a prosecutor and the municipal secretary himself.

From the perspective of interviewee A, the presence of the Municipal Finance Secretary in the composition of the Council in the 2nd instance can cause controversies of interests, as it is he who in the 1st instance admits or not the appeal filed by taxpayers or interested third parties.

8 It provides the respective article: Prepared the challenge, the process will be sent to the Municipal Attorney's Office to give the decision (IMPERATRIZ, 2003).

According to the information collected by the researchers, crossing the data collected in the interviews and the provisions of the Municipal Tax Code, a flowchart about the fiscal administrative process in Imperatriz-MA can be prepared, structured as follows:



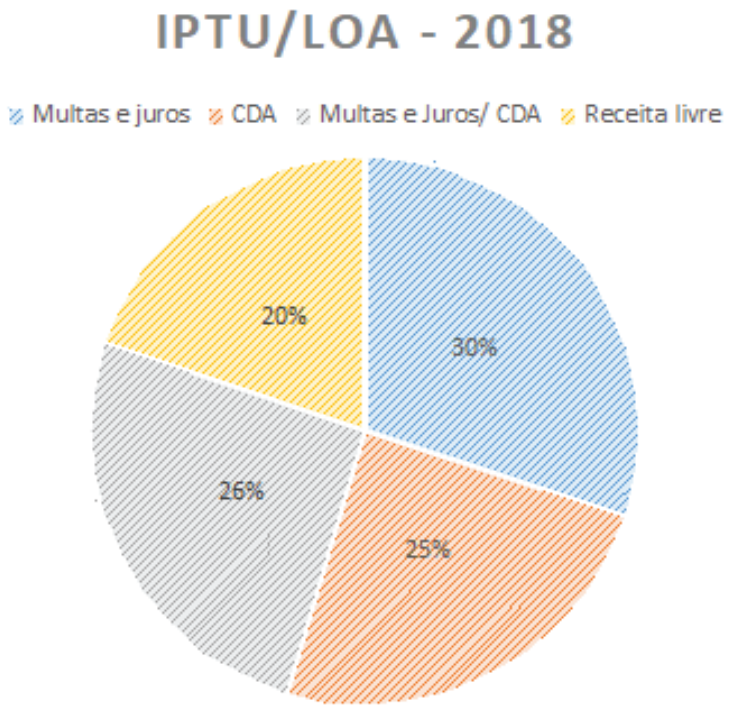
Source: Own elaboration (2018).

4.2 OF THE IMPACTS OF RE 601.720 / RJ ON MUNICIPAL COLLECTION

There are many legal questions about the correct application of property tax and the possibility of optimizing tax collection in municipalities facing the problems that spread throughout its structure, such as management problems, political influences and unjustified bureaucracy. These ailments are present both at the state and federal level.

This fact can be associated with the data brought by the author De Cesare (2005), according to which the collection of property tax in Brazil is very poorly used and exploited as a source of revenue by municipalities. In turn, this tax represents 2 to 3% of the GDP of the United States, New Zealand, the United Kingdom and Australia, while in Brazil this percentage reaches only 0.5% of the national GDP.

In the analysis of the data collected, it was found that the municipal tax authorities also experienced such problems, since the interviewees were incisive in stating that the collection of property tax did not reach all the properties of the municipality, nor those in its system, being registered around 125,533 (one hundred twenty-five thousand five hundred thirty-three) immovable.



Source: Own elaboration (2018).
Primary source: Annual Budget Law of Imperatriz - MA, 2018.

The graphic above shows the projection of collection of property tax for the financial year 2018-2019, deducted the incidence factors on the total amount of collection present in the LOA, emphasizing the fact, according to interviewee C that the municipal register only reach 60% of such projection, situation increased by the lack, in the past, of administrative processes and the resulting failure to enroll taxpayers in active debt, is finally associated with an outdated and insufficient register.

Unfortunately, it was not possible to obtain enough data to table the layout of the property tax in the 2019 and 2020 exercises.

Of the public buildings covered by the reciprocal immunity rule, only 80% are managed by the municipal tax authorities. This situation was justified by the interviewee C, as a result of the occupation by the federative entity of its own assets.

Regarding the existence of public properties ceded to private individuals in the city of Imperatriz, interviewee A believes that there is no property in this situation, because "the vast majority of the properties that the municipal entity occupies are rented, and its property two properties are they, the building where the City Hall works and where the Secretary of Health is. Being the other public goods of the State and of the Union or to these equated, they are in full use by these not having relatively free goods."

Both respondents stated that they follow the jurisprudential changes in relation to tax matters, however they denoted not knowing the RE 601.720/ RJ which allows the collection of property tax on public property transferred to private individuals when exploiting economic activity for profit.

As verified in the field research, the lack of a register with specification of the properties owned by the city, rented and/or leased prevents a real monitoring of the impacts of the jurisprudential change. The information presented is based on personal intuitionism, not evidence of administrative and fiscal transparency.

5. RESULTS AND DISCUSSIONS

This chapter aims to analyze the results obtained by the interviews of the auditors and the employee of the Department of Planning, Finance and Budget Management (SEFAZGO), associated to the hypotheses raised in the research project, with the intention of issuing notes that lead to the factual understanding of the object of this work.

What could be observed is that the Property Tax and urban territorial property tax-Iptu is despised by the public administration, compared to other taxes of municipal competence, fact confirmed by Interviewee A. This assigns to the ISS the most relevant tribute post currently in the municipality, due to the fact that the auditors have recently acquired a "Digital Certificate" that give them access to the Federal Revenue system, facilitating the monitoring of the collection of the ISS by the Simple National and the subsequent registration of taxpayers in debt.

The researcher José Roberto R. Afonso (2014) stated that in 2007 the national tax collection of property tax did not reach R $ 50 (fifty reais) per inhabitant, a value that changes throughout the national territory, in view, that in some municipalities the tax collected did not exceed R $ 5 (five reais) per person.

This reality is justified by the cultural, economic and social diversity present throughout the national territory. This heterogeneity is reflected in the local socioeconomic aspect, since a small municipality could not be expected to have a large IPTU tax collection, as well as a large municipality to obtain an insignificant tax collection against its tax capacity.

The first hypothesis pointed out in the project was that the change of understanding of the Supreme Court had valued the federative pact and the economic order consolidating thus fiscal justice, as well as enabling the increase of tax collection of municipalities.

The above assumption was confirmed, as the creation of reciprocal immunity was designed with the intention of protecting the federative pact. To vulnerate it by subtracting a municipality's exhaustion is to violate the principle of free competition and economic order[9].

Subsequently, there is the possibility that the municipality of Imperatriz-MA is not prepared to collect the property tax on public goods that were in the possession of private com-

9 Argument expressed verbally by Min. Luís Roberto Barroso in the plenary of the judgment of RE 594.015 and 601.720 on 06/04/17

panies due to the precariousness of its tax system. This proposition was also confirmed, as shown in the reports that were described in the previous chapter.

According to the interviewees, the last registration that took place in Imperatriz was in 2004, descriptions of which are in notes the pencil, outdated and inconsistent. Situation enhanced by lack of specialized personnel. In addition, the municipality only has 3 (three) tax auditors, inadequate number to local demand.

Finally, it was stated that the full inspection of the property tax would only be possible, first of all, if the municipality carries out a detailed study of its system, in order to identify its failures and difficulties, wishing to optimize it

This is the third hypothesis that was confirmed before the field analysis, being notorious the need that the municipal tax has to understand the importance of the property tax and its correct collection. In the data collection, was highlighted by all the interviewed municipal projects to improve the tax collection system, such as the renewal of the local physical structure, the formulation of a new CTM, the purchase of a new system that will enable the joint analysis of all municipal taxes and the re-registration of the property through a geoprocessing system. Existing measures only in the plan of becoming. In turn, reality is still a time-consuming, bureaucratic and hermetic collection system.

FINAL CONSIDERATIONS

The study on RE 601,720/RJ showed the change of understanding of the Supreme Court on the concept of reciprocal immunity, aiming at the realization of fiscal justice and the protection of the federative pact, as well as the maintenance of free competition and economic order. The renewal jurisprudence caused the need to restructure the tax collection system of the municipalities, which if effective, would allow the increase of the collection and the probability of extending the cost of their expenses.

The understanding of the institute of reciprocal immunity, applied to the tax on urban property and territorial property - IPTU, proved to be of great importance for the delimitation of the tax incidence field, making possible the correct demarcation of its material aspect, spatial, temporal and personal.

Likewise, the mapping of the concepts and modalities of the forms of transfer of public assets, in particular the concession contract and the jurisprudential analysis of RE 601.720/RJ, allowed the perception of the arguments raised by the ministers in the trial and the consequent evolution of the supreme court regarding the preservation of the federal system.

Thus, the search for the impacts on the tax collection of Imperatriz-MA after the trial of RE 601.720/RJ, not having achieved the initially desired results, it was possible to analyze the collection system of the municipality and, identify the failures and problems in its entire structure, which would enable its optimization and possible restructuring.

It was demonstrated that the three hypotheses raised in the research project, explained in detail in the previous chapter, were confirmed. This leads to reflect on the impacts caused in the municipal public administration due to an inefficient tax system. Observing that the

State is not self-sufficient and acquires income by taxing individuals, one imagines that it should at all costs value its monetary collection, but it is not what happens.

It turns out that in the city of Imperatriz-MA there is an inefficient tax system, notably in its ability to perform its primary function that is the collection. In the municipal tax system analyzed there is a large shortage of labor, investment in technologies, resources and mainly lack of interest of the authorities responsible for fiscal planning.

An efficient tax collection system is necessary for tax planning that can guarantee and fulfill the constitutional objectives (art. 3, CRFB). Fundamental rights, even though they are not tied to budget reserves, need resources to implement them. It is a reality that cannot be evaded. It is the material order of rights itself. Therefore, the improvement of a collection system, when accompanied by fiscal transparency and respect for the Constitution, serves not only the State, but ultimately the taxpayers themselves.

Finally, this work did not exhaust the possibilities of research and studies on the subject, because this is vast and unlimited, fostered with its results a north to future researchers of this theme, as the need to analyze the decisions of the Supreme Court in tax matters and the impact of it on the executive, legislative and judicial spheres.

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LIMITS ON THE EXERCISE OF RESIDUAL TAXING POWER ACCORDING TO THE PRINCIPLE OF FUNCTIONAL CORRECTNESS

LIMITAÇÕES AO EXERCÍCIO DA COMPETÊNCIA TRIBUTÁRIA RESIDUAL EM FACE DO PRINCÍPIO DE CORREÇÃO FUNCIONAL

THIAGO ÁLVARES FEITAL[1]

ABSTRACT

The purpose of this paper is to verify whether the Brazilian Constitution contains any other limitations on the exercise of residual taxing power, other than those set forth in articles 154, I and 195, paragraph 4. For this purpose, based on a critical interpretation of the residual taxing power, using a deductive method, and adopting as a theoretical reference the principle of functional correctness, as systematized by Friedrich Müller, we demonstrate that this requires considering the effects of federalism on the Tax System. After reviewing the concepts of federalism and fiscal federalism in the recent literature and analyzing their adequacy to the Brazilian fiscal constitution, we conclude that the residual taxing power is limited by the principle of functional correctness. The results of the research indicate that the exercise of residual taxing power cannot offend the tax equalization, because the latter is a component of the federative form of the Brazilian State.

KEYWORDS: Fiscal Federalism. Residual Social Contributions. Residual Taxing Power. Taxing Power.

RESUMO

O presente trabalho tem por objetivo verificar se existem na Constituição da República outras limitações ao exercício da competência tributária residual, além daquelas enunciadas nos artigos 154, I e 195, § 4º. Para tanto, a partir de uma interpretação crítica da competência tributária residual, por meio de método dedutivo, e adotando como referencial teórico o princípio da correção funcional sistematizado por Friedrich Müller, demonstramos que este exige que se considerem os efeitos do federalismo sobre o Sistema Tributário. Após revisar os conceitos de federalismo e federalismo fiscal na literatura recente e a analisar a sua adequação à Constituição fiscal brasileira, concluímos que a competência tributária residual é limitada pelo princípio de correção funcional. Os resultados da pesquisa indicam que o exercício da competência residual não pode ofender a equalização fiscal, porque esta é componente da forma federativa do Estado brasileiro.

PALAVRAS-CHAVE: *Competência residual. Competência tributária. Contribuições sociais residuais. Federalismo fiscal.*

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1 INTRODUCTION

The year 2018 in which the thirty years of promulgation of the Constitution of the Republic (CR) was celebrated is also a critical point for federalism in Brazil, as demonstrated by the judgment of the Fundamental Precept Breach of Plea 523, on June 11, 2018. Subscribed by twenty-three States, in addition to the Federal District, the action questions the change in the financial profile of residual contributions operated through the perpetuation of the mechanism of Untying of Union Revenues (DRU), created by Constitutional Amendment 27, 2000[2] For petitioners, by extending the term of DRU repeatedly[3] the Union has been practicing fraud to the Constitution, circumventing the constitutional scheme of tax revenue distribution - especially Article 157, II, Cor - and violating the federal principle itself.

The action invites a theoretical reflection on the relationship between federalism and the National Tax System (STN) in the Constitution of 1988, a matter of primary interest for Tax Law, [4]which justifies academically and socially this work. As we know, the technique of tax division adopted by the Constitution is one of the projections of federalism in the field of taxation, precisely the one that, granting financial autonomy to federal entities, makes its political and legal[5] autonomy effective .

In order to enrich the literature related to the theme and foster reflection on the federative balance in the Trigenoary Constitution, this article aims to answer the following research problem: It is possible to identify in the CR limitations to the exercise of residual tax competence, beyond the constraints stated in the arts. 154, I and 195, § 4º, CR?

Starting from the principle of functional conformity - adopted as a theoretical reference in the form that the concept received in the systematization made by Friedrich Müller - we will verify whether the exercise of residual tax competence by the Union should be subject to this principle.

To this end, the present work is divided into four sections, besides this introduction and its conclusion. In the first section, the conceptual frameworks necessary to situate the problem of Brazilian fiscal federalism will be articulated. In view of the vastness of the literature

2 BRAZIL. Constitutional Amendment nº 27, from 2000. Adds the art. 76 to the Act of Transitional Constitutional Provisions, instituting the untying of tax collection and social contributions of the Union. Available at: http://www2.camara.leg.br/legin/fed/emecon/2000/emendaconstitucional-27-21-marco-2000-373981-publicacaooriginal-1-pl.html. Accessed on: 08 aug. 2018

3 Cf. BRAZIL. Constitutional Amendment nº 42, 2003. Changes the National Tax System and gives other measures. Available at: http://www2.camara.leg.br/legin/fed/emecon/2003/constitutionalamendment-42-19-December2003-497205-norma-pl.html. Accessed: 08 Aug. 2018.
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BRAZIL. Constitutional Amendment nº 68, de 2011. Altera o art. 76 do Ato das Disposições Constitucionais Transis. Available at: http://www2.camara.leg.br/legin/fed/emecon/2011/emendaconstitucional-68-21-dezember-2011-612061-publicacaooriginal-134728-pl.html. Accessed on: 08 aug. 2018.
BRAZIL. Constitutional Amendment 93, from 2016. Amends the Act of Transitional Constitutional Provisions to extend the untying of Union revenues and establish the untying of revenues of the States, Federal District and Municipalities. Available at: http://www2.camara.leg.br/legin/fed/emecon/2016/emendaconstitucional-93-8-setembro-2016-783591-publicacaooriginal-151044-pl.html. Accessed on: 08 aug. 2018.

4 The field of studies of Tax Law, which is not scientifically confused with that of Financial Law, is also composed by the investigation of the rules that "[...] delimit and coordinate tax powers between the different spheres of power in countries with federal government". VILLEGAS, Hector B. Curso de Finanzas, Derecho Financiero y Tributario. Buenos Aires: Ediciones Depalma, 2001. p. 185. Free translation.

5 COÊLHO, Sacha Calmon Navarro. Brazilian tax direct course. Rio de Janeiro: Forense, 2018. p. 43-45.
In the same sense: DA SILVA, José Afonso. Positive constitutional law course. São Paulo: Malheiros, 2011. p. 478.

on the subject, only the most fundamental concepts will be exposed, without any intention of elaborating a comprehensive review. The following presents the structure of division of competences and tax revenues contained in the 1988 Constitution. The understanding of this financial framework, the core of the Brazilian fiscal constitution, is fundamental so that the proposed research problem can be adequately addressed. In the fourth section we will discuss the hermeneutic principle of functional conformity, in order to identify its normative content. Considering the existing literature, a definition will be proposed that is believed to be more consistent with the dignity that the principle of federalism assumes in the current Constitution. Finally, the principle unveiled in the previous section will be used as a normative framework to identify the systemic limitations that condition the exercise of residual competence.

2 FEDERALISM AND FISCAL FEDERALISM: CONCEPTUAL ELEMENTS

Before moving to dealing with the question posed in this work, it is necessary to establish what is meant by federalism and fiscal federalism, notions that constitute the theoretical foundation of this research.

The multiplicity of forms adopted by federal states around the world makes it the task of developing a minimally comprehensive theory of the phenomenon[6]. It is for this reason that the goal of elaborating a theory capable of providing prescriptions that would apply indistinctly to all systems must be abandoned[7]. This, which is the classical approach, must be replaced by a typological definition of federalism, capable of recognizing it and analyzing it in its multiple forms, either as a principle of political[8] organization , in the legal sense, or as a political[9] ethos , in the philosophical sense.

Although the semantic evolution of federalism in history is expressive, the fundamental structure of the federal type is simple. According to classical theory, the federal model has the division of power between a center and its periphery. In principle, a state calls itself federal when it is subject to what can be called the duality of governance[10]. This duality occurs when, after the meeting of the parties that make up the federative pact, two politically autonomous

6 VILE, M.J.C. Teoria Federal e o "Novo Federalismo". Em: JAENSCH, D. (ed.) A Política do Novo Federalismo. Adelaide: Associação Australiana de Estudos Políticos, 1977. p. 01.

7 BURGESS, Michael. Federalismo Comparativo: Teoria e Prática. Londres: Routledge, 2006. p. 45.

8 DERZI, Misabel de Abreu Machado; DE BUSTAMANTE, Thomas da Rosa. The federative principle and equality: a critical perspective for the Brazilian legal system based on the analysis of the German model. In: DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves; MOREIRA, André Mendes. Federal state and tax war in comparative law. Belo Horizonte: Arraes, 2015. p. 470.

9 MOOTS, Glenn A. The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar. Em: WARD, Ann; WARD, Lee. (eds.). The Ashgate Research Companion to Federalism. Farnham: Ashgate, 2009. p. 399.

10 SACCHETTO, C. Analysis of Fiscal Federalism from a Comparative Tax Law Perspective. In: BIZIOLI, G .; SACCHETTO, C. (eds.). Fiscal aspects of fiscal federalism: a comparative analysis. Amsterdam: IBFD, 2011. p. 12.

levels are configured, which will imply the existence of two distinct[11] legal orders, a phenomenon often called decentralization[12] .

Despite being widespread, the dualistic view is insufficient. To understand the federal structures found today, it is more appropriate to resort to the theory proposed by Daniel Elazar. According to the author, federalism is a form of distribution of power without a focal center, in an arrangement of interdependence, in which the different components coordinate around multiple centers[13]. In this scheme, the political force does not oppose itself in the center or in the periphery, but in the tension of the network as a whole[14].

Schematically, the forms of power distribution between subnational entities and the Union can take the form of dual[15] federalism ; cooperative[16] ; or competitive [17]. The first two correspond to historical models, i.e., empirically verifiable in existing political systems in the past or present. In dual federalism - found, for example, in Mexico, Malaysia, Russia, Canada, Australia, the United States, India and Pakistan - national and sub-national entities exercise their powers independently. Each entity is sovereign in relation to the powers granted to it and none of them is sovereign in relation to the powers granted to others[18]. The relationship that derives from this scheme is much more inclined to tension than to collaboration[19]. This is what opposes dual federalism to cooperative federalism. In the latter - currently practiced, for example, in Germany, South Africa and Belgium, in addition to Brazil - there is a harmonious balance between the actions of the various entities, which is characterized by the sharing of responsibilities over the same area of activity[20] . Finally, competitive federalism - an academic model that has no application in any current political system - proposes that federal entities should have identical roles, in order to maximize competition between them, which is supposed to result in an efficiency gain in the provision of public services[21].

11 "The organization of the Federal State is a task of laborious constitutional engineering. The federal state requires double regulation, triggering the rules and the rules for each one. I refer to the system of the Federation or the Union and the legal systems of the Member States."
HORTA, Raul Machado. Organização Constitucional do Federalismo. Revista da Faculdade de Direito da UFMG, n. 28-29, p. 09-32, 1986. p. 10..

12 It should be noted that fiscal decentralization is not unique to federations, but can also be found in unitary states, which make use of delegations of power to local authorities (devolutions)in order to make the administration of public affairs practicable. Cf. BOADWAY, Robin; SHAH, Anwar. Fiscal Federalism: Principles and Practices of Multiorder Governance. Cambridge: Cambridge University Press, 2009. p. 61.
Moreover, administrative decentralisation makes it possible to bring the spheres of power closer to the needs of citizens. Cf. SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: Mcgill-Queen's University Press, 2007. p. 10.

13 ELAZAR, Daniel J. Federalismo e Integração Política. Lanham: University Press of America, 1984. p. 15.

14 MOOTS, Glenn A. The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar. Em: WARD, Ann; WARD, Lee. (eds.). The Ashgate Research Companion to Federalism. Farnham: Ashgate, 2009. p. 400.

15 For the dual typology of dual federalism (layer cake and coordinate-authority), see: SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: McGill-Queen's University Press, 2007. p. 05.

16 For the Double typology of Cooperative federalism (interdependent spheres, marble cake and Independent spheres) See: SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: Mcgill-Queen University Press, 2007. p. 05.

17 For further study: BRENNAN, G.; BUCHANAN, J. The Power to Tax: Analytical Foundations of a Fiscal Constitution. Cambridge: Cambridge University Press, 1980.

18 SCHÜTZE, Robert. From Dual to Cooperative Federalism: The Changing Structure of European Law. Oxford: Oxford University Press, 2009. p. 78.

19 CORWIN, Edward S. The passing of dual federalism. Virginia Law Review, Vol. 36, n. 01, p. 01-24, 1950.

20 BARACHO, José Alfredo de Oliveira. General theory of federalism. Rio de Janeiro: Forensics, 1986.

21 "[...] If the citizens of a jurisdiction appraise the performance of their government by comparing it to the performance of governments elsewhere but at the same jurisdictional level, they would induce their own government to do as well as or better than these governments." BRETON, Albert. Modeling vertical competition. In: AHMAD, Ehtisham; BROSIO, Giorgio. (eds.). Handbook of Fiscal Federalism. Cheltenham: Edward Elgar, 2006. p. 92.

Within this complex scenario, the creation of the most appropriate regulatory structure to share responsibility for expenditure and the sources of revenue for its implementation is a matter of immediate concern. This is precisely the end of so-called fiscal federalism: the coordination of public finances among federated entities[22]. As in the case of the concept of federalism, here too several classical theories contribute to the resolution of the question of the organization of the tax structure at various levels: the rule of proximity, by George Stigler; the fiscal equivalence of Mancur Olson; Wallace Oats' theory of decentralization; James Buchanan's[23] theory of clubs. To these theories are added new contributions such as that of Shah Anwar; the World Bank's Accountability model; and the New Public Governance[24] model.

All these approaches follow the secular theorization of the principle of subsidiarity[25], according to which financial functions (taxation, spending, and economic regulation) must always be exercised by the smallest "social unit"[26], that located at the locality level in the federal structure, except where it is reasonably demonstrated that such functions will be better performed at the higher levels. In any case, a minimum guarantee of autonomy in the imposition of taxes[27] - what seems to be at the heart of the tax constitution - is constitutive of the very notion of federalism[28] .

Ideally, the distribution of fiscal power should be preceded by an evaluation of the expenses that will be borne by each entity, with three forms of its distribution[29] : the exclusive attribution of tax revenue (exclusive tax assignment), the competing attribution (concurency) and the provision of revenue-sharing mechanisms (tax sharing). As will be seen later, in Brazil the 1988 constituent employed a mixed technique, combining the three forms[30].

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22 MAJOCCHI, Alberto. Theories of Fiscal Federalism and the European Experience. In: WARD, Ann; WARD, Lee. (Eds.). The Ashgate Research Companion to Federalism. Farnham: Ashgate, 2009. p. 425.

23 For a summary of each of these theories, the reader is referred to: SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: McGill-Queen's University Press, 2007. p. 07-09.

24 For a definition and brief discussion of each of these theories, see: CABRAL, Nazaré da Costa. The theory of financial federalism. Coimbra: Almedina, 2015.

25 For an overview of the different philosophical and economic theories of subsidiarity, see: FØLLESDAL, Andreas. Competing Conceptions of Subsidiarity. In: FLEMING, James E.; LEVY, Jacob T. Federalism and Subsidiarity. New York: New York University Press, 2014. HUEGLIN, Thomas O. Federalism, Subsidiarity and the European Tradition: Some Clarifications. Telos, n. 100, p. 37-55, 1994. p. 46.
The application of the principle to an outline of moral justification of federalism in Brazil can be seen in: BATISTA JÚNIOR, Onofre Alves; DE OLIVEIRA, Ludmila Mara Monteiro; MAGALHÃES, Tarcísio Diniz. What federative pact? In search of a normative theory adequate to the Brazilian fiscal federalism. In: BATISTA JÚNIOR, Onofre Alves; MOREIRA, André Mendes. Federal state and taxation: from the origins to the current crisis. Belo Horizonte: Arraes, 2015.

26 BARACHO, José Alfredo de Oliveira. The subsidiarity principle: concept and evolution. Revista da Faculdade de Direito da UFMG, n. 35, p. 13-52, 1996. p. 51.

27 "Uma constituição fiscal é o corpo de regras e regulamentos fundamentais que enquadram a tomada de decisão na área da política fiscal." BLÖCHLIGER, Hansjörg; KIM, Junghun. Federalismo fiscal: trabalho de descentralização. Paris: Publicação da OCDE, 2016. p. 32.

28 RILKER, W. Federalism. In: GREENSTEIN, F.; POLSBY N. (eds.). The Handbook of Political Science: Government Institutions and Processes. Boston: Addison-Wesley Pub. Co., 1975.
On the contrary, stating that the distribution of tax competences is not a requirement of federalism, only the distribution of revenue: SCHOUERI, Luís Eduardo. Tax law. São Paulo: Saraiva Educação, 2018. p. 258.

29 For an economic analysis of the principles of the distribution of tax power, see: HUEGLIN, Thomas O.; FENNA, Alan. Comparative Federalism: A Systematic Inquiry. Toronto: University of Toronto Press, 2015. p. 166-204.

30 "Em princípio, a constituição de 1988 estabeleceu uma mistura relativamente convencional de cessão fiscal separada e concorrente. Na prática, o resultado mostra o quadro pouco convencional de um regime fiscal duplo: os Estados e os municípios adquiriram mais poder fiscal e uma maior quota-parte das receitas tradicionais; Ao mesmo tempo, foi atribuído ao governo federal um conjunto distinto de taxas compulsórias para financiar a política social de todos os brasileiros." HUEGLIN, Thomas O.; FENNA, Alan. Federalismo comparativo: um inquérito sistemático. Toronto: University of Toronto Press, 2015. p. 203.

From these theoretical considerations, it is necessary to emphasize that federal states hardly arise from the punishment of intellectuals. They are, on the contrary, the result of political confrontations, conflicts and social upheavals, distancing themselves expressively from the ideal models that derive from a thoughtful reflection. It is with this fact in mind that one should proceed to the analysis of the division of competences and tax revenues constitutive of the Brazilian fiscal federalism.

3 THE DISTRIBUTION OF COMPETENCES AND TAX REVENUES IN THE 1988 CONSTITUTION: BRAZILIAN FISCAL FEDERALISM

As previously seen, ideally, recommends the economic theory that the distribution of administrative competencies, since related to the budgetary scope of expenditures, precedes the distribution of tax competencies and government transfers, when the tax constitution[31] was created. This rarely happens in practice and was no different in the Brazilian case, whose Constitution incorporated, with some modifications, the tax framework existing in the previous[32] constitutions.

Even so, the 1988 Constitution innovated by providing for an unprecedented decentralization of revenue sources, a clear reflection of the democratization that the country was undergoing when it was elaborated[33] , distributing tributes to increase the autonomy of the subnational entities. But this movement was not accompanied by a decentralization of the burdens that remained concentrated in the Union[34]. The result, which could not be more disastrous for the coordination of the nascent financial federalism, was the expressive use of residual competence by the Union[35]. Whatever the historical reasons for this movement, however, from the dogmatic point of view, this practice is incompatible with the constitutional order in force, as will be shown below. Before proceeding, however, to a critical assessment of

31 SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: McGill-Queen's University Press, 2007. p. 19.

32 "In the Brazilian constitutional history, the subject of discrimination of competencies had an evolution marked by a much more empirical than rational character. The taxes were to include in each constitutional text from preexisting realities, being the cast that is found in the text of 1988 mere distribution of taxes that were already known sometimes with small modifications. In other words, the 1988 constituent had a (typological) notion of the existence of taxes and worked with them to forecast financial resources for the state." SCHOUERI, Luís Eduardo. The complementary law and the division of tax competences. In: COSTA, Alcides Jorge. The National Tax System and the stability of the Brazilian federation. São Paulo: Noeses, 2012. p. 680.
For a historical investigation of federalism in Brazilian tax law, see: COSTA, Alcides Jorge. History of taxation in Brazil: from the Republic to the 1988 Constitution. In: SANTI, Eurico Marcos Diniz de. Course on tax law and public finance. São Paulo: Saraiva, 2008.

33 As Misabel Derzi points out, federalism is closely related to democracy: "[...] federalism is a decentralization of power, keeping an intimate relationship with democracy. One does not deny the possibility of the unitary form of State coexisting with political regimes that adopt the democratic principle, but the decentralization of power peculiar to the federal form of state more easily brings about the democratic republic." DERZI, Misabel de Abreu Machado. Tax law, criminal law and type. São Paulo: Editora Revista dos Tribunais, 2007. p. 117.

34 For a more comprehensive investigation of the history of federalism in Brazil, see: OLIVEIRA, Fabrício Augusto. Theories of federation and fiscal federalism: the Brazilian case. Text for discussion n. 43. Belo Horizonte: João Pinheiro Foundation, 2007.

35 OLIVEIRA, Fabrício Augusto; CHIEZA, Rosa Angela. Height and decline of the Brazilian federation: 1988-2017. In: ANFIP; FENAFISCO. Tax Reform Required: diagnosis and premises. Brasília/São Paulo: Plataforma Política Social, 2018.

this practice, it is necessary to present the structure of the division of tax competences in the 1988 Constitution which is, as we know, and as a result of federalism, rigid[36].

As Sacha Calmon teaches, competence corresponds to the constitutional[37] division of the power to tax - "[...] originally one by will of the people [...][38] - among legal persons of domestic public law that, in Brazil, are the Union, the States, the Federal District and the Municipalities[39] . This is not confused, therefore, with the competence to legislate on tax law - competitor, as imposed by art. 24, Cor, it is up to the Union to legislate on general norms - nor with the active tax capacity that is the delegated ability to collect taxes. As the national doctrine teaches for a long time, tax competence is endowed with the characteristics of privacy, indelegability, incaducability, inalterability, irrenunciability and facultativity[40].

Also according to the magisterium of Sacha Calmon, the distribution of competences[41] in the 1988 Constitution follows a criterion resulting from the coordination of the concept of private competence (exclusive)[42] and of common competence cumulated with the theory of the linkage of the hypothesis of incidence[43] , the latter disseminated in Brazil by Geraldo Ataliba[44]. This is how taxes linked to a state action are said to be of common competence, that is, they can be instituted by any of the federated entities, provided that they are administratively competent for the practice of the act that associates with the person of the taxpayer (provision of a specific and divisible public service or exercise of police powers in the case of fees; and performance of public works resulting from the development of real estate, in the case of improvement contributions). As the tax competence in these cases is linked to the administrative competence, it is stated, as specified in the German literature, that it is an annexed[45] competence.

In the case of taxes not linked to a state action, the distribution takes place on the basis of the prior establishment of the generating facts that are then distributed among the legal entities of domestic public law (taxes, compulsory loans and special contributions). This is how the Union should establish, in addition to compulsory loans and special[46] contributions, the taxes provided for in art. 153; to the States those provided for in art. 155; to the Municipalities those listed in art. 156; and, finally, the Federal District simultaneously fits the taxes

36 WHALER, Aliomar. An introduction to the science of finance. Updated by Hugo de Brito Machado Segundo. Rio de Janeiro: Forense, 2015. p. 291.

37 As Humberto Ávila recalls, complementary laws also apply to the determination of tax jurisdiction. ÁVILA, Humberto. Tax constitutional system. São Paulo: Saraiva, 2010. p. 141-142.

38 COÊLHO, Sacha Calmon Navarro. Brazilian tax law course. Rio de Janeiro: Forense, 2018. p. 47.

39 Contrary to what happens, for example, in Argentina, in Brazil the power to tax granted to municipalities is originating and not derived. On the classification of tax power in originating and derived, see: FONROUGE, Giuliani. Derecho Financiero. Buenos Aires: La Ley, 2004. p. 267-270.

40 For a definition of each of these characteristics, see: CARRAZZA, Roque Antonio. Tax constitutional law course. São Paulo: Malheiros, 1999. p. 339-431.

41 As the best doctrine wants, the Constitution does not create taxes, who does it is the person constitutionally competent, by law of its working. BALEEIRO, Aliomar. Brazilian tax law. Updated by Misabel de Abreu Machado Derzi. Rio de Janeiro: Forense, 2013. p. 38.

42 The private denomination is used here, because it is established in the Brazilian tax literature. However, in constitutional theory the modality of competence that does not admit delegation is called exclusive.

43 COÊLHO, Sacha Calmon Navarro. Brazilian tax law course. Rio de Janeiro: Forense, 2018. p. 51.

44 ATALIBA, Geraldo. Tax incidence hypothesis. São Paulo: Malheiros, 2013.

45 The administrative competencies in the 1988 Constitution are arranged in arts. 21, 22 (Union), art. 25, § 1º (residual competence of the States), art. 30 (Municipalities) and art. 32, § 1º (dual competence of the Federal District).

46 Exceptions are state, municipal and district social contributions instituted to finance the social security system of their civil servants, based on art. 149, § 1, CR.

provided in arts. 155 and 156. From the perspective of the taxpayer, who will not be the object of development in this work, the discrimination of skills aims to preserve the ability to contribute, avoiding multiple incidences on the same generating fact.

In addition to the private and common classification, the literature also identifies residual and extraordinary competence. Both fall exclusively to the Union - which demonstrates the centralizing character of Brazilian fiscal federalism - the latter being the competence to institute extraordinary war taxes (art. 154, II, CR). The residual competence, on the other hand, unfolds in the scope of two taxable species - taxes and social[47] contributions - should be exercised within the limits contained in articles 154, I, CR and 195, § 4º, CR.

The forecast of residual competence in Brazil refers to the Constitution of 1934[48]. As things stand, the Constitution lays down strict requirements for the exercise of the Constitution, since it is the exclusive responsibility of the Union and is indelible to other bodies. According to art. 154, I, CR, to institute residual taxes, the Union must avail itself of complementary law, taking care that the new exation does not have generating fact or own calculation basis of those taxes already foreseen in the constitutional text.

In the case of residual social contributions, the requirements refer to those contained in Article 154, I, CR, reason why there was a commotion regarding the determination of the normative command aimed by the Constitution. Should residual contributions take into account the literality of the requirements set out in Article 154, I, CR? That is, should they be instituted by supplementary law, be non-cumulative and not have a generating fact or own calculation basis of the taxes provided for in the Constitution? Or, more specifically, Article 194, § 4, RC, referring to Article 154, I, CR, would also prohibit the coincidence of the basis of calculation of any residual contribution with that of the taxes provided for in the Constitution, like the similar restriction on fees (Article 145, § 2, RC)? According to the Supreme Court, the answer is negative[49]. Thus, the institution of new contributions to the financing of social security should be made through a supplementary law (first requirement), it being sufficient for the legislator to avoid the coincidence of the "generating fact" and the calculation basis with that of other existing[50] contributions (second requirement).

With regard to the sharing of revenues - "[...] the main form of internal redistribution of wealth among the units of the Brazilian[51] federation " - two forms of distribution of the pro-

47 For the legal system of social contributions, see: LOBATO, Valter. The juridical-constitutional system of contributions to the cost of social security: the fundamental and structuring importance of the purpose and the other limits to the power to tax. 2014. Thesis (Doctorate in Law) - Faculty of Law, Federal University of Minas Gerais, Belo Horizonte.
See also: SPAGNOL, Werther Botelho. Social contributions in Brazilian law. Rio de Janeiro: Forense, 2002.

48 For a brief history, see: SCHOUERI, Luís Eduardo. Direito tributário. São Paulo: Saraiva Educação, 2018. p. 265-268.

49 "[...] when the § 4º, of art. 195, of the C.F. commands to obey the rule of residual competence of the Union - art. 154, I - does not provide that contributions should not have a chargeable event or tax basis. The contributions, created in the form of § 4º, of art. 195, of the C.F., should not have, that is, generating fact and basis of calculation own the already existing contributions."
The decision is thus based on:
CONSTITUTIONAL. TAX. SOCIAL SECURITY. SOCIAL CONTRIBUTIONS: ENTREPRENEURS. AUTONOMOUS AND INDIVIDUAL. Complementary Law nº 84, of 18.01.96: CONSTITUTIONALITY. I. - Social contribution instituted by Complementary Law nº 84, of 1996: constitutionality. II. - R.E. not known.

50 See, for all, the following judgments: BRASIL. Resource Extraordinary nº 177.137-RS. Plenário. Rel. Ministro Moreira Alves, D.J. 03.05.1996. BRAZIL. Extraordinary Resource nº 165.939-RS. Plenum. Rel. Minister Moreira Alves, D.J. 03.05.1996. and BRAZIL. Extraordinary Appeal nº 228.321-RS. Plenum. Rel. Minister Carlos Velloso, D.J. 20.05.2003.

51 MOREIRA, André Mendes. O Federalismo Brasileiro e a Repartição de Receitas Tributárias. In: MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (orgs.). Estado federal e tributação: das origens à crise atual. Belo Horizonte: Arraes Editores, 2015. p. 169.

ceeds of the collection[52] are found in the 1988 Constitution: the direct (simple) - by means of which one entity directly accesses part of the revenue received by another - and the indirect (complex), by which the funds collected are sent to funds for later sharing among its members according to criteria established by law[53]. In the Constitution, there is only the modality of vertical revenue sharing - the one that "[...] occurs from the highest to the lowest [...][54] ", that is, from the Union to the States or to the Municipalities and from the States to the Municipalities - not being in Brazilian law the so-called horizontal divisions - those that are given by the richest ones in favor of the poorest units of a federation - verified in the Australian and German[55] law.

The peculiarity of the Brazilian tax constitution is the fact that residual contributions, unlike residual taxes, are not subject to the revenue sharing scheme. The exception should not cause astonishment, in the first place, because the contributions are taxes whose revenue is linked to the fulfillment of certain purposes elected by the Constitution. Secondly, and as mentioned earlier, the decentralization of resources promoted by the 1988 Constitution was not accompanied by an effective decentralization of financial burdens.

It occurs that this concentration of burdens in the Union, added to the stricter regime for the institution of new taxes and the need to share the proceeds of their collection with other federal entities, resulted in the recurrent use of residual jurisdiction to institute new contributions, which, accompanied by the revenue untying mechanism created by Constitutional Amendment 27 of 2000, ended up further skewing the tax constitution in its favour[56]. Considering the functional perspective, it is nevertheless verified that the requirements for the exercise of residual competence should be sought in a systematic interpretation of the Constitution, which implies recognizing that its exercise is also subject to requirements other than those nominally provided for in Article 195, § 4c/c 154, I, CR, as will be seen below.

52 For an exhaustive analysis of the distribution of revenues in the 1988 Constitution, including its classifications in mandatory and voluntary, linked and unrelated, in addition to direct and indirect, see: MOREIRA, André Mendes. The Brazilian Federalism and the Tax Revenue Division. In: MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (Orgs.). Federal state and taxation: from the origins to the current crisis. Belo Horizonte: Arraes Editores, 2015.

53 COÊLHO, Sacha Calmon Navarro. Brazilian tax direct course. Rio de Janeiro: Forense, 2018. p. 286.

54 MOREIRA, André Mendes. Brazilian Federalism and the Tax Revenue Division. In: MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (Orgs.). Federal state and taxation: from the origins to the current crisis. Belo Horizonte: Arraes Editores, 2015. p. 158.

55 "Com a notável exceção dos Estados Unidos, portanto, a maioria dos sistemas federais estabeleceu programas de equalização fiscal. Apenas algumas federações, como a Alemanha, o Canadá e a Suíça, escreveram uma obrigação de equalização fiscal em suas constituições, reconhecendo-a como parte do pacto básico da união federal. Tal obrigação constitucional, no entanto, não é uma indicação automática do grau em que a equalização pode realmente ser praticada. Enquanto a Alemanha tem um dos sistemas mais abrangentes de equalização, o mesmo acontece com a Austrália, onde nenhum requisito constitucional para a redistribuição horizontal existe." HUEGLIN, Thomas O.; FENNA, Alan. Federalismo comparativo: um inquérito sistemático. Toronto: University of Toronto Press, 2015. p. 172.

56 "The standard of adjustment that the federal government adopted from this reality and which it has not given up to the present day has become perverse both for the tax structure and for economic growth and for the federation itself. As they are generally cumulative in nature, as they affect turnover, gross revenue or payroll, the further advance of social contributions in the tax structure would worsen the quality of the tax system, at the same time that it would undermine the principle of competitiveness by charging domestic production more than taxes on aggregate value. as far as the federation is concerned, because the priority that has now been given to its collection would weaken, in relative terms, the collection of traditional taxes, especially from the RI and the ICI, decreasing the relative participation of the subnational spheres in the tax cake and reversing the objectives pursued with the tax reform of the Constitution to modify the equation of the Federative distribution of revenues." OLIVEIRA, Fabrício Augusto; CHIEZA, Rosa Angela. Height and decline of the Brazilian federation: 1988-2017. In: ANFIP; FENAFISCO. Tax Reform Required: diagnosis and premises. Brasília/São Paulo: Plataforma Política Social, 2018. p. 565-566.

4 THE INFLUENCE OF FEDERALISM ON THE COMMAND OF FUNCTIONAL CONFORMITY IN THE INTERPRETATION OF THE CONSTITUTION

Traditionally, the rule of functional conformity has been understood as a rule concerning the preservation of the principle of separation of powers[57] constructed by the interpreter preserves the schedule of division of duties provided in its text. It is to say that the Constitution establishes a distribution of burdens and, in doing so, signals "[...] the vocation of each of the organs of the State, the type of legitimacy that characterizes its decisions, as well as the institutional capacities that brings together [...][58] ."

In Konrad Hesse's classic formulation, the principle, which is called the "criterion of functional correctness", focuses mainly on a restriction of the creative activity of the Constitutional Court, requirement parallel to that of legality and the Separation of Powers which recommends reverence to legislative activity, for the latter would be the privileged locus of normative creation[59]. Extending the semantic extension of the principle, José Canotilho affirms its incidence also in the "[...] vertical relations of power (State/regions, State/local authorities)[60] ", what would make this a principle closely linked to the distribution of competences in the sense stated in this work (decentralization of power between autonomous entities). This development is especially relevant in the states that assume the form Federativa, as is the case of Brazil.

Federalism, as a structuring norm of the Brazilian legal system, obliges to adapt the principle of functional conformity to its normative force. It is that, as Sacha Calmon recalls, quoting the Digest, in the epigraph of his festive work: "incivile est, nisi lege prospecta, una aliqua particle ejus proposita, judicare, vel responder [61]" - that is, the systematic character of the right cannot be forgotten when interpreting any of its elements.

In federations, the principle of functional conformity also requires that the Constitution be interpreted in such a way as to preserve the competences granted to subnational entities. As a support in Friedrich Müller, one can affirm that the commandment of functional correction makes federalism relevant with a view to the very method of constitutional[62] interpretation . In this passage, the interpretation of the devices that make up the Brazilian Tax Constitution - namely, the articles referring to the National Tax System and the distribution

57 For an example of this approach, see: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel. Constitutional law: theory, history and working methods. Belo Horizonte: Fórum, 2012. p. 1212. ed. eletr.

58 SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel. Constitutional law: theory, history and working methods. Belo Horizonte: Forum, 2012. p. 1212. ed. electr.

59 "A principle of constitutional interpretation is the criterion of functional correctness. If the Constitution orders the respective task and the collaboration of the holders of state functions in a certain form, then the interpreting body must remain within the framework of the functions assigned to it; it must not, by the manner and result of its interpretation, remove the distribution of functions. In particular, this applies to the relationship between legislator and the Constitutional Court: as the Court has only one controlling function before the legislator, He is denied an interpretation that would lead to a limitation of the legislator's conforming freedom beyond the limits outlined by the Constitution or to a configuration through the same court." HESSE, Konrad. Elements of constitutional law of the Federal Republic of Germany. Porto Alegre: Sergio Antonio Fabris Editor, 1998. p. 67.

60 CANOTILHO, José J. G. Constitutional law and theory of the constitution. Coimbra: Almedina, 2011. p. 1225.

61 In the author's translation: "It is against the Law to judge or answer without examining the text together, only considering any part of it." COÊLHO, Sacha Calmon Navarro. Brazilian tax direct course. Rio de Janeiro: Forense, 2018. (epigraph)

62 MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 139.

of tax revenues - must take place under the perspective of power sharing established by the federal principle. However, as Valter Lobato says, recalling Ataliba, "[...] the principles that should guide the Judicial System Pátrio, as a consequence, the Tax System itself, are Federalism and the separation of powers in the preservation of the Democratic Rule of Law[63]. "

Caution is necessary, however, because the residual jurisdiction, provided for on two occasions in the constitutional text, is vested in the Union, and its exercise per se is not subject to any admonition. On the contrary, the creation of new taxes (taxes and social contributions) is the prerogative of the legal entity governed by domestic public law to which the Constitution has granted such a possibility, consisting of an important element of its tax structure, inseparable, therefore, from its political autonomy. Despite its natural conformity with the constitutional text, the exercise of residual competence cannot "[...] alter the constitutionally normalized distribution [...][64] of power among the units of the Federation. It is to say that the implementation of the Constitution[65] must inexorably take into account the balance of power relations between federated entities.

5 THE UNION'S EXERCISE OF RESIDUAL COMPETENCE AND THE DISRUPTION OF THE CONSTITUTIONAL MODEL OF DIVISION OF COMPETENCES

As seen above, the implementation of any constitutional rule should take into account the primary scheme of division of competences in which that rule is inserted. The interpretation of the text relating to tax jurisdiction cannot result in the construction of a standard that undermines the distribution of competences itself. Eventually, formally appropriate and seemingly legitimate exercise of tax jurisdiction, may challenge the Constitution. It is now that the command of functional conformity is relevant, because by introducing federalism as a method consideration, it reveals the internal limits of the exercise of this modality of granting the power to tax.

As already pronounced the Supreme Court in Ag.reg. RE No 793564-PE, the mere untying of Union revenue does not have the power to tax social contributions:

> SOCIAL CONTRIBUTION - REVENUE - UNTYING - ARTICLE 76 OF THE ACT OF TRANSITIONAL CONSTITUTIONAL PROVISIONS - CONSTITUTIONAL AMENDMENTS Nos 27, 2000 AND 42, 2003 - MODIFICATION IN THE CALCULATION OF THE MUNICIPAL PARTICIPATION FUND. The partial untying of the revenue of the Union, contained in Article 76 of the Act of Transitional Constitutional Provisions, does not transform social contributions and intervention in the economic field into taxes, changing the essence of those, absent any involvement in the calculation of the Municipal Participation Fund. Previous: Direct Action of Unconstitutionality nº 2.925/DF, in which I was appointed

63 LOBATO, Valter de Souza. The cost of social security and risk benefits: the applicable principles and limits to the power to tax. In: DERZI, Misabel de Abreu Machado (org.). Separation of powers and effectiveness of the tax system. Belo Horizonte: Del Rey, 2010. p. 433.

64 MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 139.

65 The term "materialization" is used here in the sense of Friedrich Müller, quoted above. Cf. MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 121.

> editor for the judgment. FINE - INJURY - ARTICLE 557, §2, CIVIL PROCEDURE CODE. Since the examination of the problem is manifestly unfounded, the fine provided for in§ 2 of Article 557 of the Code of Civil[66] Procedure must be imposed.

In fact, what is achieved by transverse means with the repeated use of this instrument is not exactly the nature of the contributions, whose resource would now be partially disaffected, but the fiscal equalization, which is normative component of the form State Government in Brazil. Analyzing the question superficially - that is, considering exclusively the formal angle of the attribution of competences and the distribution of revenues -, in fact it would not fit to consider the participation of States or Municipalities in the resource collected with these taxes. This is what the Supreme Court concludes in the judgment of the Extraordinary Appeal nº 537.610/RS of Minister Cezar Peluso, thus set:

> TRIBUTE. Social contribution. Art. 76 of the ADCT. Constitutional Amendment nº 27/2000. Untying 20% of the proceeds of the collection. Admissibility. No offense to the clause stone. Denied follow-up to the appeal. It is not unconstitutional to disconnect part of the social contribution collection, carried out by constitutional[67] amendment.

In the same sense, the position expressed by the Supreme Court in the Extraordinary Appeal nº 566.007/RS[68]. As previously seen, according to the best literature, competence must be understood as a network arrangement, on whose balance all federal entities depend. In Brazil, the Federative form of State, already stated in the inaugural article of the Constitution, under its article 60, § 4, I, can not be abolished even by constitutional amendment. This is why the legislative programme on residual jurisdiction falls within the explicit[69] textual limit of the federated form of State, which is at the same time a relevant element in relation to the method of implementation and in relation to the content of the legal rule, which was iteratively ignored by the STF:

66 "The partial untying of the revenue of the Union, contained in the aforementioned article 76 of the Act of Transitional Constitutional Provisions, does not transform social contributions and intervention in the economic field into taxes, changing the essence of those." BRAZIL. Agravo Regimental no Recurso Extraordinário nº 793564-PE. Plenário, Rel. Ministro Marco Aurélio, Dje 01.10.2014.

67 BRAZIL. Extraordinary Resource nº 537.610/RS. Plenary. Rel. Minister Cezar Peluso, DJ 18.12.2009.

68 The decision is thus set out: CONSTITUTIONAL AND TAX RIGHTS. GENERAL REPERCUSSION. UNTYING UNION REVENUES - DRU. ART. 76 OF THE ACT OF TRANSITIONAL CONSTITUTIONAL PROVISIONS. ABSENCE OF CORRELATION BETWEEN DRU'S ALLEGED UNCONSTITUTIONALITY AND THE RIGHT TO TAX RELIEF PROPORTIONATE TO THE DISCONNECTION. PROCEDURAL ILLEGITIMACY. ABSENCE OF A LIQUID AND CERTAIN LAW. EXTRAORDINARY APPEAL DISMISSED. 1. The core issue of this extraordinary resource is not whether art. 76 of the ADCT would offend permanent rule of the Constitution of the Republic, but if, possible unconstitutionality, would lead the Appellant to have the right to relief proportional to the untying of social contributions collected. 2. It cannot be concluded that any unconstitutionality of the partial untying of income from social contributions would result in the amount corresponding to the unlinked percentage being returned to the taxpayer, because the taxation would not be unconstitutional or illegal, the only hypothesis authorizing the repetition of the tax indictment or the recognition of the absence of legal-tax relationship. 3. The taxpayer who sues the restitution or non-repayment proportional to the untying of social contribution revenues instituted by art is not entitled to the cause. 76 of the ADCT, both in its original form and in the form of the amendments promoted by the Constitutional Amendments n. 27/2000, 42/2003, 56/2007, 59/2009 and 68/2011. Absence of legal right and right to impeach warrants of security. 4. Dismissal of the extraordinary appeal. BRASIL. Extraordinary Appeal nº 566.007/RS. Plenary. Rel. Minister Carmen Lucia, DJ 11.02.2015.

69 According to Riccardo Guastini, the constitutional interpretation is subject to implicit and explicit limits. The latter are "[...] those expressly established by the same constitutional document interpreted to the letter." GUASTINI, Riccardo. Interpretar y argumentar. Madrid: Centro de Estudios Políticos y Constitucionales, 2014. p. 320. (Trad. livre)
For Friedrich Müller, the reference of positivist literature to semantic limits fixed in the literality of the words that make up the normative text is illusory. However, this work takes the meaning of the limitation as explicit not in view of a supposed literal linguistic enunciation ("the Federative form of State"), but rather of its prediction in the normative text that opposes the limits derived from the norm itself (after its implementation). Cf. MÜLLER, Friedrich. Structuring theory of law. São Paulo: Revista dos Tribunais, 2008. p. 244 ff.

> It was the Constitutional Amendments nº 27/2000 and nº 42/2003 that amended the art. 76 of the Act of Transitional Constitutional Provisions, determined the untying of the revenues of taxes and social contributions of the Union and its application in the Single Account of the National Treasury, without this being incompatible with the rest of the constitutional text. In addition, it should be noted that the norm that determines the binding of the destination of the product of the collection of social contributions does not assume the character of a pedestrian clause, once not contemplated by art. 60, § 4º, of the Federal Constitution [...]. Thus, nothing prevents the Constitutional Amendment to deregulate prescribing, as did the Constitutional Amendments 27/200 e 42/2003[70].

That is to say, to verify that the exercise of residual competence is in accordance with the Constitution, the interpreter cannot limit himself to a "cold" reading of art. 60, § 4º, to verify that the binding of the collected resources is a clause that can be modified by the derived constituent power. In order to identify the programme of the rule in question, it is not sufficient to investigate the formal compatibility of the instrument exercising jurisdiction with the distribution scheme provided for in the Constitution (formal legitimacy) or its possible flexibility in the text of the constitution. It is also necessary for the interpreter to verify that his exercise is compatible with the higher (more generic) standard that guides that distribution, hence the applicability of the functional conformity criterion.

By providing for residual competence for both the tax institution and the institution of social contributions, the rule in question links the exercise of residual competence to the purpose of this important tax species - the financing of social security. The Constitution, however, did not want to limit the Union and granted it some of the power to impose taxes, in order to expand its tax area when necessary. Naturally, the competence for the imposition of new taxes aims at supplying the public coffers with unallocated revenue[71], consequently available to finance all other burdens of the Union. A simple scheme is therefore identified which corresponds to the teleological aspect of the standard which conditions the exercise of residual competence:

> (1) In view of the need to raise resources to finance social security expenditure, the Union should establish residual social contributions. Given that the income from the collection of contributions is linked to expenses, there is no need to consider the distribution of the revenue collected with the other federal entities, as the Constitution itself wants.
>
> (2) In view of the need to raise resources to finance general expenditure, as provided for in the tax budget, the Union should introduce residual taxes. In this case, it will obligatorily allocate 20% of the collected product to the States and the Federal District, pursuant to article 157, II, CR.

The reason behind this scheme is not, however, childish. It is about preserving the fiscal equalization among the federal entities, a requirement of democracy itself that does not tolerate the disregard to the texts of remissible norms the will of the people (the Federative form of State is example) by the very constitutive elements of the State[72] . By repeatedly instituting

70 BRASIL. Recurso Extraordinário nº 537.610/RS. Plenário. Rel. Ministro Cezar Peluso, DJ 18.12.2009.

71 For a reflection on the relation of the principle of non-allocation of tax revenue and the principle of equality, see: DERZI, Misabel Abreu Machado. The principle of non-allocation of tax revenue and distributive justice. HORVATH, Stephen; CONTI, Joseph Maurice; SCAFF, Fernando Facury (Org.). Financial, Economic and Tax Law: studies in honor of Regis Fernandes de Oliveira. São Paulo: Quartier Latin, 2014.

72 In this sense: MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 140.

social contributions, untying the proceeds of their collection, to make up the fiscal budget, the Union aims to eliminate the requirements set out in Article 154, I, CR.

In doing so, the fiscal constitution not only irremediably imbalances in its favor, but, by depriving the other units of the Federation of resources, limits their power of action, which consists in an attack (indirect) to its competence. It is for this reason that the use of residual jurisdiction as provided for in item 1 above (institution of social contributions) for the purposes contained in item 2 (financing of the Union's overheads) is incompatible with the 1988 Constitution, though apparent legitimacy. Again, it is necessary to invoke the teachings of Sacha Calmon who, recalling the adjunct between purpose and competence in the causal and final taxes, states:

> It makes no sense for the Constitution to prohibit the allocation of taxes to a body, fund, programme or expenditure (art. 167, IV) and to subject to severe limitations the exercise of residual competence to create new taxes and contributions, in addition to those listed in the Constitution, thus preserving the system of distribution of tax powers imposed by political persons and, at the same time, doctrine and jurisprudence, admitting, outside the constitutional system, the creation a la diable, of thousands of "intervening contributions" and social in a broad sense (outside the art. 195 of the CF) for the most varied purposes and which are, by the analysis of their generating facts, true taxes instituted by ordinary[73] laws.

In fact, an adequate understanding of the norm in question guides the interpreter in the sense that the choice by the use of one or other residual species is not pure and simple political prerogative of the Union. As we know, it is up to the constitutional text, in the Democratic States of Law, as is still the case in Brazil, to standardize the political[74] process. In the present case, the necessary adequacy of the purpose of the revenues that will be obtained with the taxable species that is intended to be established represents an unavoidable limit to the exercise of residual competence, from the perspective of functional correction. Otherwise, the Union would be allowed to change unilaterally, and by cross-cutting means, the pattern of revenue distribution imposed by the principle of federalism, which would consist of fraud against the Constitution, to the detriment of the federative pact itself.

6 CONCLUSION

As indicated in the literature review carried out in this work, the multiplicity of models of existing federal states recommends that federalism be understood more as a principle of political organization, that is, as a political type, than as a well-established ideal model. In this sense, as we have demonstrated, an adequate theory seems to be that of Daniel Elazar, for whom a federal system is a complex in network format, in which the elements are interconnected by interdependence arrangements.

73 COÊLHO, Sacha Calmon Navarro. Contributions to Brazilian law: its problems and solutions. In: DERZI, Misabel de Abreu Machado (org.). Separation of powers and effectiveness of the tax system. Belo Horizonte: Del Rey, 2010. p. 430.

74 MÜLLER, Friedrich. Métodos de trabalho no direito constitucional. Rio de Janeiro: Renovar, 2005. p. 140.

In the countries that adopt federalism, the question of public finances becomes urgent, because in order to guarantee the political autonomy of the subnational entities it is necessary to safeguard their financial autonomy. For no other reason is that the 1988 Constitution establishes, as a matter of fact, a thorough division of tax competences that is accompanied by a mechanism of vertical redistribution of revenue. In this arrangement, the Union had the possibility of instituting tributes other than those provided for in the original text of the Constitution, a phenomenon called "residual competence". This can be used to raise new taxes or contributions. In the case of residual taxes, the Constitution determines the distribution of the proceeds of their collection with the States (art. 157, II, CR), and there is no similar rule regarding residual social contributions. It is to say that the Constitution did not provide for the sharing of resources with new social contributions possibly created by the Union. The reason for this is in the nature of this tax, whose revenue is tied to certain constitutionally privileged purposes, in this case, the financing of social security. Despite the appearance of legitimacy, recognized even by the Federal Supreme Court on more than one occasion, the implementation of the fiscal constitution requires that an interpretation of residual jurisdiction be adopted according to the functional correction criterion.

As we have demonstrated in this work, in the federal states, the principle of functional correction, also called the command of functional conformity, requires that the result of interpretation be in accordance with the federal structure, that is, with the constitutional division of competences. On the basis of Friedrich Müller, it can be said that this principle transposes federalism to occupy space in the very methodology of constructing constitutional norms. It is to say that by virtue of the criterion of functional correction, federalism becomes relevant to the enforcer of law in relation to the method of approach of the constitutional text itself.

This twofold influence of federalism in the construction of the norm that creates residual competence obliges one to observe its internal limits. Thus, we conclude that the exercise of residual competence cannot offend the fiscal equalization, an unspeakable component of the state Federative form in Brazil. For this reason, it is not enough to check only the formal compliance - whether from the perspective of revenue untying, whether in the creation of new social contributions - both facts should be evaluated in the light of the norm that guides the distribution of competence itself to the entities of the Brazilian Federation.

Dessarte, as demonstrated in this work, can not ignore that, by providing for two different hypotheses of exercise of residual jurisdiction, the Constitution binds the choice of each of the hypotheses to the destination that is intended to give to the resources that will be collected. If the intention is to obtain a new source of revenue for the financing of general expenditure, the Union should use the residual competence provided for in Article 154, I, Cor. In this case, it is necessary to distribute the collected product with the States, in accordance with Art. 157, II, CR. On the other hand, if the intention is to obtain income to finance social security, the Union may use the residual jurisdiction provided for in Article 194§ 4, Cor, when it will be exempted from any obligation relating to the allocation of resources. The conclusion drawn from an interpretation which conforms to the commandment of functional correction is that the option of creating one or other residual species is not at the sole discretion of the Union. The analysis of the functional correction principle in the light of Brazilian fiscal federalism showed that the adequacy of the purpose of the revenues received with the taxable species to be instituted represents an objective limit to the exercise of residual competence.

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THE NEW CHALLENGES OF TAX ADVOCACY AND FISCAL ARBITRATION

OS NOVOS DESAFIOS DA ADVOCACIA TRIBUTÁRIA E A ARBITRAGEM FISCAL EM DESTAQUE

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ABSTRACT

This article makes a study about the new challenges faced by tax law in the context of the changing demands for the reality of the 21st century. There is an exhaustion of the capacity of the Judiciary to meet the needs of society, especially with regard to conflicts of a fiscal nature. Thus, tax arbitration appears as an adequate mechanism, but it is questioned whether the legal profession is already prepared for this reality, as well as the role of the lawyer in this context. Another question to be faced is the possibility of implementing tax arbitration in the Brazilian legal system. Based on a deductive research method, with exploratory, bibliographic and qualitative techniques, it is concluded that the lack of effectiveness of the existing means for resolving conflicts, especially those of a tax nature, reveals great legal uncertainty, and the law must be prepared for this new reality that presents itself, in the performance of arbitration cases.

Keywords: Tax advocacy. tax arbitration. efficiency.

RESUMO

O presente artigo faz um estudo sobre os novos desafios enfrentados pela advocacia tributária no contexto das mudanças demandas pela realidade do século XXI. Vivencia-se o esgotamento da capacidade do poder Judiciário em atender aos anseios da sociedade, em especial no que tange aos conflitos de natureza fiscal. Assim, a arbitragem fiscal surge como mecanismo adequado, porém questiona-se se a advocacia já está preparada para essa realidade, bem como o papel do advogado nesse contexto. Outro questionamento a ser enfrentado reside na possibilidade de implementação da arbitragem fiscal no ordenamento jurídico brasileiro. A partir de método de pesquisa dedutivo, com técnica exploratória, bibliográfica e qualitativa, conclui-se que a falta de efetividade dos meios existentes para a solução de conflitos, em especial os de natureza tributária, revela grande insegurança jurídica, devendo a advocacia estar preparada para essa nova realidade que se apresenta, na atuação de lides arbitrais.

Palavras-chave: *Advocacia tributária. arbitragem fiscal. eficiência.*

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1. INTRODUCTION

The globalized world, the informational society and the advancement of technology present themselves as impacting factors for the structural modification of the oldest known professions, being the advocacy inserted in this context of paradigm rupture, 21st century.

We experience in Brazil, with special emphasis, an extremely conflicting society, that is, the most diverse legal relations that are established in the social environment tend to turn into disputes that end up reflecting in the significant maximization of the role of the Judiciary, who cannot perform his mister efficiently and quickly, for numerous reasons.

The fact is that the professional of the law, inserted in this context, goes for determinant moment of reinvention, facing new challenges, being the main one the break with pattern of acting fundamentally litigious, governed by the sole and exclusive conduct of the dispute already brought before the courts.

Among the most diverse legal relationships materialized in the social sphere, the present study highlights the tax legal relationship between State and taxpayer, by nature, conflictual and unequal.

From an exploratory, bibliographic and qualitative research, it is intended to outline the lack of effectiveness of the existing means for the solution of conflicts, in particular those of a tax nature, in a framework of great legal uncertainty and gradual and decisive departure from the ideal of justice embodied by the current constitutional text.

Advocating the need to move towards legislative regulation of arbitration in tax matters, by reducing the bureaucracy of the system as a whole, making it more efficient and legally secure, and the contribution to greater effectiveness in the receipt of the gigantic liability existing in relation to the collection of taxes, especially by the Federal Union, it is necessary to position the advocacy of this context of de-judicialization of conflicts, with the challenges of an early century that will be marked as responsible for the profound change in the perspective of acting of lawyers, whether private or public.

2. TAX LAW: NEW CHALLENGES OF THE 21ST CENTURY. XXI

The law as a whole and more specifically the tax has been undergoing significant changes in recent years, this due to numerous factors, among which highlightthe exhaustion of the Judiciary's capacity to resolve tax disputes effectively. Thus, it is essential to go into the aspects that involve this paradigmatic change.

2.1 EXHAUSTION OF THE CAPACITY OF THE JUDICIARY TO RESOLVE TAX DISPUTES EFFECTIVELY

The complete exhaustion of the capacity of the Brazilian Judiciary to effectively resolve conflicts is a fact that has a definite impact on tax law, making the professionals who are involved need to think ahead, creating new expertise to fit into advocacy models that are more efficient and bring more desirable returns, both to the client and to the professional.

identify the judiciary as being the only one capable of, through the process and the consequent terminative decisions, offering reliable and legitimate responses to the conflicts arising from the juridical relations impregnated in the daily life of the natural and juridical persons, is clear misconception. Likewise, the advocacy based on this model is bound to face serious difficulties. The institutional crisis experienced by the Judiciary Power in recent times cannot be disregarded. In this sense, this crisis mentioned, of effectiveness mainly, represents a certain weakness of the constitutional state system, but it is not possible to consider the existence of perfect models, being the capacity of the judiciary to make justice true test of stability (VECCHIO, 2020, p. 22).

The consolidation of the idea that "the longer the procedure, with the greater number of resources and opportunities for the parties to manifest, the fairer the final decision would be" (1999, p. 79) was responsible for the gradual increase in state litigiousness, which continues to progress effectively.

To face the scenario of expansion of litigiousness and consequent exhaustion of the Judiciary Branch, it is possible to cite some significant advances, such as the edition of Law 9.099/95 (Law of Special Courts), which provides for conciliation; Law 9.307/96, which deals with arbitration; Resolution 125/10 of the CNJ, regulating the National Judicial Policy of adequate treatment of conflicts of interest within the Judiciary Branch; Law 13.140/15, which provides for the composition of conflicts, including, within the scope of the Public Administration itself; and the 2015 Civil Procedure Code itself (Law 13.105/15 - CPC/15), which mentions arbitration, conciliation and mediation already in the initial chapter, which deals with the fundamental standards of civil procedure.

Even so, the congestion rate of the judiciary is still high to the point of compromising the quality of jurisdictional provision - 73% (seventy-three percent), according to the latest Justice Report in 2017: base year 2016, prepared by the CNJ (CNJ, 2017).

The issues are even more serious when they are based on the conflicts between the tax authorities and the taxpayer. Regarding tax conflicts, they usually reside in the different legal qualification given to the facts or even in the different interpretations given to a given legal provision, since tax law is governed by the principle of legality.

The "culture of litigation" is inserted within the perspective of the gradual loss of the capacity of consensual solution of the conflicts arising in society. If in the context of private relations, in which the autonomy of the will and the rule of property availability prevail, this scenario is evident, even more serious is the situation when the Public Administration is involved in the conflict, supporting more complex analyses such as that about the supremacy or unavailability of the public interest.

The overcoming of this "culture of litigation" necessarily involves the modification of the legal mentality of all those who are part of the legal system, including, and mainly, the lawyers, inserted in a primordial position regarding the encouragement of consensuality

It is in this space of growing consensus that arbitration appears as an appropriate means for the solution of disputes involving the Public Administration, emphasizing the idea of the multiport system. The reform itself in the civil procedural legislation that took place with the promulgation of the current Code of Civil Procedure marks the definitive evolution in the national understanding about the appropriate means for conflict resolution.

The citizen would have several alternatives available to resolve a conflict. The objective of the multiport system is to seek ways of resolving conflicts that replace the traditional judicial system of dispute resolution or that these new forms can coexist with the state judicial tutelage (BRANDÃO, 2014, p. 24).

It may be noted that, in the interest of the truth, the choice of alternative routes to the classical judicial process marks a real break to the historical cultural pattern, Therefore, it is fundamental that there is a massification of these ideas in order to achieve a high degree of search by means that can solve the disputes in a more appropriate and effective way.

The high congestion rate of the Judiciary Branch, together with its deficient structure, makes evident the serious crisis that plagues the bowels of the judicious bodies. What is most worrying is that the Public Administration, especially at the federal level, is most responsible for the high number of cases under way.

The change of this litigiousness paradigm does not mean disregarding the important role played by the Judiciary Power, which should guide its decisions always "in the practical and effective result in the resolution of the social conflict, and not only in the mere assertion of winner and loser, because this can cause the fomentation of litigiousness" (MACEI; VOSGERAU; ANDRETTA, 2020, p. 14), which in itself goes against those that the Federal Constitution itself has, by establishing as a fundamental objective of the Republic the construction of a free, just society of solidarity.

Moreover, it is possible to notice that the concentration of power in the hands of the judiciary is not, in its essence, positive for society. On the subject, Martonio Mont'Alverne Barreto Lima and Evaldo Ferreira Acioly Filho (2019, p. 96) state:

> This concentration of power in the hands of the judiciary is dangerous, because from the analysis of Brazilian political history one perceives an attempt to concentrate and fortify the controller and interpreter since the time of the Empire. I am talking about the Moderating Power that, like the Judiciary, posed as a neutral third, when, in fact, it hid its conservative character. However, when the powers of judges who are not normally elected are extended, the constitutional jurisdiction also has a conservative aspect, since the judiciary has a monopoly on the morality and public order of a State, determining what a constitution is or is not. This monopoly also diverges from popular sovereignty, because a state power - Judiciary - is limited, excluding popular participation, breaking with the democratic aspect of the constitution.

Thus, it is necessary that the lawyer is placed in front of this scenario that presents itself. The 21st-century lawyer is not, and could not be, the lawyer with the litigation mentality.

2.2 PREVENTIVE, OUT-OF-COURT OR BUSINESS ADVOCACY

The historical and relevanmuito activity of advocacy, in Brazil regulated by Law n. 8.906/94 (Statute of the OAB), as well as by the General Regulation, Code of Ethics and Discipline and Provisions of the Federal Council, needs to be rethought. As a matter of fact, in recent years this process of reflection and debate on the real role of the lawyer comes without deepening and it is already possible to identify a stage of profound changes.

In spite of the predominantly private activity, there is no way to refute the important role that the lawyer assumes before society, since it is through it that he in relation to the Judiciary Power is materialized. In addition, the Federal Constitution itself, in its art. 133, tries to raise the advocacy to a level not belonging to any other liberal profession, once consider the lawyer as being indispensable to the administration of Justice.

Alongside the prerogatives, lawyers also have well-placed responsibilities, such as the tireless defense of the Constitution, the democratic rule of law, human rights and social justice. In these terms, Art. 44, I of the Statute of the Brazilian Bar Association is recommended.

The procedural legislation in force in the country assigns to the lawyer, as a rule, the exclusivity in what concerns the postulatory capacity, that is, only the lawyer, regularly enrolled in the tables of the Bar of Brazil, after passing in examination of technical aptitude, may stand trial. Thus, the domain of the ability to postulate is inherent to the activity itself, and, as a rule, this occurs within the scope of the existence of a conflict between two or more parties, a conflict that will be brought to the Judiciary for there to be adequate judicial provision.

It is almost naturally verifiable the closeness that the legal activity possesses with the constant management of conflicts, in which although this management is historically summed up to the defense in court with a view to achieving a judicial decision that favors the constituent.

Despite this contextualization, it is necessary to understand that in the 21st century there is no longer the same space for the professional lawyer who simply postulates in court, that is, the one who litigates. Historically the "good lawyer" was the one considered "good fight", idea that has been gradually emptied, as people now seek professional who can solve the concrete problem without the judicialization of the issue, preferably. The lawyer, in the current society, is concerned to find rational solutions to conflicts even before they reach the Judiciary, and this is exactly where the emphasis is placed on negotiating, extrajudicial or preventive advocacy.

On this preventive role of law, Paulo Lôbo (2009, p. 20) states that "one of the great evils of legal training in Brazil is the predominant destination of legal courses to litigation". Such a conclusion seems quite logical, since the collapsing Judiciary Power shows itself to be completely depleted and unable to deliver agile and efficient responses to society. In this perspective, the author adds that:

> [...] the most dynamic area of the legal professions today is extrajudicial action, in several dimensions. We can view them in two ways: as preventive activities and as extrajudicial conflict resolution activities. In the first case, one tries to avoid them. no second, seek different means of judicial process to resolve conflicts already installed or with potential litigation; this is the field of mediations, of individual or collective negotiations, da arbitragem [...]

There is no way to glimpse reality other than the one pictured above. The big question seems to be to locate the practice of law in this scenario of paradigm shift. In this regard, Paulo Lôbo (2009, p. 20) continues:

> [...] the lawyer is a specialized professional, whose advice or advice is essential, regardless of legal commandment, by the increasing demand for their services coming from people, companies, entities, social groups and popular movements. This vast professional field requires skills that legal courses should consider, because the trend is the increasing deregulation of their activities.

This context makes that professional lawyers need to complement their training with specific knowledge that enables them to act on these new fronts, first avoiding that conflicts occur and, being impossible the prevention, finding ways to resolve these disputes outside the traditional judicial framework.

At this point, it is questioned, for example, if the law is prepared and adequately qualified to act with negotiation, mediation and arbitration. The safest answer tends to be negative.

There is no way to talk about seeking adequate means to resolve conflicts, especially those of a fiscal nature, if all those who act in the management of these conflicts are not qualified for the new procedural trends. What is defended in this work is the implementation of arbitration in tax matters, as will be further deepened, but this reality implies a new advocacy, which effectively knows how to act outside the judicial field of conflict resolution.

2.3. FINDING ADEQUATE MEANS TO RESOLVE TAX DISPUTES

Ultimately and simply, the lawyer who instigates the litigation and in that one working aspect is doomed to create a hostile and repulsive environment towards his own clients, since no one can effectively win by prosecuting the judiciary for years and years, without an effective and adequate solution.

In the context of the exhaustion of the judiciary, there is a movement of significant legislative reforms, implementing consensual means of conflict resolution, with the ability to offer society new, sometimes much more effective, forms, to get as close as possible to what is meant about the pacification of conflicts (SILVA; SANTOS; SILVA, 2020).

By examining the picture of state inefficiency portrayed with emphasis on the solutions offered by the judiciary when trying to resolve conflicts in the tax sphere, it is noted that the use of other appropriate mechanisms to respond to this type of demand is not only necessary, but should be pursued by legal operators, provided that its possibility of harmonious coexistence with the established Brazilian legal system is duly substantiated.

Paulo Eduardo Alves da Silva (2012, p. 45) explains that:

> Each society designs the framework of conflict resolution methods according to its expectations of what is or is not formal, what is or is not safe, what is or is not violent, and, above all, what is or is not fair. And in the last century, contemporary societies have demonstrated a state of crisis with their concepts of form, security, violence and justice. Of course, this compromises the hegemony of jurisdiction and of the judicial process and opens the way for the resurgence of alternative methods of settlement of controversies.

More than an alternative to the traditional jurisdictional surrender enforced by the Judiciary Power, the search for mechanisms that prove to be adequate to the specificities of the controversies arising in contemporaneity is shown to be a necessity, as well as the necessary adaptation of all who surround this reality.

It is based that "the search for a parallel system to collaborate with the official model is not only timely, but essential" (PINHO; PAUMGARTTEN, 2016, p. 27)mainly because the expansion of the number of methods made available to the parties implies a greater probability of achieving a result appropriate to the type of conflict that needs to be resolved, bringing interesting results, including in the economic field, both the parties and the lawyers involved.

Among the main appropriate mechanisms in the legal field are mediation, conciliation and arbitration, the first two being identified as consensual methods in the self-conmpositive form, while arbitration is characterised by heterocomposition, consensual.

Although there is a long way to go, data from the International Chamber of Commerce (CCI) point out that, in 2016, the country was considered the 5th (fifth) in the world that most uses arbitration for conflict resolution, behind countries like the United States of America and France[3].

Another important fact is that provided by the Arbitration and Mediation Center of the Brazil Canada Chamber of Commerce (CAM-CCBC), a pioneer in Brazil in the field of arbitration, citing that statistics point out that there has been a gradual increase in the number of arbitrations performed, especially from 2013 onwards.

Everything advocated here is in line with the constitutional principle of efficiency in public administration, which at the same time presupposes state modernization, including with regard to the regulation and implementation of adequate means for resolving disputes, especially those of a tax nature (OLIVEIRA; OLIVEIRA; CARMO, 2019).

What is advocated here is in the field of the need for adaptation and adequacy of advocacy to this new scenario that is presented, otherwise these appropriate methods of conflict resolution, especially in the fiscal area, will remain only as formal parameters, without any degree of effectiveness.

3 TAX ARBITRATION: A NEW PERSPECTIVE

Tax arbitration presents itself as an interesting possibility within the perspective of an adequate solution of tax conflicts, reason why it is necessary to deepen the studies on some fundamental aspects that permeate the institute.

3 Information available at: https://www.jota.info/justica/brasil-e-o-5o-pais-que-mais-utiliza-arbitragem-nomundo-19092017.

3.1. SOME ASSUMPTIONS ABOUT ARBITRATION

Arbitration can be fully validated as a legal technology capable of solving some problems faced, primarily in tax matters, collaborating decisively to solve several problems of effectiveness experienced today, However, for this to be effective, it is necessary to establish a new legal culture about the dispute, involving all the actors who work in the solution of conflicts.

It is evident that the classic view of litigious process is due to the fact that the adequate and just resolution of the disputed object is a function predominantly exercised by the organs of the Judiciary, with the clear objective of social pacification, that is, this state power has safeguarded the exclusive exercise of judicial protection.

Despite the existence of this classic vision of exclusivity of jurisdictional guardianship, the existence of a feeling of renewal in Brazilian procedural law is currently perceived. For Jonathan Vita (2006, p. 205), we are experiencing this renewal wave, in which the search for other appropriate means to resolve conflicts flows in the increasingly effective valorization of mechanisms such as conciliation, mediation and arbitration. It seems obvious that advocacy cannot and should not be alien to this real paradigm shift.

As mentioned, within this perspective of renewal comes the arbitration, considered heterocompositive means of conflict resolution, since there is between the parties the uniformization of a consensual understanding, subjecting both to the solution presented by a third (arbitrator or arbitration court) which is outside the context of the Judiciary Branch, it is lawful to speak of a clear waiver of state jurisdiction when accepting an arbitration clause.

The arbitration procedure presupposes the existence of available rights, which is a point of dispute when it comes to arbitration in tax matters. The fact is that, if there is the availability in relation to the state jurisdiction, which occurs through the arbitral commitment, the Judiciary Power will not be able to intervene, except at a time after the arbitral award, in case of any defect that completely annuls the procedure itself, and not the substance of the decision in the arbitral award.

The conceptual treatment given to arbitration by the doctrine, in general, can be systematized by the words of Francisco José Cahali (2015, p. 117), for whom arbitration is placed, alongside the state jurisdiction, as a heterocompositive conflict resolution mechanism, where the parties concerned, having full and agreed capacity, establish that a third party, or even a collegiate party, shall have the power to resolve the dispute. It is important to note, in this context, that the settlement of the conflict takes place through the arbitration ruling, which will have the same effectiveness as a judicial ruling.

There are those who advocate the thesis that in arbitration there is a kind of "privatization of justice", which in fact is not acceptable. In this respect, Beraldo (2014, p. 25), understands that arbitration cannot be seen as the "judicious rise of neoliberalism triumphant", thus refuting the idea of "privatization of justice"simply because it has been the object of wide expansion in other countries for decades.

It is possible to cite numerous benefits of the use of arbitration, in particular the production of effectively technical decisions. This aspect should be highly valued when talking about tax arbitration, since tax disputes often boil down to disagreement on some eminently

technical aspect between tax and taxpayer, such as the classification of products for the purpose of taxation.

When faced with complex demands, involving technical issues over which the Judiciary Power does not have full control, it is possible to understand how far the classical jurisdictional process proves to be exhausted, unable to provide solutions with the minimum of effectiveness sought by the court

On the legal nature of arbitration, Carmona (1993, p. 25) states that: "there seems to be a universal tendency to broaden the concept of jurisdiction, as it increases the degree of participation and popular interest in the administration of justice, revealing one of the fundamental scopes of jurisdiction, the political". The need for this expansion is evident, thus giving priority to the teleological element of jurisdictional activity.

In spite of the autonomy of the will as a fundamental norm, there is in the foreign legal systems the provision of situations in which the submission to arbitration is mandatory, as occurs in the Constitution of the Portuguese Republic, which expressly mentions the "arbitral courts" in his art. 209[4]. Another example cited by the indoctrinator is Costa Rica, where there is an obligation to participate in the arbitration in matters related to social security.

The idea of autonomy of the will as a "propelling spring" of arbitration in all its aspects is consolidated, revealing from the faculty that the parties have in a given business involving available property rights to adopt this optional path of conflict resolution, until the arbitral procedure is developed when, for example, arbitrators are appointed and chosen. The fact is that it is perfectly possible to extract from Law 9,307/96 several articles that indicate the close relationship of arbitration with the autonomy of the will, which will be analyzed in a more detailed way.

3.2. NEED TO OVERCOME PARADIGMS

Based on some premises, it is necessary to advance the discussions on the possibility of using arbitration to resolve conflicts involving the interests of the Public Administration, from the very interpretation of Law 13.129/15, which amended Larb so that it would be possible to defend the use of this appropriate means of resolving tax conflicts.

In Brazil there is great resistance to tax arbitration, even though it is possible to verify that the institute is widely disseminated in several countries, such as in Portugal, for example. Hugo de Brito Machado (2008, p. 130) defends the impossibility of the arbitral solution to tax deals from the defense that the right to collect taxes, inherent to the Public Treasury, would be unavailable. It is clear that the point of discussion revolves around the (in) availability of the law to legitimize the use of the arbitration procedure. Despite this, the institute is not new.

4 "Art. 209 Categories of courts 1. In addition to the Constitutional Court, there are the following categories of courts: a) the Supreme Court of Justice and the first and second instance judicial courts; b) The Supreme Administrative Court and other administrative and fiscal courts; c) The Court of Auditors. 2. There may be maritime tribunals, arbitral tribunals and courts of peace. 3. The law shall determine the cases in which and the ways in which the courts referred to in the preceding paragraphs may be set up, separately or jointly, in conflict courts. 4. Without prejudice to the provisions on military courts, the existence of courts with exclusive jurisdiction for the prosecution of certain categories of crime shall be prohibited."

The New Consolidation of the Customs and Rent Bureau Laws, approved on April 13, 1894, already provided for the institution of arbitration in tax matters, mainly for the judgment of topics relevant to customs areas (SEIXAS FILHO, 2008, p. 221).

In the context of the tax legal relationship the main state need is the satisfaction of the tax credit, since only in this way will the State have the financial capacity to accomplish what is proposed, in accordance with the fundamental objectives set out in CF/88[5] in its art. 3rd. This provision is the cornerstone of all tax activity of the State and must be viewed with such a view to taxation assuming its real social function.

For the purpose of defending tax liability, two are the important elements that can be extracted from these basic premises related to the tax legal relationship. The first is the pecuniary character of the tribute, from the very legal concept of tribute brought in art. 3o do (CTN)[6] (BRASIL, 1966), for whom tribute is compulsory pecuniary benefit, therefore eminently patrimonial. The second is the fact that the collection takes place through an administrative activity fully linked, which does not preclude the possibility of the Government to submit to arbitration the controversies that have arisen, seeking a solution different from the classical state jurisdiction.

According to Casella and Escobar (2016, p. 746), the international doctrine divides the categories of tax arbitration as: Tax disputes arising from business relations; Agreements to avoid double taxation; Tax disputes between a foreign investor and the invested country. The authors understand that such division takes into account only the merit and scope of the controversies. Thus, they propose a classification that is considered to be extremely relevant to what is proposed here, taking into account the time of the dispute, the merit and its scope, which is: a) Regarding the time: it would be divided into preliminary and preventive to the collection of the tax credit; or subsequent to the creation of the tax credit; b) Regarding the merit: it is divided in direct - analyzing directly the tax issues; or indirect - when the arbitral reports arise a new tax legal fact (generating fact); c) As to the scope: it is divided into internal - when it occurs within the internal Federative structure or between Administration and national taxpayers; state international - involving agreements to avoid double taxation; or mixed international - when involving a state and one among foreign private.

The authors' proposal summarizes the forms that tax arbitration can present, both in the international and internal. It is interesting to observe in this classification the possibility of arbitration having space before the definitive constitution of the tax credit, through the launch, which, according to Priscila Mendonça (2014, p. 115) would promote a growing dialogue between the tax authorities and the taxpayer.

This is a relevant position in that the high litigiousness impregnated in the tax legal relationship makes Fisco and taxpayer increasingly dialogue less, that is, the relationship is permeated on the one hand by authoritarianism and on the other by the incessant flight of taxation.

5 "Art. 3º They are fundamental objectives of the Federative Republic of Brazil: I - to build a free, fair and solidary society; II - to guarantee national development; III - to eradicate poverty and marginalization and to reduce social and regional inequalities; IV - promote the good of all, without prejudices of origin, race, sex, color, age and any other forms of discrimination."

6 "Art. 3º Tax is any compulsory pecuniary benefit, in currency or whose value can be expressed in it, that does not constitute a sanction of unlawful act, established by law and charged through administrative activity fully linked."

The question seems to be the breaking of paradigms so that this heterocompositive means of conflict resolution can be implemented in Brazil, what is defended in this thesis as being something impacting to collaborate with the overcoming of the serious economic crisis that plagues the country in recent years, predominantly fiscal base.

In general, the discussions about the possibility or not of the use of arbitration in tax disputes rest on the question of the interpretation about the availability or not of the tax credit, which will be analyzed in detail below. It is worth noting that this credit is the one resulting from the tax legal relationship and represents the subjective right of the State to collect the proceeds of tax taxation.

Even in the face of unfavorable arguments, it is believed that the use of this means to resolve tax conflicts is a real necessity. Portuguese professor Diogo Leite de Campos (2005, p. 50) argues:

> The fair interrelationship between the citizen and the State at the level of taxes, with the "free" and spontaneous assumption by that of its tax obligations - as a principle and starting point - involves the free assumption of the regulation of conflicts between creditor and debtor. It passes, in other words, by the faculty of recourse to arbitration. With all the advantages it brings with regard to the certainty and security of law. In particular: the choice of the judges by the parties, from among the most knowledgeable on the subject; increased thoroughness and depth of the decisions; more careful "personalisation" of the decision in terms of further consideration of the facts and the law, without regard to the deforming jurisprudences of the specific case; greater predictability of the justice of the decision - hence waiver of unfeasible claims; etc.

It should be noted that the advantages of tax arbitration rest on aspects related to the certainty and security of the law itself, two fundamental aspects for the construction of a more rational and fair national tax system.

It is important to highlight that the Bill 4.257, of August 6, 2019 (BRAZIL, 2019), of Senator Antonio Anastasia (PSDB - MG), proposing the modification of the Law on Tax Executions (Law 6.830, of September 22, 1980) and establishing two extremely important legal figures: administrative tax execution and tax arbitration.

According to Saulo Gonçalves Santos and Rômulo Guilherme Leitão (2019, p. 471), "with the expansion of alternative dispute resolution mechanisms, a multiport system of dispute management is materialized"the participation of the Public Administration in arbitration proceedings is imperative.

Thus, defends Camila Siqueira Xavier, that "the arbitration signed through the arbitration commitment represents an appropriate method for the resolution of tax charges (complementary to judicial litigation and administrative litigation)", thus considering a "third way of challenging the tax credit already constituted, besides bringing effectiveness in the prevention of disputes, through the arbitration clause previously signed" (2019, p. 32).

In fact, tax arbitration has the important function of presenting itself as a suitable and complementary way to resolve certain fiscal conflicts, operating a kind of deregulation of demands, reason why the project should be debated in the National Congress with the urgency that the theme demands, since possible contributions to solve the fiscal crisis of the State is a major issue in the national development agenda.

4. THE ROLE OF COUNSEL IN ARBITRATION PROCEEDINGS

As already mentioned, the law is going through a historic moment of profound transformations, driven by the exhaustion of the judiciary and the need to assume a leading role in a system of prevention of litigation, or even find an appropriate solution so that disputes can be effectively resolved.

Among the appropriate dispute settlement mechanisms, arbitration is an important instrument, This raises doubts about the ways in which lawyers can place themselves as professionals whose participation is essential for an effective result.

Initially, it should be mentioned that the Arbitration Law itself (Law n. 9.307/96) (BRAZIL, 1996) makes it optional to Poststulation before an arbitration process through a lawyer, as it provides:

> Art. 21. The arbitration shall be in accordance with the procedure established by the parties to the arbitration agreement, which may refer to the rules of an institutional arbitration body or specialised entity, and may be delegated to the arbitrator himself or to the arbitral tribunal, regulate the procedure.
>
> § 1 If there is no stipulation concerning the procedure, it shall be for the arbitrator or the arbitral tribunal to discipline him.
>
> § 2º The principles of the adversarial, of the equality of the parties, of the impartiality of the arbitrator and of his free will always be respected in the arbitration procedure.
>
> § 3º The parties may apply through a lawyer, always respecting the power to designate who represents or assists in the arbitration proceedings.
>
> § It will be up to the arbitrator or to the arbitral tribunal, at the beginning of the procedure, to attempt the conciliation of the parties, applying, as far as possible, Art. 28 of this Law.

In spite of this power being clearly observed, there is no need to think about excluding the professional lawyer from the process of constitution and development of the arbitral solution.

It is necessary to remember that arbitration is a heterocompositive solution of conflicts, but of clear consensus basis, in which the choice takes place through the Arbitration Convention, whether judicial or extrajudicial. In both situations, the participation of the lawyer is fundamental, even because no one will venture legally without the advice and accompaniment of a trained professional.

The absence of lawyers in the arbitration solution may even remove the possibility of transforming the speed and efficiency of the out-of-court solution into a problem that may in the future fall back into the traditional state jurisdictional activity, That is, it is a price for which the parties are certainly not willing to pay.

It should be noted that in the arbitration process the lawyer appears as a truly indispensable figure, but a professional who has new parameters of professional performance, dispensing with the aggressiveness often required in traditional processes and understanding that there is tacit renunciation of the instruments of procrastination that are carried out when acting before the Judicial Power. In arbitration, what both parties want is for the conflict to be resolved as efficiently and quickly as possible, with lawyers imbued with this objective.

The first fear in the advocacy resulting from the dissemination of arbitration as an appropriate means of resolving disputes was the exclusion of professionals enrolled in the Bar Association of Brazil, this before the alleged faculty indicated by the Arbitration Law.

In fact, what we see at the moment is the opening of new possibilities of professional activity, within the perspective of gradual selective abandonment of old practices in law. The professional puts himself at a decisive moment when he needs to adapt to a very clear reality: the litigation traditionally placed in the orbit of the Judiciary Power is no longer interesting to all the actors involved.

In addition, it should be borne in mind that arbitration itself goes through an expansion process in Brazil. As stated above, it is essential that it be incorporated, for example, into the tax dispute settlement system. Thus, in the orbit of tax law, a new space of action will arise for those who show themselves open to this new reality, which will undoubtedly come.

Tax arbitration in Brazil seems to be on the verge of legislative regulation and for this reason it will need a change of attitude the conception by the professionals of the law that militate in this very specific area. In this perspective, the lawyer should place himself as a great facilitator, giving the necessary security so that the parties to the conflict can seek out-of-court solutions, whether consensual or not.

Public law itself has been undergoing, in a very short time, a profound change in the form of action, this with the incorporation of the mechanisms of consensual dispute resolution, as well as the extrajudicial forms already implemented in the public administration.

Thus, there is no doubt about the importance and indispensability of the participation of the lawyer in the construction of arbitration as an appropriate mechanism for resolving conflicts, in which the rapid and effective solution of disputes is sought.

5. CONCLUSION

From all that has been studied throughout the present work, it is possible to conclude that the globalized world, the informational society and the advancement of technology are based on an environment that calls for the reinvention of some professions, with advocacy being an integral part of this context.

In the 21st century, the challenges imposed on lawyers, especially in the tax field, are many, especially in the context of the complete exhaustion of the capacity of the judiciary to efficiently resolve the conflicts brought to the classic idea of state jurisdiction.

In this context, it is necessary that the professional of the law realizes the need of gradual abandonment to the exclusive ideal of litigiousness, advancing on a debate related to the consultative and preventive advocacy, to the issues of consensual solution of the conflicts, or even out-of-court mechanisms, such as arbitration.

It is concluded by the full possibility of legislative regulation of tax arbitration in Brazil, breaking classic paradigms about the supremacy of the public interest and unavailability of tax credit.

Thus, a perspective of action arises for the lawyer who militates in this field, and it should be emphasized the importance of the participation of this professional in the arbitration procedure, thus not having the risk of undervaluing the advocacy.

Finally, it is concluded that perhaps the great challenge of advocacy in the 21st century is to incorporate the importance and indispensability of the participation of skilled professionals in the construction of arbitration as an appropriate conflict resolution mechanism, in the search for a speedy and effective settlement of disputes, especially those of a fiscal nature.

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TAX COLLECTION AND SOCIAL JUSTICE: THE INEFFICIENCY OF TAX DEBIT INSTALLMENT FOR SMALL COMPANIES

ARRECADAÇÃO TRIBUTÁRIA E JUSTIÇA SOCIAL: A INEFICIÊNCIA DO PARCELAMENTO DE DÉBITOS TRIBUTÁRIOS PARA AS PEQUENAS EMPRESAS

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ABSTRACT

Considering the large number of installment programs implemented in recent years, this research has the following problem: the installment of debts granted to Simples Nacional companies by Complementary Law No. 155/2016 is an efficient tool to deal with small companies default and expand public revenue? The main objective of this research is to analyze the data related to the installment provided for in Complementary Law No. 155/2016 to identify whether the taxpayer has complied with the legal provisions, expanding tax collection and as specific objectives, to identify the legal treatment of the tax installment and the its impacts; examine the tax system of Simples Nacional and its installments contained in Complementary Law No. 155/2016; and, finally, to analyze the effectiveness of the subdivision of Simples Nacional in public collection. Using the deductive method and secondary documentary data, a descriptive research and a quantitative approach, it was found that the expressive majority of the installments was excluded from the program, with the minority being paid in installments or still maintaining their regular status, a result that runs counter to the main objectives of installment payments, settling arrears and regularizing taxpayers. Thus, it is concluded that the studied parceling did not reach the objectives for which it was created, pointing to its inefficiency as a Public Administration initiative.

Keywords: Tax installment payments. Simples Nacional. Tax collection. Complementary Law n ° 155/2016. Realization of social rights.

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RESUMO

Considerando o grande número de programas de parcelamentos instituídos nos últimos anos, esta pesquisa tem o seguinte problema: o parcelamento de débitos concedido às empresas do Simples Nacional pela Lei Complementar n° 155/2016 é uma ferramenta eficiente para lidar com a inadimplência das empresas de pequeno porte e ampliar a receita pública? O objetivo principal desta pesquisa é analisar os dados referentes ao parcelamento previsto na Lei Complementar nº 155/2016 para identificar se o contribuinte tem cumprido com as prestações legais, ampliando a arrecadação tributária e como objetivos específicos, identificar o tratamento jurídico do parcelamento tributário e os seus reflexos; examinar o sistema tributário do Simples Nacional e o seu parcelamento contido na Lei Complementar nº 155/2016; e, por fim, analisar a efetividade do parcelamento do Simples Nacional na arrecadação pública. Utilizando do método dedutivo e de dados documentais secundários, de uma pesquisa descritiva e uma abordagem quantitativa, constatou-se que a maioria expressiva dos parcelamentos foi excluída do programa, sendo minoria os parcelamentos integralmente pagos ou que ainda mantêm sua situação regular, resultado este que contraria os objetivos principais do parcelamento, de quitação das dívidas atrasadas e de regularização dos contribuintes. Desta forma, conclui-se que o parcelamento estudado não atingiu os objetivos para os quais foi criado, apontando para sua ineficiência como iniciativa da Administração Pública.

Palavras chave: *Parcelamento tributário. Simples Nacional. Arrecadação tributária. Lei Complementar n° 155/2016. Concretização dos direitos sociais.*

INTRODUCTION

The Federal Constitution provides for the possibility of differentiated treatment for micro and small enterprises. Following this permission, the Complementary Law n° 123/2006 that instituted the National Statute of Microenterprise and Small Business was published. Recently, this status of small enterprises was amended by Complementary Law n° 155/2016, which included a special program of installments of tax debts due until May 2016 for companies under the scheme, to be paid in up to 120 monthly installments.

The use of installments as a tool for the tax regularization of companies has been constant by the State. In addition to the so-called "common installments", provided for in Law 10.522/2002, which is always available to companies, the special installments have been repeatedly employed. According to a study conducted by the IRS in 2017, approximately 40 special installment programs have been opened since the beginning of this millennium. This high number of programmes demonstrates the relevance of tax instalments in the national scenario, but is constantly criticised and is often treated as a contradiction, considering that special instalments, at least in theory, they should deal with exceptional situations.

In the exclusive scope of Simples Nacional, because it is a relatively new tax system, few installment programs were granted, if compared to the general history of the country. However, it is known that micro and small enterprises, despite the simplifications brought by the regime, also have problems to remain regular. Even so, in recent years, the legislation concerning the Simple has used the installments as a way to deal with the issue of default.

The installment of tax debts aims to increase tax collection, with the increase of public coffers, contributing to the expansion of state investments in reducing social inequalities. Therefore, this study seeks to answer the following problem: the installment of debts granted

to Simples Nacional companies by Complementary Law n\176; 155/2016 is an efficient tool to deal with the delinquency of small businesses and increase public revenue?

The main objective of this research is to analyze the data regarding the installment provided in Complementary Law 155/2016 to identify if the taxpayer has met the legal benefits, expanding the tax collection. It has as specific objectives, to identify the legal treatment of the tax installment and its reflexes; to examine the tax system of the Simple National and its installments contained in Complementary Law 155/2016; and, finally, analyze the effectiveness of the installment of the National Simple in the public collection.

This research was based on the official publications carried out regarding the special installment of the National Simple, mainly the "panel of installments", tool provided by the Attorney General's Office of the National Treasury and that provides information regarding all tax installments granted. The data collected refer to the months of December 2016 to March 2017, which corresponds to the period of accession to the special installment of Simples. All Brazilian states were considered and the analysis was carried out on the current situation of the plots granted in the form of LC n° 155/2016 presented in the panel.

In this case, the greater the number of active installments, with their regular situation, or of fully paid debts in installments, the greater will be the approximation of the program to its objective of tax regularization. Differently, the greater the number of debts excluded from the installment, the less efficient it will be from the point of view of the State, and the greater the distance from its objective of discharge of debts due and of consequent tax regularization.

In order to demonstrate the hypothesis that the installment of debts of companies framed in Simple National has little efficiency for public collection purposes and, consequently, do not contribute to the promotion of social justice, this research usedthe deductive method, with bibliographic research and statistical data collection and analysis.

1. THE LEGAL TREATMENT OF THE TAX INSTALMENT

The tax installments have increasingly acquired relevance, both for the public sector, which uses them in order to increase its collection and regularize defaulting taxpayers, as for companies, that find in these programs an important alternative to deal with their tax liabilities (PAES, 2014), since the installment is provided in the legislation as one of the causes of suspension of the chargeability of the tax credit, according to art. 151, VI of the National Tax Code.

The types of suspension of the tax liability act as "inhibiting agents" of the process of positivation of the legal norms that establish it (VERGUEIRO, 2009). As shown by Harada (2017), in the cases of art. 151 of the CTN there is no extinction of the claim, it continues existing, there is only the effect of preventing its collection by the Tax Administration. Amaro (2006) treats such hypotheses as a form of temporary protection of the taxable person, since, while the credit is suspended, he will not suffer from the collection acts that would normally be adopted by the IRS.

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Originally, the tax installment was not present in the National Tax Code in its promulgation in 1966, being included as one of the hypotheses of suspension of the tax credit by the Complementary Law n° 104/2001. In this way, the instalment has as its initial effect the interruption of the recovery acts by the tax authority of the claim that has been instald.

In addition to having a suspensive character of the chargeability of the tax obligation, the installment allows the division of the tax debt for later payment, which will be made by means of instalments. However, this installment "payment" must be made with the incidence of interest and fines, in order to avoid "[...] putting the taxable person in a more favorable position than others who met legal deadlines" (SCHOUERI, 2013, p. 608).

Still in the concept, it is common to find authors who treat the installment as a moratorium modality, also provided for in CTN as one of the hypotheses of suspension of the chargeability of the tax credit (art. 151, I). This is what Machado (2018) says in clarifying that in the moratorium the debtor manages to extend the deadline for debt discharge, and in some cases this payment can be made in installments, as it occurs in installments programs. Thus, he concludes that the inclusion of the installment as a suspension hypothesis by LC n° 104/2001 was not necessary.

Likewise, Amaro (2006) states that the installment already had the effect of suspending the chargeability of the tax credit even before its inclusion in the National Tax Code, both for its intrinsic characteristics, but also because it is just another form of moratorium. Sabbag (2016), on the other hand, states that, despite the similarities, with the inclusion of the installments to the CTN, he enjoyed total independence, no longer confused with the moratorium.

For the concession of the installment, in general, some conditions are imposed on the taxable person, such as the payment of the first installment and the confession of the debt. With this, when adhering to a installment, the taxpayer, could no longer discuss the debt judicially, since, when splitting his debt he would be confessing his existence. There are constant criticisms and studies about this obligation. In this sense, Dexheimer (2015) believes that the greatest restriction consists in the prohibition of the individual invoking the Judiciary in the future, with the renunciation of the claim, because it prevents the taxpayer to contest the tax obligation in the judicial sphere. In turn, Padilha and Alvaraz (2017) demonstrated that the courts have admitted the judicial discussion of debt installments even the law emphasizing that such confession would be irrevocable and irrevocable.

Another point to highlight, from the perspective of companies, is that, in addition to the benefit of being able to split the tax debt, after adhering to a installment program it is possible to apply for a Positive Certificate with Negative Effect, that allows the company to participate in bidding processes and conclude contracts with public agencies, which in many cases is an important source of revenue for companies (MACHADO, 2018).

In the case of installments granted in the country over time, as shown by Dexheimer (2015), they are usually separated between ordinary (or common) installments and special installments. The ordinary installment was established by Law n° 10.522/2002 and is disciplined from Article 10 to 14-F. Such installments are always available to the taxpayer, who can split his debts in up to 60 (sixty) installments. This is what establishes the norm: "the debts of any nature to the National Treasury may be divided into up to sixty monthly install-

ments, at the sole discretion of the State authority, in the form and conditions provided for in this Law".

As described in art. 155-A, § 1° of the CTN, the installments do not rule out the incidence of interest and fine. This is seen in the common installment, where they remain added to the principal amount of the debt. Meanwhile, Paulsen (2017) notes that it is common practice for Brazilian legislation to grant installments that not only have much longer deadlines than that provided for in the ordinary installment, but also offer substantial reductions in interest and fines, occurring, in some cases, its total exclusion.

These are the special installments, which are constantly employed at both federal and state and municipal levels. As already commented, there were almost 40 programs established since the beginning of the millennium, but in the federal sphere four stand out: (i) Program of Tax Recovery or Refis, established by Law n° 9.964/2000 and covered debts due until 29 February 2000, allowing installments without a ceiling of benefits; (ii) Special Instalment or Paes, established by Law n° 10.684/2003 and enabled installments up to 180 (one hundred and eighty) monthly instalments of debts due until 28 February 2003; (iii) Parcelamento Exceptional or Paex, came into force as amended by the Provisional Measure n° 303/2006 and offered three installment options, with emphasis on the modality that allowed the division of debt in up to 130 (one hundred and thirty) installments; (iv) Installments of the Crisis, created by Law n° 11.941/2009 and opened a series of options of installments and repayments of debts, highlighting the possibility of, again, divide the debt in up to 180 (one hundred and eighty) installments; the program also had four reopenings, one in 2013 and three in 2014.

In addition to the high number of installments, all these programs had significant reductions in interest rates, fines, or both. As an example, one can cite the Installment of the Crisis, which in art. 1°, § 3°, II offers an installment in thirty installments with a 90% reduction of the fine for late payment and 45% of the interest. In addition to these, it is worth mentioning two more recent installments, the Tax Regularization Program (PRT) and the Special Tax Regularization Program (PERT). Imposed by Provisional Measures n° 766/2017 and n° 783/2017 respectively, they also offered special installment conditions and, together, had almost 850,000 members, according to federal revenue data.

Finally, it is also important to mention that, in general, the law leaves open the possibility of performing reparcelling, as described in art. 14-A of Law n° 10.522/2002. This is even more evident in the special instalment programmes. Taking for example the Paex, the MP 303/2006 in its article 4° explains the possibility of the reparcelling of debts that were included both in the common installment and in the Refis and Paes. Such a possibility has made common the transfer of debt tranches in one programme to another with more favourable conditions.

2. THE TAX SYSTEM OF THE SIMPLE NATIONAL TAX AND THE INSTALLMENTS PROVIDED FOR IN COMPLEMENTARY LAW 155/2016

This item aims to present some considerations about the tax legal treatment given to small businesses and analyze the possibility of splitting their tax debts according to Complementary Law 155 of 2016.

2.1 THE TAX TREATMENT OF MICROS AND SMALL ENTERPRISES

Micros and small businesses need, by the way of art. 179 of the CF, differentiated legal treatment that encourages them with the simplification of their administrative obligations, tax, social security and credit. In this sense, the Constitution presents rules of jurisdiction that allow the infraconstitutional legislator to create a differentiated treatment for small businesses (CUNHA, 2011).

The tax system cannot be viewed in a simplistic way, having as its sole objective the collection of taxes for the public coffers, but rather as a mechanism for the realization of social justice (COSTA; DIEHL, 2017). The differential treatment ensured by the Constitution should be interpreted in this context as a form of social justice, collaborating with the implementation of fundamental rights.

Since its creation, the Simple National has undergone several changes and attempts to improve. Initially created by Law n° 9,317/96, the scheme allowed the unified collection of federal taxes, and was therefore the name "Simple". In 2006 came into force the Complementary Law n° 123/2006, which repealed the Law n° 9,317/96 and increased the list of taxes encompassed by the Simple, including state and municipal taxes. Subsequently, this law came to suffer numerous changes, mainly with the Complementary Laws n° 147/2014 and n° 155/2016 that practically restructured the legislation concerning the National Simple.

With this, the Simple National allows the companies opting, framed in the condition of Micro or Small Business, collect, in a unified way, eight taxes, including the ICMS, of state competence, and the ISS, of municipal competence. It is also admitted to join the Simple, according to the legislation, the entrepreneur who meets the conditions to be considered Individual Microentrepreneur.

Machado (2018) points out that the Federal Constitution already mentioned the possibility and the need to offer a differentiated treatment to micro-enterprises and small businesses. The definition of the size of the company is based on its annual gross revenue. Today, already considering the changes brought by the Complementary Law n° 155/2016, the legal entity that receives in the calendar year a gross revenue of up to R$ 360,000.00 (three hundred and sixty thousand reais) is classified as a microenterprise and small company the company that obtains revenue above R$ 360,000.00 (three hundred sixty thousand reais) and below R$ 4,800,000.00 (four million eight hundred thousand reais).

The importance of differentiated treatment of small businesses is demonstrated by Machado (2018), due to the obstacles they face in what concerns, mainly, the issues that

involve their taxation. These difficulties also cover ancillary obligations, which become too complex for such undertakings, which in general do not have an exclusive department available to deal with ancillary tax obligations. In this way, simplification measures emerge as a way of protecting free enterprise and promoting fairer competition.

In addition to ICMS and ISS, Simples Nacional also includes the following tributes: IRPJ, IPI, CSLL, Cofins, Pis/Pasep and CPP. The calculation of the tax in Simples is made based on the gross revenue of the last 12 months. As Cleônimo dos Santos (2018) explains, each company will use the tables contained in the law, specific to its field of activity, for the calculation of the single tax. Subsequently, there is the distribution of the collected value among all taxes that were included, and such percentages vary according to the company's range and its industry.

Regarding specifically the amendments promoted by the Complementary Law n° 155/2016, in addition to the institution of the special installment (art.9°), it is worth mentioning the change in the revenue limit for the framework of organizations as a small company, up from R $ 3.600.000,00 (three and six hundred thousand reais) to R$ 4,800,000.00 (four million and eight hundred thousand reais) and for the setting of entrepreneurs in individual microentrepreneurs, rising from R$ 60,000.00 (sixty thousand reais) to R$ 81,000.00 (eighty-one thousand reais). Another important point was the opening of the possibility of the figure known as "angel investor" to make capital contributions to the companies under the scheme, but without being part of the entity's share capital. There was also a decrease in the number of tables and billing ranges for the calculation of the tax and the inclusion of new activities among those that can opt for the regime.

2.2 PAYMENT OF DEBTS IN THE SIMPLE NATIONAL

As mentioned at the beginning of the work, there were not many programs of installments granted by the legislation concerning the Simple, mainly due to be a relatively new regime.

The first possibility of splitting the debts for micro and small enterprises was established in 2008 as an alternative for companies to join the Simple National regime. This is thanks to the existing sealing in art. 17, V of Complementary Law 123/2016 that prevents legal entities that have debts due with the INSS and with the Public Farms adhere to the Simple National. In this way, the Complementary Law n° 128/2018 allowed companies to share their debts in up to 100 (one hundred) monthly and successive installments, being R$ 100.00 (one hundred reais) the minimum value of each installment. Thus, micro and small enterprises could opt for this installment and, suspending the chargeability of their debts, opt for the National Simple as a taxation system.

As Paulsen (2017) clarifies, the second possibility of installments created in the sphere of Simple National was given by the Complementary Law n° 139/2011, which included the §§ 15 to 24 in Article 21 of Complementary Law 123/2006. This installment resembles the one disciplined by Law 10,522/2002 and is always available to companies of the Simple National. It is accepted the installment of the debts due of the National Simple in up to 60 (sixty) months. Regarding the value of the plots, the Normative Instruction n° 1,508/2014 determined that

they could not be less than R$ 300.00 (three hundred reais) for ME and EPP or R$ 50.00 (fifty reais) for Individual Microentrepreneurs.

There is also, in this mode, the possibility of reparcelling. Resolution CGSN n° 140/2018 provides on this option, but for this to be possible it is necessary to pay the first installment, which will correspond to 10% of the consolidated value of the debts, or 20% if there is debt that has already been subject to previous reparcelling.

Subsequently, with the entry into force of Complementary Law n° 155/2016, a new form of installment of tax debts was instituted. Its article 9° stated that debts due in the scheme until May 2016 could be divided into up to 120 (one hundred and twenty) monthly installments.

The Normative Instruction n° 1.677/2016 defined that to join the program, the request for installments should be made between 12 December 2016 and 10 March 2017. Of course, the main advantage of this programme, from the point of view of companies, is the maximum number of plots, in which case it is double the previous installments. The possibility of extending this installment to up to one hundred and twenty months makes it resemble the special installment programs mentioned above, although there is here a substantial decrease in interest and fines, as occurred in the most famous programs instituted by the federal government. There is, when joining the programme, a reduction in the administrative fines, as follows:

> I - 40% (forty per cent) if the taxable person applies for the instalment within 30 (thirty) days from the date on which he was notified of the instalment; or
>
> II - 20% (twenty percent), if the subject requests the installment within 30 (thirty) days, from the date on which he was notified of the administrative decision of 1st (first) instance (Normative Instruction n° 1,677/2016, art. 4°, Sole Paragraph, I and II). (BRAZIL, 2016)

Nor have the rules on the value of the plots changed. Both the Complementary Law 155/2016 that instituted the program and the Normative Instruction n° 1.677/2016 that later regulated it clarified that the value of the installments will be calculated by dividing the consolidated value of the debt by the number of installments, with a minimum value of R$ 300.00 (three hundred reais) for ME and EPP and R$ 50.00 (fifty reais) in case of MEI.

Very similar are also the causes of termination of installments, although not reproduce literally what is explicit in Art. 21, § 24, I and II of LC 123/2006, Normative Instruction n° 1.677/2016 establishes as causes of termination the non-payment of three installments, not necessarily consecutive, or the complete non-payment of the debt after maturity of the last installment. It should be noted that the legislation made possible the transfer to the program of debt installments in the form of the ordinary installment, causing, consequently, the withdrawal of this.

Finally, the last installment program created in the scheme happened with the promulgation of Complementary Law n° 162/2016. This standard established the National Simple Companies Special Tax Regularization Program (Pert-SN), which offered special conditions of installments and was an adaptation to the regime of the Special Tax Regularization Program created by the federal government in Provisional Measure n° 783/2017.

As demonstrated by Paulo Lenir dos Santos (2018), the values of the minimum installments remained the same as those of the previous programs. Meanwhile, Complementary Law 162/2018 offered three different ways of splitting debts, with reductions in fines and interest proportional to the number of benefits chosen. As a condition for adhering to this installment, the legislation defined the obligation to pay at least 5% of the consolidated debt. Subsequently, after payment, the taxable person could opt for the following forms of debit discharge, provided for in art. 1 of Complementary Law 162/2018:

> a) settled in full, in a single tranche, with a 90% (ninety per cent) reduction in interest on late payment, 70% (seventy per cent) of fines for late payment, for business or in isolation, and 100% (one hundred per cent) of legal charges, including legal fees;
>
> b) installments in up to one hundred and forty-five monthly and successive installments, with 80% reduction (eighty percent) of the interest on late payment, 50% (fifty percent) of the fines for late payment, of office or in isolation and 100% (one hundred percent) of the legal charges, including attorneys' fees; or
>
> c) installments in up to one hundred and seventy-five monthly and successive installments, with reduction of 50% (fifty percent) of the interest on late payment, 25% (twenty-five percent) of the fines for late payment, business or isolated, and 100% (one hundred percent) of the legal fees, including attorney fees. (BRAZIL, 2018)

This program covered debts due until November 2017 and for their adhesion companies should submit the application between June 4 and July 9, 2018, according to Normative Instruction n° 1,808/2018. They could also transfer to Pert-SN, the instalment debits according to the installment foreseen in the other two programs already mentioned here.

3. THE EFFECTS OF TAX INSTALMENTS ON TAX COLLECTION

Having acquired significant importance as a tool of fiscal recovery from the beginning of the millennium, the installments also became an object of study of the most relevant. Tax accountants, accountants and economists have often been concerned with highlighting their effects and implications, extending also to public agencies, with the publication of an important analysis regarding the reflections of special installments by the IRS.

Padilha and Alvaraz (2017) conducted a study based on the aforementioned clauses in the installments, which make mandatory, when joining any program, the withdrawal of any lawsuit involving debt installments. The authors conclude that this obligation hurts the rights of taxpayers, first because the Constitution guarantees the right to the judiciary, but also because such clauses give the installments the idea that there is an agreement of wills between the public body and the taxpayer in relation to tax obligation, which does not translate the reality, since the tax arises from legal provision and is independent of the will of the parties. The study also dealt with presenting the position of the courts on the issue and it was found that the judicial discussion of debt installments has been admitted, provided that

it is found the existence of some kind of defect in his confession, maculating its effect as a means of proof.

Dexheimer (2015), in the same sense, points to the unconstitutionality of the clauses in question. It shows that membership of a tranche cannot be made conditional on the renunciation of a constitutional right, and that this imposition can have serious consequences, such as the validation of the collection of illegal taxes, once adhering to the installment the taxpayer could no longer discuss the legitimacy of the debt in the judicial sphere.

Muzzi Filho, Gonçalves and Quadros (2018) examine the reflections of the special installments based on the principle of efficiency, in which the actions of the State must be guided. In view of the understanding that the special installments would be aimed at meeting exceptional situations, the authors understand that the repeated opening of these programs has the effect of misrepresenting reality, creating the idea of an endless economic crisis.

In addition to this distortion of reality and legislation, the constant implementation of instalment programmes has the opposite effect to that expected, to encourage tax regularisation of taxpayers, often acting in a way that encourages defaults, whereas companies can simply opt for the non-payment of their taxes considering the possibility of opening a new programme in a short period of time, allowing debt to be divided for a prolonged period and under extremely favourable conditions, considering the reductions in interest and fines.

Given this scenario, Muzzi Filho, Gonçalves and Quadros (2018)conclude that the installment programs have not presented efficiency in their purpose, acting negatively, inclusive, in the companies' competition, since organizations that pay their taxes on time end up contracting a competitive disadvantage, by not enjoying the benefits provided by installment programs.

Strengthening this idea, Paes (2012) uses an econometric model to assess the effects of installments on taxpayers' behavior. The author finds what he calls a "great collection point", at which point the largest number of contributors would spontaneously pay their taxes. According to the author (PAES, 2012), in the country, this percentage would be 66%, which means that, in Brazil, at best, 66% of taxpayers pay their tax debts spontaneously. Paes (2012) shows, however, that with the effects of the frequent opening of installment programs this percentage falls to approximately 62%. After the completion of the model, it is observed that the expectation for a new installment with favorable conditions decreases the tendency of taxpayers to collect their taxes spontaneously, again bringing the idea of an incentive to default.

Faber e Silva (2016) also sought, with an economic analysis, to study the consequences of installments in the behavior of taxpayers. The analyzed sample was constituted by the companies that underwent a differentiated follow-up by the IRS and adhered to the Installment of the Crisis or some of its reopenings. The authors came to the conclusion that the expectation for installments, in the two years prior to its opening, is able to reduce by up to 5.8% the induced collection of companies that opt for installments in relation to non-accessive, and in the two years after its opening, in what they call a "side effect", the reduction can reach 1.5%. Thus, considering the amount collected over the years by the companies analyzed, they estimate that the losses in the collection, due to the "expectation effect" and the "collateral effect", correspond to approximately R$ 18.6 billion per year.

Another important result to be highlighted was the participation of the companies analyzed in relation to the total collected spontaneously. To this end, Faber e Silva (2016) divided the companies between opting and not opting for the special installments and analyzed their behaviors taking into account the programs opened from the year 2000. It is concluded that, by 2007, the opting companies had a considerably larger share than the non-accessive ones, rotating around 60% of the total. However, from that year on the difference began to decrease and reversed in 2014, corresponding to about 49% of the total collected spontaneously. On this result the authors (FABER; SILVA, 2016, p. 165) understand that "[...] it seems to be symptomatic the existence of moral risk and that companies that have already opted for installments have acquired a different behavior towards the tax: to reduce spontaneous payments".

Another important source of information on the subject is the study conducted by the Federal Revenue Service in 2016 and updated in 2017, which dealt with the effects of the special installments established from the year 2000 (BRAZIL, 2017). This study provides information that is extremely relevant to the analysis of the subject, such as the amount of tax write-off that those programmes represented, the discharge percentage of the four main special instalment programmes, the number of contributors who have joined three or more programmes, among others.

The study (BRASIL, 2017) concludes that the installments have not been successful in their purpose of recovering tax debts. Contributes to this conclusion the high tax waiver that these programs represented to the public coffers, given that only the Installment of the Crisis implied a renunciation of more than sixty billion reais. It also reinforces this idea the fact that, between the years 2013 and 2016, in which several programs of special installments were created, the tax liability of the Union rose from a trillion and one hundred billion reais to a trillion and six hundred billion reais, corroborating the idea that the special installments have contributed to the increase of default.

Another relevant data provided by the study (BRASIL, 2017), as cited, is the percentage of discharge of the four main special installments established at federal level. This percentage showed to be very low, being minority taxpayers who joined a program and settled the entire debt by installment. More common has been the exclusion of the program, both due to default and the option of a new installment. Clear example is Refis, established in 2000, in which only 6.81% of its debts were fully settled in the program, according to the table below:

Special Installment	Quantities						
	Adhesions	Active	%	Exclusions	%	Settlements	%
Refis	129.181	2.853	2,21%	117.446	90,92%	8.791	6,81%
PAES	374.719	4.311	1,15%	248.504	66,32%	121.849	32.52%
PAEX	244.722	3.517	1,44%	146.792	59,98%	94.021	38,42%
Refis da Crise	536.697	105.581	19,67%	177.515	33,08%	253.604	47,25%

Source: Federal Revenue of Brazil (2017)

Table 1 - Current situation of the main federal installments

Finally, another important finding concerns the discrepancy between the terms of the installments granted in Brazil and those granted in most other countries. To this end, a study conducted by the OECD was published in 2014. It shows that, while only in the Brazilian conventional installment, the debts can be divided into up to 60 installments, in other countries

the maximum term, in general, is 12 or 24 months, and when a longer term guarantees are required. This disparity is, of course, even more evident compared to the deadlines for special instalments.

3.1 ANALYSIS OF THE EFFECTIVENESS OF THE SIMPLE INSTALLMENT IN PUBLIC COLLECTION

As pointed out, this article aims to analyze the special installment of the Simple National implemented by Complementary Law n° 155/2016, emphasizing its effectiveness in maximizing public collection. After dealing with the legal aspects of the tax installment, especially that destined to the debts of the Simple National, it is dedicated to examine if the installment reaches its purposes.

The tool "panel of installments" provided by the Attorney General's Office of the National Treasury is based on Law n° 10.522/2002. In this rule it is stated that "monthly, the Federal Revenue Department of Brazil and the Attorney General's Office of the National Treasury will publish, on their websites, demonstratives of the installments granted within the scope of their powers". This tool was the main basis for this study.

For methodological purposes, it is necessary to inform that the analysis of the data contained in the "panel of installments" was carried out between the months of December 2016 and March 2017, referring to the period of adhesion to the parcel studied. All Brazilian states were considered and the current situation of the plots granted in the form of LC n° 155/2016 was examined, as presented in the panel. In this case, the greater the number of active installments, with their regular situation, or of fully paid debts in installments, the greater will be the approximation of the program to its objective of tax regularization. Differently, the greater the number of debts excluded from the installment, the less efficient it will be from the point of view of the State, and the greater will be the distance of its objective of discharge of debts due and of consequent tax regularization.

In order to be able to carry out the proposed analysis, it was filtered among all the installments granted in the period from December 2016 to March 2017, only those in the conditions of art. 9° of Complementary Law n° 155/2016. After the completion of this filter, using the Excel program, a total of 42,325 (forty-two thousand three hundred and twenty-five) installments along the lines of this law was reached. This was the total of plots used in the analysis. It should be noted that this is not the total of installments, in fact, granted, given that one portion was rejected electronically, and another was rejected otherwise, not specified in the portal.

Then the main point becomes the current situation of the installments, which, as made available by the Attorney General's Office of the National Treasury, are in one of the following situations: (a) Deferred and Consolidated: are the installments that are still in force, and are in their current situation; (b) Closed by Liquidation: it is the installments portion that was closed by the full payment of the taxpayer; (c) Closed by Termination: it is the installments that were closed by non-compliance of the rules by the taxpayer, such as the non-payment of three instalments or the complete non-payment of the instalment after the payment of the last instalment. Another possibility would be the transfer of this installment to another, which

would cause, as defined by the law, the withdrawal of the first; (d) Electronic Rejection: are the cases in which the application for installment was not accepted by the Attorney General's Office of the National Treasury. Being the refusal made electronically; (e) Refused: are also requests for installments refused by PGFN. However, the way in which this rejection occurred is not addressed. Only six of all plots analyzed fit this situation.

As the main objective of the installment is its discharge, in order to reach the conclusion that the installment has reached its ends, it is understood that the largest possible number of installments should be framed in the situation "Closed by Settlement", which would amount to saying that the installments have, in fact, been paid in full. However, because the maximum number of installments possible in this installment program is one hundred and twenty, or ten years, it was expected that most of the installments would still be active, classified in the "Deferidos e Consolidados" category.

On the other hand, it can be inferred that, for this installment program to be efficient, contributing to the expansion of the collection, the smallest possible number should be framed as "Terminated by Termination", that is, for some of the reasons already cited, the taxpayers did not pay, your debt in full. In turn, the installments that were rejected assume a different characteristic, not so relevant to the analysis, as they were not even accepted, and it is not possible to evaluate the behavior of these taxpayers in relation to the debt.

The table below shows the number of plots classified in each situation and their respective percentages in relation to the whole:

Installment Situation	Number of Installment covered	Percentage of each situation
Deferred and Consolidated	1.361	3,22%
Closed by Settlement	2.330	5,50%
Closed by Termination	29.708	70,19%
Dismissed	6	0,01%
Electronic Dismissal	8.920	21,08%
Total	42.325	100%

Source: Elaborated by the author

Table 2 - Current status of installments granted pursuant to LC No. 155/2016

Based on the ideal scenario, in which the installments should have been settled, that is, framed as "Closed by Settlement", or else be assets, being paid on time and classified, this way, as "Deferred and Consolidated"Table 2 shows the total inadequacy of the revenue effectiveness of the installment, since these two situations together reach only 8.72% of the analyzed installments. In contrast, the installments "Closed by Termination" reflect 70.19% of the total, proving that the vast majority of these debts will not be settled within the installment.

In line with what was presented, pertinent is also the analysis of these situations disregarding the rejected installments, because they are not relevant to the scope of this research, as shown in table 3 below.

Installment Situation	Number of Installment covered	Percentage of each situation
Deferred and Consolidated	1.361	4,07%
Closed by Settlement	2.330	6,98%
Closed by Termination	29.708	88,95%
Total	33.399	100%

Source: Elaborated by the author

Table 3 - Status of installments, disregarding those rejected

When the analysis ceases to take into account the rejected installments, this result is even more evident, as shown in Table 3. In this case, the installments "Deferred and Consolidated" and "Closed by Settlement", added, correspond to 11,05% of the total analyzed, while the installments that were terminated, for non-compliance with the standard by the taxpayer, or by option for other installments, represent 88,95%.

By assessing the data by State, Minas Gerais was the one with the highest percentage of debts closed by its total payment. However, this result was not very different from the total percentage, reaching 6.8%. Tocantins presented the worst result for this situation, with only 3.39% of the installments fully paid. In this state the percentage of installments that are still in force, classified as "Deferidos and Consolidated", It is also lower than the general average, and 1,98% the total. The state that had the highest percentage of installments "Closed by Termination" was Rio Grande do Norte, with 75,76%. The lowest percentage for this situation is in Roraima, with 63,49%. São Paulo, the state with the largest number of installments, showed a total of 3,79% of installments "Deferred and Consolidated", 6,40% of installments "Closed by Settlement" and 67,63% "Closed by Termination, in addition to the refused installments.

It is observed that the variation of the results between the States is low, and the overall result is not influenced by an exception, or by an abnormal behavior of one or a set of States. In this way, it is possible to infer that the behavior of the taxpayer in relation to this installment program was relatively similar throughout the country, with the clear tendency to its non-compliance until the end.

In addition to the default, which has always been present in the instalments granted, a factor that arises with one of the possible justifications for the high number of terminations before they are fully paid, consists in the creation of the Special Tax Regularization Program of Simples Nacional companies. Although there is, in the data analyzed, no information about the transfer of installments, the tendency of taxpayers to migrate their debts from one installment to another more beneficial, verified in the previous installments, provides subsidies to support this hypothesis. Still, if it is considered that in PERT-SN the maximum deadlines are even greater than that of the installment of LC n°155/2016 and that there are larger reductions in interest rates and fines, this thesis gains even more strength.

It raises here a new research suggestion, to evaluate the amount installments that were transferred from the Special Installment of the National Simple to the Special Tax Regulariza-

tion Program of the companies of the National Simple, and assess what has been the behaviour of the taxpayer in relation to the latter instalment.

Relevant can also be the comparison of the results of the Special Installment of the National Simple with that of the four main federal installments granted (Refis; PAES; PAEX and Refis of the Crisis). By evaluating the data in Table 1 and Table 3 (which disregards the rejected installments), it is possible to notice a greater similarity between the results of the Simple and Refis installments established in 2000. In Refis, of the 129,181 (one hundred and twenty-nine thousand one hundred and eighty-one) installments granted, 9.02% were either fully liquidated or were still active, while in the installment of the National Simple the active or fully liquidated installments amounted to 11.05%. However, there is a greater disparity when comparing with PAES, PAEX and Crisis Refis. In the PAES, the active or liquidated installments totaled 33.67% of the total, in the PAEX, the percentage was 39.86%, while in the Crisis Refis, it was 66.92%, and all had higher results than the analyzed installments.

CONCLUSION

Seeking to answer whether installment is the best tool to deal with the defaults of micro and small enterprises and increase public revenues, the present article had as main objective to evaluate the behavior of the taxpayer in relation to the installment of tax debts granted by the Complementary Law n° 155/2016 to the companies framed in the Simple National and thus to evaluate if the installment in question obtained success in its two main purposes: to regularize the regime's companies and to boost public revenue.

In addition to this central objective, the present study sought to demonstrate the main legal characteristics of the tax installments. It also analyzed the National Simple, focusing mainly on the plots granted in the scheme, one of them being the plots examined at work. Finally, as a last specific objective, it sought to evaluate how the installments granted by the Complementary Law n° 155/2016 impacted the public revenue.

In order to answer the research question, the data provided by the Attorney General's Office of the National Treasury were analyzed, with the aim of specifically studying this parcel granted to Simples's companies, objectively evaluating the results found and making a parallel with the conclusions presented in other studies. Through this investigation, it was possible to corroborate with the studies carried out, thanks to the extremely low number of installments that were fully paid or that are in their regular situation, having been excluded the vast majority of installment debits.

The thesis that taxpayers have acquired, with the constant installments, the habit of not paying off one installment by the expectation by another more beneficial, characterizing a debt roll, can not be ruled out here. This is because the Complementary Law n° 162/2018 made it possible for Simples companies to share their debts on more advantageous terms than those offered by the installment analyzed in this article, regarding the deadlines for discharge and reductions in interest and fines. Accordingly, the possibility of transfer from one tranche to another should be considered.

Thus, the study pointed to the inefficiency of this installment program as a form of tax regularization, considering that, of the 33,399 (thirty-three thousand three hundred and ninety-nine) companies that had their debts framed in the installments, 29,708 (twenty-nine thousand seven hundred and eight) were excluded. It appears that the reasons for the termination have not been made available, which makes further analysis difficult. However, the numbers are significant enough to challenge the effectiveness of this installment as a beneficial tool to the State, not contributing to the expansion of public investments in the promotion of social justice.

It is worth mentioning that the absence of studies related to the analyzed installment, as well as the difficulties encountered for data collection, made a more in-depth analysis difficult, especially in relation to the collected impacts of the installment. It is suggested, for future research, evaluate the amount of installments transferred from the Special Installment of the National Simple to the Special Program of Tax Regularization of the companies of the National Simple and examine what has been the behavior of the companies in relation to this new installment.

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

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

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ABSTRACT

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

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

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

RESUMO

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

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

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1. INTRODUCTION

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

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

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

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

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

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

2. THE ANALYZED DECISION

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

"Visas.

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

It's the report.

I Decide.

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

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

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

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

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

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

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

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

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

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

I grant the judicial gratuity.

Urge yourself to quote and intimidate yourself."

3. THE RELATIONSHIP OF PHILOSOPHY WITH THE LAW

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

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

The philosophical paradigms prior to the linguistic-ontological turn, conceived of the language as an expression of the realization of an ideal essence, when it is access to understanding, sense of the world (GADAMER, 1999, p. 642) and externalization of reason (OLIVEIRA, 1996, p 202-203). The theory of knowledge guided by the metaphysical subject-object[2] relationship, supports the entification of being, leading to an interpretive process guided predominantly by the objectivity of the text or subjectivity of the interpreter (STRECK, 2008, p. 128-129), ignoring the ontological difference, for based on a difference between subjectivity and transcendental objectivity, which was an impediment to the cooperation of philosophy, to the philosophical filtering of law (STEIN, 2002, p. 100). The law, in the criticized view, was constituted in an operational knowledge that ignored the philosophical preposition (STRECK, 2009b, p. 67), with which it built a proper philosophy for the law (STEIN, 2004, p. 137) incapable of bring the same rational vectors of philosophical hermeneutics.

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

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

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

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

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

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

4. LINGUISTIC OPENING AND INTERPRETATIVE METHODS

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

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

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

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

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

Platonic premise mentioned (BARTHES, 1987, p. 20). Metaphysics is revealed by Gadamer (1999, p. 566) when he recognizes the universality of language, constituting a condition of being, without which there is no interpretation, there is no understanding, there is no access to the world. The positivist objectification in the adjudication of meanings is overcome by the linguistic process of understanding and interpretation, since "language is the universal medium in which understanding itself takes place. The way of understanding is interpretation (GADAMER, 1999, p. 566). So, the object (its sense) is only or can become through language, interpretation and understanding (GADAMER, 1999, p. 588-589), in the "being-sense-language" (VÉLEZ, 3006, P. 40).

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

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

5. CONSTITUTIONAL STANDARDIZATION IN THE CASE STUDYED

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

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

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

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

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

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

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

6. CONCLUSION

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

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

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

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

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

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

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

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LABOUR LAW REFORM, HYPERSUFICIENT EMPLOYEE AND PRECARIZATION

REFORMA TRABALHISTA, EMPREGADO HIPERSUFICIENTE E PRECARIZAÇÃO

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ABSTRACT

In face of the changes of the reality of labour's market and of the economic crisis of 2015, there's a strengthness of the neoliberal speech. In the meanwhile, the pressure to change the labour legislation arises in a sense that this will make Brazil overcome the economical recession and the high unemployment level's by turning it market friendly. So, a Labour Law reform is approved urgently, modifying many rules of the labour's juridical system. One of the changes was the incorporation of many stratified employee regimes, which objective was to precarious the classical employment contract (done by a person, subordinated to the direct employer, inside the company during a labour's journey of 8 hours per day and 44 hours by week). Under the focus of the hypersufficient employee and the precariousness of the employment relationship, this text proposes to analyze, through a theoretical-normative study, the reflexes of the modification introduced in the Brazilian legal system, by Law nº 13.467 / 17 - known as Labor Reform - in face of the Constitution, Comparative Law and International Human Rights Treaties.

Keywords: Labour Law Reform. Hypersufficient employee. Precarization.

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RESUMO

Diante das mudanças da realidade do mercado de trabalho e da crise econômica de 2015, percebe-se o fortalecimento do discurso neoliberal. Nesse diapasão, cresce a pressão para flexibilizar a legislação trabalhista de modo a tornar o país market friendly e superar a recessão econômica e os altos índices de desocupação. Assim, aprova-se a reforma trabalhista em caráter de urgência, modificando diversas normas do sistema justrabalhista. Dentre as mudanças, destaca-se a incorporação de diversas modalidades empregatícias estratificadas, voltadas a precarizar a relação de emprego clássica (prestada por pessoa física, subordinada diretamente ao seu tomador, prestado dentro da sede da empresa, com direito à jornada de trabalho de oito horas diárias e 44 horas semanais). Sob o enfoque do empregado hipersuficiente e a precarização da relação empregatícia, o presente texto se propõe a analisar, por meio de um estudo teórico-normativo, os reflexos da modificação introduzida no ordenamento jurídico brasileiro, pela Lei nº 13.467/17 - conhecida como Reforma Trabalhista – em face da Constituição, do Direito Comparado e dos Tratados Internacionais de Direitos Humanos.

Palavras-chave: *Reforma trabalhista. Empregado hipersuficiente. Precarização.*

1. INTRODUCTION

Brazil is going through the most severe and lasting economic crisis. Among its reflexes, there are high unemployment rates, low levels of consumption, shrinking production and closure of companies. In this sense, data from the Brazilian Institute of Geography and Statistics (IBGE) indicate that before the changes in labor legislation, the 2016 GDP (IBGE, 2018) decreased 3.6%, as well as 3.5% in 2015 (IBGE, 2017). On the other hand, the Gross Fixed Capital Formation (GFCF) indicated a decrease in investments of 10.2%. In addition, the unemployment rate was the highest in the historical series, reaching 13.7% in the first quarter of 2017, according to data released by IBGE.

The recession established since 2015 was caused by a combination of political and socioeconomic factors. And, like the European countries that faced post-economic crisis austerity measures of 2008, it led to the strengthening of the neoliberal discourse, accompanied by austerity measures, such as the labor reform of 2017.

Amid advances in Brazilian doctrine and jurisprudence aimed at promoting decent work, there is the resumption of allegations aimed at reducing labor rights to make the country Market Friendly, in order to increase the pressure to adopt austerity measures, like new atypical forms of employment contract. And so, with the approval of Laws 13,429/2017 and 13,467/2017, the labor legislation is amended and the Brazilian legal system now provides for new employment modalities, increasingly distant from the indefinite subordinated employment relationship with a defined working day.

The objective of this text is to reveal, through a theoretical-normative study, the precarious reflexes of the modification introduced in the Brazilian legal system, by Law 13,467/17, specifically regarding the hypersufficient employee.

The present article is structured in five items, this introduction being the first; followed, respectively, by one in which the panorama of the Labor Reform is approached; later, the third item presents the stratified employment modalities; the fourth item is intended for the study

of the hypersufficient worker, and the fifth, and final item, discusses the need for a rereading of labor law, from this new employment modality, moving then to the conclusion of the study.

2. LABOR REFORM AND SOME CONSIDERATIONS

As explained in the introduction, the national socioeconomic situation - caused by the worsening of the economic crisis of 2015 - provided a reform in the legislation justrabalhistas. In addition, the economic issue was used as a subterfuge so that there would be a rapid legislative process of urgent processing (CHAMBER OF DEPUTIES, 2017; SENATE, 2017), which culminated in Laws 13,429/2017 and 13,467/2017 (COUTINHO, 2017).

Under the focus of the legislative process of Law 13.467/2017 (which was responsible for a more comprehensive reform of labor legislation), it should be noted that it began with the sending of Bill 6.787/16 by the government Temer, in December 2016. Originally, it contained the proposal to amend only ten points agreed between employers' confederations and trade union centrals.

Still in the Chamber of Deputies, the mentioned Bill was expanded to about 100 amendments of labor legislation, with the approval by 296 votes (with opposition of 177 deputies). Already in the Senate, It was appointed as the Complementary Bill (PLC) No 38/17, which was approved (by 50 votes in favor and 26 votes against) without any change in the text sent by the House of Representatives. And, finally, President Michel Temer sanctioned Law 13.467/2017, without any veto, in 13 July 2017 (MARTINS FILHO, 2017, p. 59).

That is, in close synthesis, after the interval of approximately seven months, more than a hundred changes were promoted in the justrabalhista system. And, in the face of this, following the neoliberal doctrine, the motives of PLC nº 6787/16 praised that the labor reform would be the means capable of guaranteeing employability and combating informality, as well as generating legal certainty (BIAVASCHI, 2017).

Under this line of thought, it was still argued that the labor reform in Brazil would be in accordance with the context of changes in European labor laws promoted since the first decade of the 21st century. Thus, it emerged that such reforms have flexisecurity[4] as a common feature (MARTINS FILHO, 2017, p. 55).

In short, it is a speech stating that the reduction of labor rights is the solution to the evils of the Brazilian economic crisis. But such a speech cannot prevail. First, it should be pointed out that labour legislation is not capable of changing the reality of the labour market itself. Second, it is notorious the contradiction between the neoliberal discourse of modernization of labor norms and the reality posed by the Brazilian labor reform, because, in fact, the labor conquests were made more flexible with formulas already tested (without success) in other countries (SANTOS, 2017, p. 249).

Thus, it should be understood, as does Viegas (2017, p. 74), that:

4 Flexisecurity means promoting the deregulation of the employment relationship in order to enhance collective bargaining and, at the same time, adopting measures to relax legislation in order to prevail the will of the parties, so that safety and security does not depend on the rigidity of the legislation.

> In the legal field, the labor reform has divided opinions, some argue that the Law is already old, due to the lack of necessary social dialogue; others say that, despite having as a basis the modernization, the law uses glaring formulas of labor flexibilizations already experienced in some countries of Europe, however, did not have good results; others go beyond, and point out unconstitutionalities and setback in labor gains.

Finally, it should be noted that, after two years of the Law 13,467/17, the results expected by the neoliberal discourse did not correspond to reality. On the contrary, Lameiras et al (2019) found only a slight improvement in the indications of the General Employment and Unemployment Registry (CAGED) and the National Household Sample Survey (PNAD) of the unemployment rate in the first quarter of 2019 (decrease of 04 p.p.); 22.7% of households with no income still remain; given that the increase in the occupation rate occurred mainly in the informal market. In addition, the PNAD continues to point out that the unemployment rate ranged from less than 1 p.p. in the third quarter of 2017 (12.4%) to the third quarter of 2017 (11.6%)[5].

In addition, according to DIEESE (2018), there was a reduction in the number of collective standards already noticeable in 2018, "reduction in almost 50% of the agreements in the first quarter of 2018 compared to the same period of 2017, compared to a reduction of almost 30% in the agreements, according to the same comparison parameters".

Likewise, according to the statistics of new actions distributed before the Labor Court, the Superior Labor Court (TST, 2019) found that there was a reduction of 2,013,241 labor complaints in 2017 to 1,287,208 labor complaints in 2018. This corresponded to a decrease of 36% in the number of labor complaints. However, in 2019, 3,377,013 new processes were distributed, demonstrating the resumption of labor complaints.

Thus, there is only the deleterious effects of the labor reform, since there was a reduction in the compensation of employees; decrease in typical work contracts and increase in stratified hiring; increase in informality; decrease in the work of the trade union movement; Only momentary decrease in the number of labor complaints.

3. OF THE STRATIFIED EMPLOYMENT MODALITIES

Nowadays, the rise of financial capitalism and the transformations of the reality of the labor market (competition in the global market, corporate restructuring and the 3rd Industrial Revolution) gave room for thinking under strong economic bias to become hegemonic. Amid this scenario, the employment relationship - although it is a fundamental activity in the constitution of social relations - is now questioned (DELGADO, Mauricio, 2015, p. 111-113).

In this process, there is a change in the identity of workers as a social group, to the point of reconfiguring the forms of work. Under such logic, there is a doctrine focused on the erosion of the typical employment relationship (DELGADO, Gabriela, 2015, p. 161-162). That is, it

5 The data mentioned are available at the link: https://www.ibge.gov.br/statistics/socials/work/9173-nationalresearch-by-home sampstra-home maintenance_quarterly.html?&t=series-historicas&utm_source=landing&utm_medium=explica&utm_campaign=unemployment>. Accessed: 29 Jul. 2020.

starts to question the employment relationship established in an indefinite employment contract under the organization and direction of a single well-defined employer (NASCIMENTO, 2017, p. 277-278).

And, following this movement, the labor reform incorporated into the Brazilian legal system several atypical labor relations. In this sense, Nascimento (2017, p. 278) highlights that:

> The Law 13.467/2017, which translated in Brazil what was called labor reform, came in the wake of the movement, seductively called flexibilization of labor relations, a movement that has privileged atypical labor relations, through the insertion into the legal system of plastic forms of employment, which are adapted to purely economic interests, the most diverse.

Therefore, what can be seen is that Law 13,467/2017 aims to reverse the logic of labor law, in order to relativize worker protection through the standardization of new forms of work and the legitimization of old labor fraud (ROCHA, 2018, p. 51). At this fork, Coutinho argues that:

> It will continue to be the regulatory framework of capitalism, a Capitalist Labor Law that was born from the Industrial Revolution as a framework for the modernization of living conditions, the result of struggles and resistance. But now it introduces a new system, as it replaces the myth of foundation, of tutelage and protection of the low-quality worker for individual and collective private bargaining autonomy. It rejects and highlights the State, abandoning the Welfare to welcome the Minimum, sheltering the neoliberal ideology and abstracting the need for state intervention in the market, in the economy. It replaces the project of a wage society, that is, a universalization of regulated wage earners as a standard for the economy by a fragmented and precarious labor society, whose income perspective can be replaced by welfare (COUTINHO, 2017, p. 119).

Thus, it can be said that the erosion of the typical employment relationship caused by the Labor Reform caused the "stratification" of this type of relationship. Delgado and Delgado, in dealing with the subject, describe it as a specific phenomenon of the hyper-sufficient worker. Follow:

> As it is perceived, the Labor Reform Law creates stratified segment in the universe of employees of institutions and employers companies, from two factual data that highlights: the fact of being the employee with higher level diploma; the fact that this employee perceives monthly salary equal to or greater than twice the maximum limit of benefits of the General Social Security System (DELGADO; DELGADO, 2018, p. 171).

Thus, it is understood that, in fact, this stratification process is a broader phenomenon, not limited to the hypersufficient worker. It is necessary to take into account, as a parameter, the employment relationship typically conceived by the constitutional and celetist norms (prior to Laws 13,429 and 13,467/2017).

That is, on the basis of the contract of employment for an indefinite period, directly subordinated to the service taker, provided within the company's headquarters, with the right to the working day of eight hours a day and forty-four hours a week, It can be said that the reforming legislator inserted atypical, or rather stratified, employment contract modalities.

In this tuning fork, they identify themselves as modalities of stratification of the employment relationship adopted by Laws 13,429/2017 and 13,467/2017: the intermittent employee,

the teleworker, the hypersufficient, the outsourced in the end-activity and the autonomous work (combined with the effect of "pejotization[6]"). However, this study has as its object only the analysis of the hypersufficient employee, reason why the other types of stratified work are not addressed.

4. THE HYPER-SUFFICIENT WORKER

As already discussed, the hypersufficient worker was one of the figures of the stratification of the typical employment relationship created by Law 13,467/2017.

In accordance with the sole paragraph of Art. 444 of the CLT, there is provision for this specific modality of employees to negotiate directly with the employer matters considered of relative irrenunciability, that is, those provided for in art. CLT 611-A, regardless of union assistance or representation.

According to Boucinhas Filho (2018, p. 129), the reforming legislator, by political choice, instead of creating a specific law guaranteeing fewer rights for parasubordinated workers, or senior executives, has fixed that employees carrying higher education degrees and, concomitantly, notice monthly salary equal to or greater than twice the maximum limit of benefits of the General Social Security System (RGPS) would have greater autonomy to negotiate their rights.

In this passage, Delgado and Delgado (2018, p. 171-172) defend that the legislator - through art. 444, sole paragraph, of the CLT - would have inserted a device diametrically opposed to the principle of harmful contractual inalterability, provided in the head of the same article. Thus, in a confused wording, marked by remissions, the hyper-sufficient worker and the employer would have ample freedom to negotiate individually the various multidimensional themes amenable to collective bargaining (art. 611-A, da CLT).

Given the lack of clarity of the norm, it is argued that the hyper-sufficient employee would have his relativized subordination, since he could impose his will in the employment[7] relationship. Thus, some doctrinators (RODRIGUES et. al., 2017, p. 159), when analyzing the debates on this normative amendment, point out that legislators judged that the worker with a degree in higher education and salary above the average salary of the population (estimated 2% of employees with formal ties) could not be considered vulnerable - subject to state protection or union protection.

Corroborating this position, Bastos (2018, p. 170) notes that it should be borne in mind that Labor Law was designed for the purpose of protecting subordinate workers, mediating conflicts and negotiations between asymmetrical parties. In this sense, the lawyer argues that the rules established in Articles 9,444, caput, and 468 of the CLT - which were not alternated by labor reform -, when interpreted in a teleological way, leave certain that there is a

6 The term "employment" refers to the employer's requirement or the employee's own initiative to conceal the employment contract by constituting a legal entity, as if it were an inter-company contract.

7 In the same sense, Bastos (2018, p. 173) argues that the protection of the standard ended up unprotecting the "high employees" by preventing him from negotiating differential negotiations, since there was no legal backing and the agreement was annulled before the Labor Court with adjacent convictions.

freedom of contract in the labor field. However, such autonomy is subject to rules of interest and public order of protection of the worker (present in the law, collective norms or decisions of competent authorities) and, therefore, if the clauses agreed may be declared null and void.

But, for the aforementioned author, although the normative framework of labor is born against the "imperialism of the contract", the legislation, however modern, would not be able to follow the transformations of the models of service provision, since it is inherent in the dynamics of industrial relations themselves that they are adaptable to the needs of the market. Hence the need to relax the standard through contracts. But, faced with the resistance of labor courts to allow the adaptation of the legislation to the peculiarities of the employee, the reforming legislator adopted the infamous "negotiated on legislation", including in the individual harvest (BASTOS, 2018, p. 170-171).

From this perspective, the doctrinaire argues that Law 13.467/2017 brought a paradigm break by establishing that "not every employee will be considered as hyposufficient or every employer will be considered a dominant part of the work relationship" (BASTOS, 2018, p. 171). From then on, it is up to the interpreter to go beyond the limits of the law and analyze numerous variables present in the labor pacts - including, the legal brocardo pacta sunt servanda, since the contract between hyper-sufficient and employer will make law between the parties; beyond objective good faith, legality and equality. Thus, in a close synthesis, Bastos understands that:

> [...] the worker must assume his role as an integral negotiator of this relationship and aware of what he is adopting as a contractual clause, claiming responsibility for their choices and their performance in the contract with the employer and bearing the consequences.
>
> From the moment the State returns to the citizen the responsibility for his actions, in casu, to the worker, who, in theory, can assumela, this citizen/worker evolves allowing it to be reached to other people who do not have the same conditions and opportunities and who really need it (BASTOS, 2018, p. 173).

However, such a current of thought must not prevail. Because, in line with Padilha (2017), it is understood that the figure of hypersufficient is an attempt to reverse the logic of Labor Law - the protection of the hyposufficient worker, appealing only to the subjective side of the employee's degree of technical knowledge. It should be forgotten, however, that hyposufficiency also arises from the economic dependence that the employee has, since he needs to sell his labor force to subsist. In this sense, Padilha (2017, p. 126-127):

> In this perspective, some proponents of neoliberal theories intend to remove the "myth" of the employee's contractual weakness and even fight for the return to the autonomy of the parties' will, as they understand that the protective evolution of the juslaboral branch resulting from this "myth of permanent genetic incapacity of the worker" happens "the recognition of the excesses and perverse defects of the protectionist objective, as well as the uncertainty about the economic viability of the system", which makes - for this current of thought - clear the importance of weighing the costs brought by excessive labor protection.
>
> (...)
>
> [o] that has been witnessed in the current economic situation is that, increasingly, the force of agreement of working conditions is returning to the employ-

> er's side. And it seems that it is precisely what advocates of these currents of thought want: the return to the parties' negotiating freedom to enable the employer to operate for the benefit of his sole and exclusive interest.

In line with the above, Delgado and Delgado (2018, p. 172-173) clarify that there is no empirical, theoretical or scientific basis to support the criterion adopted by the reforming legislator. Therefore, one could not detach the logical and systemic matrix of labor law to those workers who receive above a certain value. The vulnerability and the typical hypo-sufficiency of the work contract (made by adhesion) remains in the figure of the hyper-sufficient worker and, therefore, he has the same level of negotiation as the employer.

Moreover, Goulart (2018) points out, the legislator made an option for a patrimonial aspect, ignoring the essential quality of the good hired in the employment relationship of the hyper-sufficient worker, human work. However, the valorization of work cannot be seen as mere philanthropy, because without it there is no citizenship and social inequalities are aggravated. Therefore, it is understood that "there can be no differentiated legal regime due to schooling or salary level, because the political option of the constituent legislator of 1988 is human dignity, inherent to any working person" (GOULART, 2018, p. 124).

It is also worth mentioning the position of Melhado (2017, p. 95), for whom labor reform promotes the "fetishization" of the autonomy of the will by allowing negotiation in the individual work relations of expensive topics, such as hours banks, intraday break, warning, teleworking, intermittent work, pay and even unhealthy degree.

Thus, it can be said that Law 13.467/2017 causes the false impression that the worker, if it meets the requirements of the sole paragraph of the art. CLT 444 would no longer be hyposufficient, or at least mitigate it. Therefore, the figure of the "pseudo-sufficiency" arises, which has a false understanding of reality. It is forgotten that there is precarious employment relationship in all employment contracts in Brazil - since until today art has not been regulated. 7th, I, of the Constitution, whose sealing of arbitrary or unjust dispensation is seen as a rule of limited effectiveness. Thus, adds Melhado (2017, p. 96-97), there is no talk of worker autonomy because it only perfects an accession contract with conditions set without real dialogue by the service provider, leaving the option to "accept" or opt for unemployment.

Under the same bias, Boucinhas Filho (2018, p. 126-127) clarifies that the expression "hyper-sufficient" was originally used by Cesarino Júnior as one of the categories used in economic law to distinguish the economic power of related companies. There was no application with the Labor Law, since the absolute hypo-sufficiency stems from the need for the worker to sell his labor force to maintain himself, fitting the division of men only into owners and non-owners.

Under this logic, Melhado (2017, p. 97-98) questions whether a formal university education and higher remuneration would justify the differentiated treatment of the aspect of hypo-sufficiency typical of the work relationship. He clarifies that the subjection of labor to capital is not a result of contract or intellectual deficit, but of a structural factor intrinsic to the capitalist mode of production: the oversupply of labor. Therefore, the fear of unemployment is what makes the employee hyposufficient - including the high official or one who meets the requirements of art. 444, sole paragraph, of the CLT because it is afraid of having a brutal drop in its income if it is dismissed and has to receive unemployment insurance with values below its usual income.

In addition, it is worth noting that Boucinhas Filho (2018) argues that emotional stress and anguish, which characterize hypo-sufficiency, would increase proportionally with the employee's responsibility and remuneration. Follow:

> The fear of unemployment is umbilically related to insecurity (...) Once dismissed, the senior executive faces more and greater difficulties than other employees to relocate to the labor market. To one because there aren't that many job openings for top executives. A duas porque as notícias corre muito rapidamente no mundo corporativo e a dispensa de um executivo em razão de maus resultados will surely negatively affect your image in the market, reducing your hiring possibilities (BOUCINHAS FILHO, 2018, p. 127).

Another point raised by Melhado (2017, p. 98-99) that should be taken into account is the unconstitutionality of the criterion of differentiation of the hypersufficient worker because he has a higher level. For, on the one hand, the high tech subjection of the means of production would eventually equal the workers under machinery and robotic control and, on the other hand, the Constitution would have forbidden the distinction between manual, technical or intellectual work (art. 7º, XXXII of the CF).

In addition, there is a flaw in the wording of the device under analysis that is worth mentioning in the section where the standard provides that direct negotiation between the hypersufficient worker and the employer will have "same legal effectiveness and preponderance over collective instruments". Given the lack of precision of the term, Melhado (2017, p.100) understands that what is laid down in the law, regardless of the intention of the legislator, is that "these contractual clauses have no and could not have preponderance over the law".

Given the breadth of the rights that come to be negotiated by a specific part of workers, regardless of the category to which they belong, it can be said, with support in the opinion of Goulart (2018, p. 120), that among the changes of the CLT, "this, undoubtedly, is perhaps the most emblematic because it reaches the very core of social protection, tracing a new 'category' of worker".

Even, for Delgado and Delgado (2018, p. 174), the figure of the hyper-sufficient worker is a stratification of the worker, in order to offend the constitutional objectives of "building a free, just and supportive society" (art. 3º, I), of "ensuring national development" (art. 3º, II) and "eradicating poverty and marginalisation and reducing social and regional inequalities" (art. 3º, III); as well as undermining the constitutional principles of the social function of property, the pursuit of full employment, the most favourable norm and the closing off of social regression.

For Bastos (2018, p. 174-175), this means that the written agreement will prevail over collective norms and law. However, the limits of constitutional norms and those laid down in international human rights treaties remain, because they have supralegal status.

Thus, it is understood that the stratification of the classical employment relationship occurs due to the possibility of individual negotiation between the hyper-sufficient employee and his employer prevailing over the labor legislation, as it runs counter to principles that govern not only the employment contract in the field of work, but also contracts in general in the civil sphere.

It is salutary that Civil Law has undergone a repersonalization process, so that this branch of legal science is seen under the civil-constitutional bias. This means that the interpretation

of its institutes ceases to be patrimonialist and, from then on, focused on the valorization of human dignity (FACHIN, 2006, p. 39-46). And, one of these interpretative changes occurred with regard to contracts (MORAES, 2010, p. 296).

In this tuning fork, with the repersonalization of Civil Law, the contracts in the civil sector are analyzed from the weighting of contractual freedom with the principles of the existential minimum, contractual good faith and the social function of property (TEODORO, 2016, p. 149). This situation is even more latent in the labor sphere, in which not only the search for human dignity prevails, but also the norms, contracts and individual and collective negotiations must be interpreted based on the principle of protection (ALVES, 2017).

Therefore, if even in the contractual rules where the parties are equal the autonomy of the parties is not absolute, we argue that the contractual freedom of hyper sufficient should be analyzed beyond the "negotiated on legislation". In the same sense, Alves (2017, p. 168) understands that, in the current state of capitalism, employee freedom, whether hyper-sufficient or not, is not guaranteed, given its economic dependence on employment. Therefore, the interpretation of art. 444, sole paragraph, of the CLT must be interpreted according to principles and values laid down in the Constitution, in order to preserve the minimum conditions for the dignified existence of the worker.

Thus, with the repersonalization of labor law, we understand that the interpretation of the clauses of the negotiation of hyper-sufficient should not meet only the protection of the minimum civilization level (including the fundamental obligations of the employment contract - with a view to the horizontal effectiveness of fundamental rights and duties) as well as the duties attached to the employment contract.

Therefore, any agreement made by the hypersufficient with fulcrum in art. 444, sole paragraph, of the CLT must be analyzed in the light of the parties' objective good faith, and the employer must fulfill his duties of clarifying the effects of the negotiation; of the employee's safety; in addition to ensuring his loyalty to his employees; and promote cooperation for the human development of its workers (principle of progressivity). Otherwise, the odd situation will prevail in which civil law will be more protectionist in providing for the social function of the contract, while, in labour law, the individual negotiation of the hypersufficient aggravate its hypo-sufficiency by agreeing conditions below the fundamental labor rights and, therefore, stratify it of the other employees.

Still in this sense, disagreeing with the position of Fincato and Felten (2018, p. 59), for whom there would be no shaking for the trade union movement under the argument that the hyper-sufficient do not represent 5% of the labor market, we argue that the rule discussed is anti-union, considering that the stratification of hypersufficient can cause harm in the scope of the Collective Labor Law by creating an individual and parallel alternative to the union solution for the other workers of the category. For the trade union organizations, which are already weakened by the lack of representativeness and the lack of obligatory union contribution, will still have their category weakened during the paredista movement or collective bargaining, since the portion of the hypersufficient will no longer have interest in negotiating collectively or going on strike, since they can repactuate their employment contracts individually.

It is valid to mention that, despite questions about the content previously made, there are flaws in the writing of art. 444, sole paragraph, of the CLT, which makes the interpretation of the standard difficult. In this sense, the legislator did not specify whether the parameter for the wage criterion should be taken into account the net or gross wage to determine twice the GDPR benefit ceiling. In this sense, Bastos (2018, p. 174) argues that the criterion should be the net wage, based on the most favorable interpretation to the employee.

Finally, regarding Comparative Law, it should be highlighted the criticism of Melhado (2017, p. 98-99) to whom the legislative policy adopted by the labor reform highlighting that, in other countries, the figure of the high employee does not use these two criteria laid down in Law 13,467/2017, but the analysis of the concrete case of exercise of management and management functions, absorbing the alter ego of the capital itself.

It is worth noting that the figure of the high director, in fact, is seen in the Spanish legal system as the person who exercises powers inherent to the legal ownership of the company on functional areas of indisputable importance, acting with autonomy and full responsibility. This figure is governed by the Decree of Alta Dirección and removes several rights provided for in the Statute de los Trabajadores (ET). And it is not confused with the ordinary managers or technicians, because these, although they occupy high positions, with several employees under their command, are below that and are governed by ET (BOUCINHAS FILHO, 2018, p. 125-126).

But in any case, by international bias, Melhado (2017, p. 99-100) adds that the figure of hyper-sufficient is at odds with the precepts of ILO Convention 111, which establishes general parameters against discrimination in employment and occupation. For him, there would be offense to the isonomy of opportunities and treatment by distinguishing him from other workers because of their school education or remuneration.

5. HYPER-SUFFICIENCY AND THE NEED FOR A RE-READING OF LABOUR LAW

About the aforementioned modifications, Nascimento (2017, p. 291) highlights that the challenge is to find the balance "in the inhospitable jungle of capitalism, the Aristotelian mediania between the abyss of precarious rights and the abyss of unemployment". It is therefore necessary to question the scenario (im)put by the labor reform. Thus, if on the one hand the advantage of adopting these entry relaxation measures is evident, since the stratification of the typical employment relationship provides a range of options that allow the company to meet the transitional business needs and adapt to market changes, without the burden of hiring for an indefinite period. One wonders, from another band, what is the human cost of this easing? Would the creation of new jobs, or even the distribution of existing ones, through these new plastic forms of labor, be sufficient justification to admit precarious conditions?

Delgado (2015, p. 27-29) points out that work (world of being) is a fundamental right prior to the Labor Law (world of duty-being), whose regulation allows the promotion of dignity, even if it does not correspond to reality. Even, the author warns of the risk of understand-

ing the right to work broadly and literally, which would include precarious work. The right to work must therefore be restricted to those who are worthy, otherwise it will be used as a device for the commodification of the labour force.

Moreover, as Delgado (2015, p. 114-119) points out, the market alone is not capable of promoting social justice and democratizing power. Thus, the labor legal norms, when intervening in the labor contract, promote a generic pattern of social justice realization in the structurally unequal capitalist system. It should be noted that work is the means by which the individual is inserted into the economy. Thus, by raising the conditions of the labour force's agreement, the formation and preservation of the internal market is made possible.

In this sense, Fabriz (2006, p. 16-17) points out that, in the Brazilian legal system, the right to work is foreseen as a social right, in the terms of art. 6º of the Federal Constitution. Although they are all correlated and interdependent, the right to work is the generating fact of others. Thus, the social value of work is considered the principle of the Constitution (art. 1º, III). It should be borne in mind that it is free and creative work (as opposed to forced labour), capable of man's material and spiritual fulfilment, inherent in the human condition.

Thus, the touchstone must be the dignity of the worker as the north of the juslaboral system and, therefore, the rescue of his main figure, the typical employment relationship. In this sense, the movement of repersonalization of Labor Law stands out.

It is based on the lessons of Teodoro (2016, p. 151), that the rereading of Labour Law is proposed with focus on the fundamental rights provided by the Constitution, placing the worker's person and the off-balance-sheet aspects at the center of the interpretation - in the same way as with Civil Law.

It should be borne in mind that "work and the worker cannot be seen as dissociated elements", because "work is the worker himself on the move" (MOTA, 2016, p. 158). According to this logic, Mota clarifies that:

> It is necessary, therefore, that the Labor Law finds its existential matrix, built from an anthropological and personalistic morality, forming a normative system aware that it has no other origin than the promotion of the worker's dignity. If labour law affects the economy, helping to justify capitalism, it does so as a consequence and not as a cause. Only the approximation of Labor Law with its elementary core (the human worker) will make it unfounded to the deconstruction process that has expanded in its direction. (MOTA, 2016, p. 159).

And for the repersonalization of Labor Law to be effective, it is necessary to promote the search for the broad valorization of decent work, regardless of its framework. For Delgado, this should occur so that:

> [...] the value of work will be revealed both by the worker and by the historical moment experienced. In other words, the work determines the own valuation of the subject who works (understood: the valuation refers to the subject as a worker). Then it is possible that, in society, the employee, the self-employed worker, the trainee worker, among others, may be valued in different ways. What does not mean, by the way, that the Law should identify this differentiation of values as an exclusion criterion (DELGADO, 2015, p. 102).

In addition, it is understood, as well as Delgado (2015, p. 178-184) that, although Labor Law restricts its area of protection to the employee, there is a fundamental duty of protec-

tion of other forms of work that require reformulation (expansion of axiological awareness) of such a branch of the right to insert fundamental rights unavailable to any and all workers - universal model of Labour Law.

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6. FINAL REMARKS

The present study analyzed the doctrinal discussions on the regulation of hyper-sufficient employees in Brazil, as well as a study compared to the experience of other countries. From this, it can be said, therefore, that the way in which Law 13,467/2017 incorporated the hyper-sufficient employee figure into the Brazilian legal system is unconstitutional.

Moreover, although it is worth the argument of generating jobs, it is a figure focused on the precarization of labor relations, so as to put the economic perspective in front of humanistic. In other words, it is one of the most striking examples of the incorporation of neoliberal discourse and the prevalence of economic reasoning over social logic.

As can be seen, although the comparative study of alien legal systems warns of precarious characteristics, the reforming legislator chose to stratify the typical working relationship in Brazil through the esdruxula position of the hypersufficient employee.

In short, it is possible to observe that the hyper-sufficient worker is an anomalous figure in the Brazilian legal system, because his criteria are neither justified nor supported in other normative systems, since it is not a high executive.

One perceives, therefore, that there is a stratification of the working class, by the false impression that the worker would not be subject to hypo-sufficiency, which, in fact, is inherent in the property-free class, irrespective of their monthly salary or educational training.

Finally, the lack of clarity in the wording adopted by the legislator has led to doubts even as to the scope of its application. It should be noted that, in any case, even if the direct and individual negotiation is valid, ignoring the offense to the constitutional principles and objectives and the very essence of Labor Law, still has the protection of ILO Convention nº 111, which prohibits discriminatory treatment. Also, it is in the same sense the statement agglutinated nº 1 of the Commission 4 of the 2nd Day of Material and Procedural Labor Law of ANAMATRA.[8]

Therefore, it is understood that regardless of the content and editorial flaws of the art. 444, single paragraph, of the CLT, the figure of the hypersufficient worker, in fact, has its hypo-presence exacerbated by being stratified by the other workers. In this passage, the question arises of what will be the practical implications of this, from more abstract aspects, such as the psychosocial identification with its category; until more practical aspects, such as the

8 Statement agglutinated No 1 of Commission 4 of the 2nd Day of Material and Procedural Labor Law of ANAMATRA: HYPER-SUFFICIENT WORKER. ART. 444 CLT SOLE PARAGRAPH.
I - The only paragraph of art. 444 of the CLT, plus Law 13,467/2017, contradicts the principles of labor law, affronts the Federal Constitution (arts. 5º, caput, and 7º, XXXII, among others) and the international system of protection of labor, especially the ILO Convention 111.
II - The individual negotiation can only prevail over the collective instrument if more favorable to the worker and provided that it does not contravene the fundamental provisions of protection to the work, under penalty of nullity and affront to the principle of protection (Article 9 of CLT c/c, Article 166, VI, Civil Code).

rights provided in the list of art. 611-A of the CLT could be negotiated by a single worker (even if he has no technical knowledge for it) or even issues of wage equalization.

Thus remains the challenge of indoctrinators, lawyers, labor prosecutors and magistrates perform their arduous functions essential to justice for the construction of the concrete norm for conflict based on systematic interpretation of the current normative system - which includes the minimum level of civilization constitutional and international standards. Challenging hermeneutics in view of the unclear text of the Labor Reform.

Moreover, it is possible to notice that the argument of reducing labor rights did not have the expected economic effects (in the same way as the countries analyzed in the comparative study), considering that the country still faces a recession in the economy with high unemployment.

It is important to emphasize the conclusion that the "touchstone" must be the dignity of the worker as north of the Justrabalhista system and, therefore, the rescue of its main figure, the typical relationship of work. And for this step to be effective, it is necessary to promote the search for the broad appreciation of decent work.

Given the uncertainties of the scenario, it is questioned whether the valuation of the "hyper-sufficient" worker - even though it perceives more than twice the ceiling of the RGPS and has a higher level - it would not remain present in the rescue of basic principles such as the primacy of reality and the assessment of the effective bargaining power of such a worker, his parity before the employer.

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THE REACH OF THE PARTER'S SUCESSION RIGHTS WITH STF'S JUGDMENT OF THE EXTRAORDINARY RECOURSE nº 878.694/MG

O ALCANCE DOS DIREITOS SUCESSÓRIOS DO(A) COMPANHEIRO(A) COM O JULGAMENTO PELO STF DO RECURSO EXTRAORDINÁRIO nº 878.694/MG

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ABSTRACT

The purpose of this article was to analyze the current situation of the partner in succession in the Civil Code of 2002, as a result of the judgment of Extraordinary Appeal No. 878.694 / MG, in which the Supreme Court (STF) recognized and declared the unconstitutionality of art. 1,790, of the mentioned normative. The Supreme Court equated the stable union with the marriage, for succession purposes, and determined the application, in both cases, of the regime established in article 1.829 of the Civil Code of 2002. The methodological procedure consisted of a descriptive research, presenting the current situation of the partners in Brazilian and qualitative inheritance law, analyzing the understanding of the judgment of Extraordinary Appeal 878,694 / MG by the STF. It was concluded that the STF left several omissions in its decision, such as not having declared the inclusion of a partner in the list of necessary heirs, provided for in art. 1,845 of CC / 2002, as well as saying whether the cohabiting person will have real right to housing rights, according to the rule of art. 1,831 of the same regulation. The STF also failed to take into account the scope of the legal certainty of its decision, since in determining that the understanding of the decision should be applied only to open and unfinished inventories, it ended up facing Articles 1,784 and 1,787 of CC / 2002.

KEY WORDS: Supremo Tribunal Federal. Stable Union. Succession of the Partner.

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RESUMO

O presente artigo teve como objetivo analisar a situação atual do(a) companheiro(a) no direito sucessório, no Código Civil de 2002, em decorrência do julgamento do Recurso Extraordinário nº 878.694/MG, em que o Supremo Tribunal Federal(STF) reconheceu e declarou a inconstitucionalidade do art. 1.790, do mencionado normativo. O STF equiparou a união estável ao casamento, para fins sucessórios, e determinou a aplicação, a ambos os casos, do regime estabelecido no artigo 1.829 do Código Civil de 2002. O procedimento metodológico consistiu numa pesquisa descritiva, apresentando a situação atual dos companheiros no direito sucessório brasileiro e qualitativa, analisando o entendimento do julgamento do Recurso Extraordinário 878.694/MG pelo STF. Concluiu-se que o STF deixou várias omissões em sua decisão, como não ter declarado a inclusão do companheiro ou companheira no rol de herdeiros necessários, previsto no art. 1.845 do CC/2002, bem como dizer se o convivente terá direito real de habitação, conforme regra do art. 1.831 do mesmo normativo. O STF também se omitiu quanto ao alcance da segurança jurídica de sua decisão, posto que, ao determinar que o entendimento do decisum fosse aplicado apenas aos inventários abertos e não findos, acabou por afrontar os artigos 1.784 e 1.787 do CC/2002.

PALAVRAS-CHAVE: *Supremo Tribunal Federal. União Estável. Sucessão do (a) Companheiro(a).*

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1. INTRODUCTION

A stable union is a de facto relationship between a man and a woman, in a prolonged way, without being formalized, as is marriage, but with the goal of family formation. This stable union regime is fully practiced in Brazilian society and supported in its legal system. In this sense, the Federal Constitution of 1988, in its article 226, §3º, recognized the stable union as a family entity and ensured the facilitation of its conversion into marriage, taking the first steps towards equating the rights of partners with those of spouses, family law and inheritance rights.

Later the promulgation of the Magna Carta, as a complement and application of the aforementioned device, were edited Laws 8,971/1994 and 9,278/1996, granting rights to the companions, mainly with regard to the succession.

With the validity of the Civil Code of 2002, there was in its article 1.723 the recognition of the stable union as a family entity, configuring the said union with the publicity, continuity, durability and will of family constitution, consolidating the constitutional desire. However, it also did not occur when the law of succession dealt with the succession of companions, which was regulated in Article 1.790, making clear distinction in relation to the law of succession of the spouses, this regulated in its Article 1.829 and other devices, generating many questions in the doctrinal and jurisprudential context.

Through the Extraordinary Appeal nº 878.694/MG, judged by the Supreme Court (STF) in May 2017 and with Judgment published in February 2018, with effect of general repercussion, the unconstitutionality of Article 1,790 of the Civil Code and the distinction it made as regards inheritance schemes between spouses and partners has been recognised and declared, and in both cases the arrangements laid down in Article 1,829 of the Code of Conduct shall apply.

Despite the recognition of the equivalence of the succession regime between spouses and partners, it is hypothesized that the Supreme Court did not face, in decisum, the issue in its entirety, omitting in relation to various devices that permeate this legal regime. In this

sense, questions will be analyzed that have not been clear or omitted regarding the assimilation, such as: whether or not the companions are in the list of necessary heirs, as provided in art. 1.845 of CC/2002 in relation to spouses, and focus on them the rules laid down in Articles 1.789 and 1.846 to 1.849, which deal with the protection of the legitimate party, which generates for the coexisting restrictions on donation and will.

It will also be analyzed what was the scope given by the Supreme Court in relation to the partners on the real right of housing assured to spouses in art.1.831 of the CC/2002, as well as the application by the Supreme Court of its decision, open and unfinished judicial and extrajudicial inventories.

In order to analyze the scope of the decision of the Supreme Court in the trial of Extraordinary Appeal nº 878.694/MG, about the succession of comrades, the present article was divided into three topics, and initially will be presented an overview of the current situation of(a) companion(a) in the law of succession according to the Civil Code, also addressing the concept and requirements of stable union. The second topic will bring an approach on RE 878.694/MG, in which the STF recognized and declared the unconstitutionality of Article 1.790 of the CC/2002 and equated inheritance schemes between spouses and partners. The third and final will expose the succession rights of the (a) companion(a) in the trial of Extraordinary Appeal nº 878.694/MG, addressing the reach of the Supreme Court on necessary heir, the right in rem to housing and the application of the decision to judicial and extrajudicial inventories opened and not yet completed.

Thus, this study aims to demonstrate the new rule of succession for those living in a stable union, after the recognition of the unconstitutionality of Article 1.790 by the Supreme Court, highlighting, specifically, the scope of the decision before the Supreme Court, relating to several other provisions of the Civil Code which form part of that legal regime.

2. CURRENT STATUS OF COMPANION(A) IN THE LAW OF SUCCESSION IN THE CIVIL CODE

In Brazil, for a long historical period, the prolonged union between man and woman, without the formalization of marriage, living or not under the same roof, was considered as concubinage (PENA JÚNIOR, 2017). The concubinage consists in the relationship between man and woman, among whom one or the other is not free to marry, so that the concubinage is not recognized by the legislation. Differently, in the stable union the participants are free to constitute marriage.

In a stable union, the relationship between a man and a woman is prolonged, continuous and lasting, with the aim of forming family ties, which can be converted into marriage. In the concubinage, the relationship between the man and the woman, although not occasional, does not have the objective of having a family and, as has been exposed, at least one of the companions is legally prevented from marrying.

With the promulgation of the Federal Constitution of 1988 and the recognition of the stable union as a family entity, the advancement and legal protection of this de facto situation in Family Law was significant. In this sense, state Farias and Rosenvald (2015, p. 446),

> From the art §3º. 226 of the Citizen Charter of 1988 it is possible to visualize the stable union, also called companionship, as a situation of absence existing between two people, of different sexes and free to marry, who live together, as if married were (living more uxorious)characterizing a family entity.

Farias and Rosenvald (2015) further add that the stable union is, in fact, a marriage of fact, arising from social and natural relations of affection, from the will of the parties involved, who by reason of the freedom they experience, simply do not wish to bow to the formalities of marriage. Therefore, the protection granted by the Magna Carta is legitimate.

Later, on 29 December 1994, Law 8,971 was enacted, which regulated the rights of companions to food and succession. As far as inheritance rights are concerned, he assured(o) the surviving companion(o) the enjoyment of a fourth part of the property, having children, or half if there are no children, but surviving ascendants and still the right to the entirety of the inheritance in the absence of descending and ascending. In the first two situations, the (a) companion (a) will only be entitled to the enjoyment of the goods of the deceased until it constitutes a new union.

On May 10, 1996, a new law was enacted, Law 9,278/1996, which regulated art. 226, §3º, of the Federal Constitution (BRAZIL, 1988), recognizing the stable union between man and woman as a family entity, assuring the partners the right to inherit and the right of real housing, among others.

Laws 8,971/1994 and 9,278/1996 were tacitly repealed because the subjects dealt with in them were included in the Civil Code of 2002, which incorporated in Articles 1,723 to 1,727 the basic principles of the said Laws (BRAZIL, 2002). In this sense, says Gonçalves (2012, p. 608),

> The aforementioned Laws n. 8,971/94 and 9,278/96 have been repealed in view of the inclusion of the matter in the scope of the Civil Code of 2002, which made a significant change, inserting the title concerning the stable union in the Family Book and incorporating, in five articles (1,723 to 1,727), the basic principles of the aforementioned laws, as well as introducing sparse provisions in other chapters as to certain effects, as in cases of maintenance obligation (art. 1.694)

Gonçalves (2012) also points out that the 2002 Civil Code dealt, in the above mentioned provisions, with procedural and property aspects, leaving for the law of succession the inheritance effect, as provided in art. 1.790 of CC/2002 (BRASIL, 2002).

The Civil Code of 2002 made express mention of the spouse's right in rem to housing, omitting itself in relation to (the) companion (the), which although without provision in the said Code, still proclaims the subsistence of Article 7, sole paragraph, of Law 9.278/1996, which ensured that the surviving companions had a right of residence in respect of the property intended for the residence of the family.

The doctrine differs as to the applicability of the aforementioned article, Pereira (2016) states that there was a tacit repeal of everything that was not incorporated by the Civil Code,

Gonçalves (2012) argues that there was no express repeal of the aforementioned law as to the real right of housing of the (a) companion(a), as well as no incompatibility of the benefit provided in it with any device of the Civil Code (BRAZIL, 2002). It is still invoked, through analogical interpretation, that the real right of housing ensured to the spouse in art. 1,831, Civil Code 2002, should be extended to comrades.

> Even in the absence of prediction in the Code, supports a doctrinal current been the subsistence of art. 7th, sole paragraph, of Law 9.278/96, which defers to the surviving companion the right in rem of dwelling in relation to the property intended for the residence of the family. It is argued, in defense of the companion, that there was no explicit repeal of the said law, as well as no incompatibility of the benefit provided in it with any device of the new Code. Furthermore, the analogical extension of the same right granted to the surviving spouse in art. 1.831 of the same diploma is invoked.
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> In this line, Statement 117 of the Federal Court Council, approved at the 1st Civil Law Conference, held in Brasilia in September 2002: "The real right of housing should be extended to the partner, either because the provision of Law 9.278/96 has not been revoked, or because of the analogical interpretation of art. 1,831, informed by art. 6º, caput, of CF/88", (GONÇALVES, 2012, p.189-190)

For the Supreme Court the Laws 8.971/94 and 9.278/96 had their devices revoked, as can be seen in the Menu of the Judgment of the judgment of RE 878.694-MG, of 10.05.2017, in which was recognized the unconstitutionality of art. 1.790 of the Civil Code 2002 [...]

> So, the art. 1,790 of the Civil Code, by repealing Laws Nos 8,971/94 and 9,278/96 and discriminating against the companion (or companion), giving her succession rights much lower than those conferred on the wife (or husband), is in contrast to the principles of equality, of human dignity, of proportionality as a barrier to poor protection, and of the barrier of retreat[...].

Thus, it can be stated that part of the doctrine and the Supreme Court agree the validity of the Civil Code 2002 established the succession law of the (a) companion(a), tacitly repealing all previous provisions.

It was in Article 1,790 that the Civil Code (BRASIL, 2002) regulated the succession law of the people living with each other in a stable union, in general terms, that the companion(a) (a) participates in the succession only in respect of the property acquired for consideration during the marriage, in accordance with the following provisions: a) if you compete with common children, you will be entitled to a share equivalent to that of the latter; b) if you compete only with descendants of the author of the inheritance you will be entitled to half of what you touch each of them; c) if you compete with any other next of kin, the (a) companion(a) survivor shall be entitled only to one-third of the inheritance and d) only when there are no successable relatives shall he be entitled to the entirety of the inheritance.

The succession of the spouse does not refer only to onerous assets acquired in the constancy of coexistence, nor does the spouse compete with any successable relative who is not descended or ascending.

The succession rights of the (a) companion(a) are far from the property succession of the spouse, as can be observed in Article 1,829 of the Civil Code. In a brief analysis of the two devices, Articles 1,790 and 1,829 of the CC/2002, we see clearly the difference in the regime of succession of the spouse and the companion or companion, which generated many ques-

tions about the unconstitutionality of art. 1.790, of the aforementioned diploma, in the field of the judiciary (BRASIL, 2002).

It fell to the Supreme Court, when assessing the Theme 809, concerning RE 878.694/MG, to recognize as unconstitutional the distinction of inheritance regimes between spouses and partners provided for in art. 1.790 of CC/2002, determining that the regime of art be applied, both in the cases of marriage and stable union. 1,829 of CC/2002, where the spouse is included in the order of the hereditary vocation and nothing was mentioned about the companion(a) (a). Note that the Supreme Court did not repeal Article 1,790, because only the Legislative Branch is possible to do so, (ANDRADE, 2018).

With this decision, the same succession regime provided for spouses under Article 1,829 of the 2002 Civil Code also currently applies to partners.

However, in its decision (RE 878.694/MG), the Supreme Court did not clarify some emblematic issues: whether the partner has real right to housing, provided in art. 1.831 of the CC/2002 to the spouse; whether or not to be included in the list of necessary heirs of the art. 1.845 of CC/2002, because the necessary heirs, among them the descendant, ascendant and spouse, are entitled not to be deprived of the legitimate part, ie fifty percent of the inheritance.

Similarly, the Supreme Court, in determining that the decision establishing the unconstitutionality of Article 1.790 of the CC/2020 was applied to judicial and extrajudicial inventories already opened and not yet completed, nothing explained about the affront of this understanding to the provisions of Articles 1,784 and 1,787 of the CC/2002, which determine that the succession and the legitimation to succeed are regulated by the law in force on the date of its opening.

Thus, the Supreme Court was omitted by not clarifying whether the rules of various provisions of the CC/2002 are applied to the partners, which are in accordance with the legal regime of the spouses. There is therefore a need for the Court to present the scope of the judgment thesis and the rules and provisions of the succession regime of the spouse that should be applied to the companions, as well as to clarify which law should be applied to the succession of the companions.

3. THE DECLARATION OF UNCONSTITUTIONALITY OF ARTICLE 1.790 OF THE CC/2002 WITH THE JUDGMENT OF THE SPECIAL APPEAL No 878.694/MG BY THE SWISS COURT

On May 10, 2017, the Supreme Court concluded the trial regarding the unconstitutionality of Article 1,790 of the CC/2002, which treated differently from the spouse the (a) surviving partner(a) regarding inheritance rights. The final decision was driven by the Extraordinary Appeal nº 878.694/MG, which had as Rapporteur, Minister Luís Roberto Barroso.

The conflict that generated the process mentioned above was due to the conflict that came to exist after the death of the author of the inheritance, between his brothers and the appellant, with whom he lived in a stable union. The deceased left no will and came to exist

pretension regarding his patrimony by both parties: brothers and companion. The deceased possessed property and had no descendants, nor ascendants, having as his closest relatives only three brothers, who were in the passive pole of the resource.

The decision of the judge of first degree recognized the right of the surviving companion to the whole of the inheritance left by the deceased companion, excluding from the succession the siblings of the cujus, still granting him the royal right of habitation. Therefore, the court of first instance applied to the case the clause III of article 1,829 of the CC/2002, giving equal treatment to the institute of stable union in relation to marriage.

In the present case, in being applied the rule established in Article 1,790, Section III, of the CC/2002, the living siblings, who are collateral of 2nd degree, would contribute to the inheritance with the companion, being the latter only one third of the property left by the deceased companion.

Unconvinced, the brothers of the deceased appealed the decision to the Court of Justice of Minas Gerais (TJ-MG) which, starting from the premise of the constitutionality of art. 1.790 of CC/2002, approved the appeal, pursuant to Article III. 1,790, limiting the companion's right to one-third of the goods acquired onerously during the existence of the stable union, excluding the companion's private goods.

Unhappy with the decision of the court of 2nd degree, the companion of the plaintiff brought Extraordinary Appeal before the Supreme Court, as a last opportunity of appeal, arguing that the succession regime laid down in Article 1,790 of the CC/2002 is incompatible with the Magna Carta, with the State obligation guaranteed by it to protect the family in accordance with the provisions of the Art. 226, §3º, da CF/88. Announcing that the succession regime to be applied to your case should be the one identical to the succession of the spouse. In support of this claim, the applicant put forward the principle of equality enshrined in Art. 5 of the Charter of the Republic and the recognition of the stable union promoted in Article 226 above.

In opposition to the Extraordinary Appeal, one of the judges defended the constitutionality of art. 1.790 of CC/2002, claiming that CF/88 recognised the stable union as a family entity, but did not equate it with the marriage institute.

The Supreme Court concluded the trial, deciding, by majority vote, to grant the Extraordinary Appeal nº 878.694/MG, to recognize the unconstitutionality of art. 1.790 of CC/2002, declaring the right of the applicant to participate in the whole of the inheritance left by her companion, equating the succession regime of the partners to that of the spouse, in the form in art. CC/2002 1.829.

The summary of the decision of Extraordinary Appeal 878.694/MG, published in February 2018, was submitted as follows:

> CONSTITUTIONAL AND CIVIL LAW. EXTRAORDINARY APPEAL. GENERAL REPERCUSSION. UNCONSTITUTIONALITY OF THE DISTINCTION BETWEEN SUCCESSION ARRANGEMENTS BETWEEN SPOUSES AND PARTNERS.
>
> 1. The Brazilian Constitution includes different forms of legitimate family, in addition to that resulting from marriage. This list includes families formed through a stable union.

> 2. Spouses and partners, that is to say the family formed by marriage and the family formed by a stable union, shall not be entitled to desequip for inheritance purposes. Such hierarchization between family entities is incompatible with the 1988 Constitution.
>
> 3. Thus, the art. 1790 of the Civil Code, by repealing Laws Nos 8.971/94 and 9.278/96 and discriminating against the companion (or the companion), giving her succession rights much lower than those conferred on the wife (or the husband), is in contrast to the principles of equality, of human dignity, of proportionality as a barrier to poor protection, and of the fence of retrogression.
>
> 4. For the purpose of preserving legal certainty, the understanding concluded herein shall apply only to judicial inventories in which there has been no final decision on the sharing order, and to out-of-court shares in which there is no public deed.
>
> 5. Appeal is well founded. Affirmation, in general repercussion, of the following thesis: "In the current constitutional system, it is unconstitutional the distinction of inheritance regimes between spouses and partners, and in both cases the regime established in art. 1.829 of CC/2002".

Thus, according to the decision of the Supreme Court exposed, in the understanding of the majority of the Supreme Court ministers, won only the Ministers Dias Toffoli, Marco Aurelio and Ricardo Lewandowski, the rules of the Federal Constitution contemplate different forms of families, beyond what results from marriage, and this list includes families formed through a stable union. The decision is not legitimate to desequip, for inheritance purposes, the family formed by marriage and the stable union.

Therefore, with the above-mentioned decision, art. 1.790 of the CC/2002 has lost its practical applicability and the partner becomes, next to the spouse, in the order of legitimate succession provided for in art. 1,829 of CC/2002 (BRASIL, 2002).

However, it should be noted that the succession regime of the spouse is not restricted to the provisions of Article 1.829 of the Central Committee/2002, and that several others of the Law deal with the succession of the spouse and remain open to the partners, as already dealt with, the real right of housing and configuration of the necessary heir condition, as for example.

This was the line of understanding of the Brazilian Institute of Family Law, when hindering the decision of the Supreme Court in Extraordinary Appeal number 878.694/MG, arguing, in summary, that in the succession regime of the spouse, beyond the rules laid down in art. 1.829 of the CC/2002, there are several other provisions of the said Act that conform this legal regime, in particular the art. 1,845. He requested that the Supreme Court clarify the scope of the thesis of general repercussion, in order to mention the rules and legal provisions of the succession regime of the spouse that should apply to the partners.

The Court, however, rejected the embargoes, as stated in the decision, which stands out below:

> CONSTITUTIONAL AND CIVIL LAW. EMBARGOS DE DECLARAÇÃO EM RECURSO EXTRAORDINÁRIO. REPERCUSSION GENERAL. APPLICABILITY OF ART. 1.845 AND OTHER DEVICES OF THE CIVIL CODE FOR STABLE UNIONS. ABSENCE OF OMISSION OR CONTRADICTION.

> 1. Disclaimers questioning the applicability of Art to stable unions. 1.845 and other provisions of the Civil Code constituting the inheritance regime of the spouses.
>
> 2. The generally recognised impact relates only to the applicability of Art. 1.829 of the Civil Code to stable unions. There is no omission as to the applicability of other devices to such cases.
>
> 3. Disclaimers rejected. (STF, Emb. Decl. no RE 878.694/MG, Rel. Min. Luis Roberto Barroso)

Despite the arguments of the Supreme Court in the decision that rejected the embargoes, analyzing the decision relating to the trial of Extraordinary Appeal number 878.694/MG, it can be noticed that the Court equaled the succession regime between spouses and partners, imposing the application of the rules of art. CC/2002 1.829. However, it is undeniable that the Court omitted the applicability, to stable unions, of several other devices of the CC/2002 that conform the succession regime of the spouse, citing, as a highlight, the art. 1,845, which deals with the list of necessary heirs.

4. OMISSIONS IN THE TRIAL OF EXTRAORDINARY APPEAL No 878.694/MG CONCERNING THE LAW OF SUCCESSION OF(A) COMPANION(A).

As already widely handled, the Federal Supreme Court has concluded the trial of Extraordinary Appeal No 878.694/MG, with general repercussion, unifying its decision for other similar cases, and has established the thesis that, in accordance with the principles and constitutional guarantees in force, it no longer includes the distinction between spouses and partners in succession, and the provisions of Article 1,829 of the 2002 Civil Code should apply to both.

The Federal Supreme Court has therefore equated, for succession purposes, spouses and partners, that is to say, the family formed by marriage and formed by a stable union, on the ground that it thus safeguarded and fulfilled the constitutional precepts in force, was silent on other rights that, also, deal with the succession of the spouse, but that were not described in the art. 1.829 of CC/2002, as the inclusion of the companion(a) in the list of necessary heirs, the real right of housing of the companion(a) and, as well as on the succession rules laid down in the Civil Code as to the moment of the opening of the succession and the law regulates it.

4.1 O(A) COMPANHEIRO(A) COMO HERDEIRO NECESSÁRIO NO ART. 1.845

Although the Federal Supreme Court, in its decision in the trial of Extraordinary Appeal nº 878.694/MG, has equated spouses and companions for inheritance purposes, applying, both for the stable union and for marriage, the rules of art. 1,829 of CC/2002, it was not stated whether to apply to the companions also the rules of Article 1,845, which establishes the list

of necessary heirs: descendants, ascendants and spouse, without making any mention of the companion or companion.

According to Gonçalves (2012, p.205) " is the descendant (son, grandson, great-grandson etc.) or ascendant (father, grandfather, great-grandfather etc.), successor, that is, is every relative in a straight line not excluded from the succession by inhuman or disinherited, as well as the spouse (CC, ART. 1845)", and who appears in this list has succession protection, limiting the author of the inheritance to freely dispose of his estate, since the necessary heirs are entitled to half of the inheritance's assets, constituting it legitimate, as rule of art. 1,846 of CC/2002, which can only be removed in cases of indignity and disinheritance.

The omission left by the Supreme Court generates many questions concerning the Law of Succession and many consequences, such as doubts about the effectiveness or not of this right. In this regard, TARTUCE (2019) highlights that the inclusion of the companion in the list of heirs needed would have three effects, as described below.

The first effect that is pointed out, if considered the companion as necessary, would be the protection of its legitimate, generating restrictions on donation and will, due to the incidence of the rules provided in the arts. 1.789 (availability by the testator of only half of the estate), 1.846 (constitution of legitimate) and 1.849 of the CC/2002 (possibility of being heir testamentary and legal).

As a second effect, arising from the inclusion of companions in the list of heirs needed, would be the understanding of the rupture of the will in the ignorance of the existence of living companion, according to the intelligence of art. 1,974 of the 2002 Civil Code.

And as a last effect, the co-existent, as necessary heir, has the duty to collate the goods received in anticipation, as provided in the arts. 2.002 to 2.012 of the 2002 Central Committee, under penalty of being considered as evaded, in accordance with Articles 1.992 to 1.996, when it is also recognised to the spouse.

Although the Brazilian Institute of Family Law (IBDFAM) has joined with embargoes, claiming that the judgment of RE number 878.694/MG would have omitted in relation to the inclusion or not of the companion as necessary heir, as rule of art. 1.845 of CC/2002, the Court rejected them unanimously, pointing out to the rapporteur that there was no omission to be remedied:

> There is no need to mention the omission of the judgment embargoed for absence of manifestation in relation to art. 1.845 or any other provision of the Civil Code, as the object of the generally recognised pass-on did not cover them. There was no discussion about the integration of the partner to the list of heirs needed, so there is no omission to be remedied, (STF, Emb. Decl. no RE 878.694/MG, Rel. Min. Luis Roberto Barroso).

The rejection of the declaration embargoes proposed by the IBDFAN to the Supreme Court did not resolve the question about the inclusion or not of the companion as necessary heir. In this sense, the words of TARTUCE (2019, p. 244):

The position of the present author is in the sense that this rejection of these embargoes, which occurred in October 2018, did not solve the dilemma, and the doctrine and jurisprudence - notably the Supreme Court - should respond, in interpretation of the previous decision of the Supreme Court, whether or not the companion is the necessary heir.

Thus, faced with the omission of the Supreme Court, the just question about the need to clarify the inclusion or not of the (a) companion(a) as necessary heir in the provision of art. 1,845/2002, since this article establishes the list of necessary heirs, including the spouse, mentioning nothing about the partner or companion.

4.2 THE REAL RIGHT OF RESIDENCE OF(A) COMPANION(A)

In the same trial of the Extraordinary Appeal nº 878.694/MG, to equate the spouse and companion, for succession purposes, that is, the family formed by marriage and formed by the stable union, the Supreme Court also mentioned nothing as the right to real housing companion.

It is certain that in this regard nothing had been argued in the original judgment and that the real right of habitation of the companions was already being debated and recognized by the doctrine and jurisprudence. However, the change caused by the decision in the law of succession in relation to the spouse and companion or companion, demanded the manifestation of the Court on the right of real housing of the (a) companion(a), mainly with regard to the extension of this right, understanding not yet pacified.

Although the Supreme Court mentioned that the validity of the Civil Code 2002 tacitly revoked all previous infraconstitutional laws that dealt with the law of succession of comrades, the doctrine is not unanimous in this regard, and as the Supreme Court was silent, it must be asked whether the real right of habitation of the (a) companion(a) is assured by reason of the subsistence of art. 7th, sole paragraph, of Law 9.278/1996, or is granted this right in the same way as the spouse, in the form prescribed in art. 1.831 of the CC/2002. In this regard, it is emphasized that the two devices have different contents.

It is understandable that the real right of housing is based on the rule laid down in art. 1.831 of CC/2002, although only the name of the spouse is mentioned, it is to be interpreted that the rationale of the decision of the Supreme Court on the unconstitutionality of the art. 1,790 was that the inheritance rights between the spouse and companion(a) could not be divergent, nor could it be the real right of housing (BRASIL, 2002). In addition, this was the understanding of the Statement of the Federal Court, on account of the I Civil Law Day.

The Statement No 117 of the CJF/ STJ established two criteria for the real right of housing of companions to be maintained: a) that there was no express repeal of Law 9.278/1996 and b) that there is a permanent and constitutional right of housing. And after, the decision of the Extraordinary Appeal of the Supreme Court is possible that the aforementioned Enunciation had another criterion: the equality between the inheritance rights of spouses and partners.

4.3 THE STF DECISION NO 878.694/MG ON PENDING CASES.

It is unquestionable that the decision taken by the Supreme Court in the trial of RE 878.694/MG caused significant changes in the law of succession by equating, for these purposes, spouses to partners. At the time of the decision, many inventory processes were still

underway, referring to the inheritance of those who had died before the publication of the decisum.

With the argument of preservation of legal certainty, the Supreme Court ruled that the decision should be applied only to unfinished inventory processes, according to the following excerpt from the menu:

> [...] In order to preserve legal certainty, the agreement now signed is applicable only to judicial inventories in which there has been no final decision on the partition, and to extrajudicial shares in which there is still no public deed [...].

With the understanding signed at the trial, the Supreme Court intended to define the scope of the decision taken, with the purpose of granting security to the succession legal relations involving the interests of spouses and partners, printing, inclusive, the rules laid down in the Code of Civil Procedure dealing with procedural law in time, including the system of the isolation of procedural documents, in which the new law is applied to pending proceedings, (MEDINA, 2019).

It is undeniable that the effects of the decision of RE 878.694/MG reached other provisions of the Civil Code, besides the rules of art. 1,829, which remained open, since the Supreme Court did not face this issue, as already discussed. As for the modulation of the effects of the decisum, stated herein, the Court determined its application to inventories that had not yet had final judgment and extrajudicial shares that did not yet have public deed, at the time of publication of the decision, that is, those who refer to the successions opened before the publication of the decision of the Supreme Court, which hurts provisions of the Civil Code as to the rules of succession, especially its article 1.787, which provides on the law governing the succession, as the law in force at the time of its opening.

At this point, the decision of the Supreme Court, with the limitation imposed by the Court, not appreciating its effects on the other provisions of the Civil Code, It ended up not bringing the desired legal certainty, since the succession and the legitimation to succeed are regulated by the law in force at the time of the opening of the succession, as provided for in Article 1,787 of the CC/2002, plus an omission, for not having considered the STF, the possibilities of opening the succession of the (a) companion(a) prior to the 2002 Civil Code, since Article 1,790 was considered unconstitutional.

It remains evident that the aforementioned Court, by modulating the application of its decision, determining the application to the judicial inventories and to the open and unfinished extrajudicial shares, faced not only the rules of Articles1787, but also, of the 1.784, which provides that the time of the transfer of the inheritance is the time of death, both of which are contained in the 2002 Civil Code.

The Supreme Court, although questioned about the scope of the decision through the aforementioned embargoes, rejected them and did not face the issue, leaving the doubt open and the question about the real legal certainty of decisum.

The present question could have been promptly eliminated, preserving the legal certainty of the open and unfinished successions, if the Court had determined that the effects of the decision would apply, in accordance with the provisions of the arts. 1.784 e 1.787 do diploma

civil, to the successions opened from the term of the Civil Code of 2002, or from the publication of the decision.

5. FINAL CONSIDERATIONS

The Federal Constitution of 1988 recognized the stable union between man and woman as a family entity, which could be converted into marriage if the partners wished.

In accordance with constitutional precepts, on December 29, 1994, Law 8,971 was enacted, which regulated the rights of companions to maintenance and succession, in the latter part, he assured the surviving companion the enjoyment of part of the goods in competition with descending and ascending, and also the right to the whole of the inheritance in their absence.

In the process of monitoring the succession rights of the companion protected by the Magna Carta, on 10 May 1996, Law 9.278 was published, recognizing the stable union between man and woman as a family entity, ensuring the right of inheritance and the right of residence.

With the Civil Code of 2002, the succession regime between comrades was annihilated by the rules laid down in art. 1,790, establishing a clear distinction in inheritance rights between partners and spouses, demonstrating clear prejudice to coexistence relations not formalized by marriage.

As a result of non-conformism of the infraconstitutional law, the appeal of a concrete case reached the Supreme Court in a general repercussion, in the trial of Extraordinary Appeal no 878.694/MG, when the Court of First Instance recognised and declared the unconstitutionality of Art. 1.790 of CC/2002, which governed the succession effect between companions, determining the immediate application, as to those effects, the rules of art. 1.829 of CC/2002, which deals with the inheritance regime between spouses. With this decision, the Supreme Court equated spouses and partners for succession purposes, having art.1.790 of the CC/2002 lost its applicability and found unconstitutional.

The above decision, by equalizing the inheritance regimes of spouses and partners, prescribing for both rules of art. 1,829 of the CC/2002, provoked several questions about its scope, especially in relation to inheritance rights of the spouse who were not disposed in the said article, as the right of real housing, the inclusion of the (a) companion(a) as the necessary heir and scope of the decision. Although the Supreme Court has been questioned about such rights to be achieved, also, by the companion, through declaration embargoes, these were rejected.

Thus, the Supreme Court clarified nothing in the decision of the Extraordinary Refusal n. 878.694/MG as to the real right of housing of the partner, since rule provided in art.1.831 of the CC/2002, figure the spouse.

Likewise, the Supreme Court was silent when the inclusion or not of the partner in the list of required heirs, as provided in art. 1.845 of CC/2002, where the spouse was raised to this level.

The above two omissions are reflected in other provisions of the civil law, concerning the succession law of the companion(a), such as protection of legitimate property, collection of property, right to housing, finally, there are doubts about the applicable rules, which could have been, quickly and easily, answered by the Supreme Court when declaratory embargoes were filed.

Similarly, doubts and questions regarding the legal certainty of that Decision have been raised, whereas, when its application is determined to the successions of the comrades in inventories whose decision did not have the final judgment and extrajudicial inventories still without deed of share on the date of the publication of the judgment, the Supreme Court ends up violating the rules of the arts. 1,784 and 1,787 of the CC/2002, which ensure that the succession and the legitimate are governed by the law in force at the time of its opening, it would be sufficient if he, in his own decision, had safeguarded the provisions of those articles.

It is possible that judicial decisions may be inclined to equate all succession rights guaranteed to the spouse, also to the companion, However, three years after the decision of the Supreme Court considering unconstitutional the order of hereditary vocation granted to comrades by the Civil Code 2020, the discussion still generates disagreements and controversies.

Finally, we regret the fact that the Supreme Court has not faced all these issues as it could and should, now what is expected is that there is as soon as possible a reasonable solution, on the part of the legislator, to correct obvious omissions left by the Supreme Court in the trial of Extraordinary Appeal nº 878.694/ MG, pacifying the absolute equality between spouses and partners, for inheritance purposes.

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SEXUAL VIOLENCE AGAINST CHILDREN AND ADOLESCENTES: DEMYSTIFYING THE INDIVIDUAL LOGIC OF THE VICTIMIZATION PROCESS

A VIOLÊNCIA SEXUAL PRATICADA CONTRA CRIANÇAS E ADOLESCENTES: DESMISTIFICANDO A LÓGICA INDIVIDUAL DO PROCESSO VITIMIZATÓRIO

SCHIRLEY KAMILE PAPLOWSKI[1]

ABSTRACT

This article focuses on sexual violence perpetrated against children and adolescents, with considerable complications in Brazil in recent years. It is justified by the scope of the theme and the connection with different segments of human life, through the impacts caused by the traumatic event. The problem of the study focuses on the demonstration of the social roots of sexual violence, on the hypothesis that it is a manifestation of gender violence and the relations of power and domination established within societies, without disregarding the psychological influence of (individual) conduct. To face a reality that appears timid, albeit with accentuated frequency, it is necessary to *discover it*, whose visibility is possible even through the debate and academic research, objectives of this study. Through the hypothetical-deductive method, with exploratory research technique, the article was divided into three moments, reaching the considerations that Brazilian society coexists with the paradox of the legal protection of children and adolescents, at the same time that it promotes adultization, the spectacularization of their bodies (especially the female ones) and the blaming of the victims, notably in cases of sexual violence.

Keywords: Sexual abuse. Human rights of children and adolescents. Spectacularization of bodies. Pedophilia. Social practice.

RESUMO

O presente artigo tem como temática a violência de natureza sexual perpetrada contra o público infantojuvenil, com consideráveis intercorrências no país brasileiro nos últimos anos. Justifica-se pela abrangência do tema e pela conexão com distintos segmentos da vida humana, através dos impactos causados pelo evento traumático. A problemática do estudo se concentra na demonstração das raízes sociais da violência sexual, pela hipótese de sê-la manifestação da violência de gênero e das relações de poder e de dominação estabelecidas nos seios das sociedades, sem desconsiderar o papel psicológico da conduta (indi-

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vidual). Para enfrentar uma realidade que se apresenta tímida, embora com acentuada frequência, faz-se necessário descobri-la, cuja visibilidade é possível inclusive pelo debate e pela pesquisa acadêmica, objetivos deste estudo. Através do método hipotético-dedutivo, com técnica de pesquisa exploratória, o artigo foi dividido em três momentos, chegando às considerações de que a sociedade brasileira convive com o paradoxo da proteção legal de crianças e adolescentes, ao mesmo tempo em que fomenta a adultização, a espetacularização dos seus corpos (especialmente os femininos) e a culpabilização das vítimas, notavelmente nos casos de violência sexual.

Palavras-chave: *Abuso sexual. Direitos humanos infantojuvenis. Espetacularização dos corpos. Pedofilia. Prática social.*

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1. INTRODUCTION

The family space, formed through the historical institution that is the family, is a field in which multiple relationships are practiced, whose extension, today, exceeds the models historically defined as ideals. In contemporaneity, the bonds that make up the institution are sustained through affection, which made it possible to recognize homoaffective and single-parent relationships (exemplificatively) as authentic synonyms of family. However, it is within this same cultural structure that major conflicts can arise, especially in the occurrence of inequality of rights and duties, linked to the use of force and violence. When it is revealed the occurrence of abuses in the family environment - precisely in which we seek protection, affection and welcome - harmful portraits emerge in the form of violence against children, marital violence and violence against the elderly (POTTER, 2016).

In this study, attention is directed to the first type of violence mentioned above, which occurs in the family environment, as well as outside it. Its practice can occur in various ways, such as mistreatment, abandonment and neglect, and also in a sexual way, this being the crucial point that welcomes here. This phenomenon involves different ways, which go beyond the immediate sphere of the notion of rape, as by the release of video that contains scenes of pornography involving children or adolescents. Although such cases do not appear to occur in the same intensity as other crimes, such as those that affect property, the perception is illusory and is largely due to one of the characteristics of such a form of violence: it occurs within dimensions that do not allow its visibility, either by the nature of the fact, or by the family secret.

Based on these initial elements, this article has as its theme the sexual violence perpetrated against children and adolescents, with considerable complications in the Brazilian country in recent years. Its justification arises from the scope of the theme, to the point of being a true phenomenon (negative), for causing pain and suffering to its victims; as well as the dimensions related to it, which include a set of human needs hampered by the violent act.

For this, the research method adopted is the hypothetical-deductive, in line with that proposed by Karl Popper (MARCONI; LAKATOS, 2003). The present investigation has a gap in scientific knowledge, a problem to conduct the investigation, following its hypothesis (provisional solution), which is confirmed, refused or corroborated at the end. In casu, the guiding problem of the research consists in: are the causes of sexual violence against boys and girls, especially in Brazil, individual (such as psychic pathologies)? The hypothesis developed

and confirmed in the results is that, although individual factors interfere in people's violent actions, social causes are essential for maintaining the current violent state, based on the way in which society trivializes child sexualization, stimulates the exposure of bodies (especially female), adultizes and blames the victims. It should also be said that in the victimization process society ends up occupying the role of revitalizer, because it amplifies the trauma experienced by the victim of violence, due to perquiritions, blame and protective omission.

Victimization or victimization process consists of the complex act by which one is elected to the condition of target object, in the face of which conducts are practiced. In this process, there are forms of victimization - or modalities of objectification of the subjects - that unfold in primary, secondary and tertiary. Such forms are related to the moment of violence and who practices it. Primary victimization consists of the first phase of the traumatic process, which occurs by the practice of fact, of crime; it is the immediate sphere of this process, the "first violence" (MOROTTI, 2017; PAPLOWSKI, 2018).

The secondary refers to the suffering generated by the legal system itself, given the inadequate use of investigative procedures or care, for example, performed by school units, guardianship boards, care teams, Judiciary (among others). This form of victimization is also recognized as revitalizing, because it amplifies the trauma experienced, dilates victimization and violates, in consequence, the fundamental rights of those who have already been offended. Tertiary victimization, in turn, is the circumstance in which suffering is practiced by society, especially in the stigmatization and blaming of the victim (PAPLOWSKI, 2018; POTTER, 2016).

To achieve these considerations, the research technique is exploratory (covering doctrines, news, artistic clippings and judicial decision, through the previous collection of content by the author), without performing a specific case study. In order to narrate the status of the Brazilian country as legal protector of childhood and youth and also of the social responsibilities involved, the research technique also included observing normative devices, like the 1988 Federal Constitution and the Federal Laws of n. 13,431/2017, 11,340/2006 and 8,069/90, dividing the study into three moments.

Sexual violence as a social practice is revealed in the study through subtle demonstrations, especially through the media, as in television media and in musical lyrics. In order to combat this scenario, in addition to demystifying taboos that cover the subject, it is important to discuss and research the impasse, real objectives of research, in order to promote the dialogue aware of the role of each human being in the generation and interruption of violence, especially as consumers of products and services which, more often than not, encourage it against children and adolescents.

2.A VIOLÊNCIA COMO UM FENÔMENO HISTÓRICO, BIOPSICOSSOCIAL E REPRESSOR DE NECESSIDADES

Every day, intimate contexts and affection provoke deep suffering in the space of interpersonal relationships. However, the social space also acts as an active subject in relations

of violence, especially when it is guilty of the victim, intolerant and silent to the multiple and constant violent actions directed against children and adolescents. On the normative level, its violent condition stems from the omission in the constitutional duty established by article 227, caput, of the Federal Constitution of the Republic, 1988 (with wording given by the Constitutional Amendment nº 65, of 2010):

> It is the duty of the family, society and the State to ensure that children, adolescents and young people have the right to life, to health, to food, to education, to leisure, to professionalisation, to culture, to dignity, respect, freedom and family and community coexistence, besides putting them safe from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. (BRASIL, 2020, s.p., highlighted).

Living free from cruel, exploitative and oppressive treatment is the inherent right of every human being, even with the affirmation expressed by the Statute of the Child and the Adolescent, Federal Law 8.069/1990, in its fifth[2] article . However, although it is forbidden any offense to fundamental rights, especially as to the children of Ojuvenis, the practical plan is not encouraging[3]. Thus, from the moment someone behaves with violence directed at the infant, in addition to violating his right to live free from any treatment, the agent has just repressed several needs of the abused, among them that of physical integrity and personal freedom (BARATTA, 1993).

It is through this understanding of Violence that we can report it as a way of nullifying the other as a Subject.In addition to the multiple verifiable omissions in society as supposed protective agent of childhood and adolescence, many of the social bases run through complex processes of disruption, or, in reverse, these issues have recently become visible. With the family it is no different (and this is said not because the logic of the traditional family has been undergoing changes, which is significantly positive and humanitarian, but because it is from the family structure that repeated psychic and social problems arise).

On the subject, Luciane Pötter (2016) notes that violence against children and adolescents is not recent, on the contrary, it accompanies the history of humanity, manifesting itself in various ways: "[...] the more we go back in history (and even today in some peoples) the greater the chances of observing that violence against children and adolescents and the lack of legal protection were (and are) common" (PÖTTER, 2016, p. 68). In the author's words, specifically in relation to sexual violence, what emerges is what is recognized by "incest", which "[...] may be the most extreme form of sexual abuse, involving an adult's relationships with a child or adolescent in the family context" (PÖTTER, 2016, p. 68).

Faced with the pact of silence that often prevails in the contexts of intra-family sexual violence, most of the nefarious acts of abuse were (and continue to be) concealed. Family

2 "Art. 5th No child or adolescent shall be subject to any form of negligence, discrimination, exploitation, violence, cruelty and oppression, punished in the form of the law any attack, by action or omission, on their fundamental rights" (BRASIL, 2020, s.p.).

3 Although the secret is one of the characteristics of the practice of sexual abuse, more specifically when intrafamilial, there are situations in which acts of sexual violence become clear to the public. And it is from these complications that the assiduity with which children and adolescents are sexually victimized becomes noticeable. Only in September 2017 (in one of the semesters of conducting the research), in an example, two major events occurred in the state of Rio Grande do Sul and became public. Both occurred in the capital of Rio Grande do Sul: one of them in a supermarket, at which time the author of the fact, counting more than 62 years, approached the infant and touched parts of the girl's body, being all the acts practiced recorded by the surveillance camera of the place (PAGANELLA, 2017). The other, in turn, took place in a virtual way, when a medical student (27 years old) held in his home a computer containing more than 12 thousand photographs of children and adolescents in pornography, being the object seized upon enforcement of search warrant and seizure (SPERB, 2017).

dysfunction, in this context, arises in opposition to the view that the family is visualized, as being the sacred and harmonic space, the "home, sweet home". Dysfunction allows us to see this structure as a promoter of pain, without any condition to effect the healthy and worthy existence of its members. Thus, affection and violence intersect, whose consequences can hardly be measured, a scenario that requires the meeting of different areas of study for its confrontation (such as Psychology, Social Service, Sociology and Law). Rape appears in this space as the ultimate expression of sexual violence, sometimes accompanied by pedophilia.

Maria Cecília Minayo (1994) teaches that violence is one of the problems that have long permeated social theory and the political and relational practice of humanity. "No society is known where violence has not been present" (MINAYO, 1994, p. 7). In fact, currently, situations that portray violent behaviors causing extreme disgust have become more visible, as is the case of the subject under study. However, following the example of aggressive behavior, the history of the peoples of humanity confers the knowledge of their presence from remote periods.

Such violence is not related only to a scientific branch, because it is expressed in the legal, social, philosophical and psychological fields. The search for understanding the essence of the phenomenon of violence is long-standing, as the author explains; however, today it is practically unanimous the idea that violence is not inherent to the human condition and that it has no biological roots. "It is a complex and dynamic biopsychosocial phenomenon, but its space for creation and development is life in society. Therefore, to understand it, one must appeal to historical specificity" (MINAYO, 1994, p. 7). To add to the classification of violence as a biopsychosocial phenomenon, the Italian jurist Alessandro Baratta (1993) understands it as repression of needs, in any of its forms, and violation or suspension of human rights.

Brazilian philosopher Marilena Chaui (2019, s.p.) assimilates the theme of violence with ethics. This is because they are diametrically opposed: ethics understands the subject as being rational and free, whereas violence simplifies it as a thing, by disregarding his will and freedom. In his own words:

> [...] Violence opposes ethics because it treats rational and sensitive beings, endowed with language and freedom as if they were things, that is, irrational, insensitive, dumb, inert or passive. Insofar as ethics is inseparable from the figure of the rational subject, voluntary, free and responsible, treat him not as human but as a thing, making him violent in the five senses in which we gave this word. (CHAUI, 2019, s.p.).

Thus, Chaui (2019) and Baratta (1993) converge in their considerations because they relate violence as a form of imposition, whose conduct disregards the human condition of the abused subject, holder of rights, rationality, will and dignity. In fact, the development of the human species accompanies great events guided by atrocities. It is for such reasons that violence is considered and commonly referred to as a phenomenon, of such an extent that it is expressed on the universal plane, not being restricted to a certain epoch or society. having regard to the multiplicity of relations established between individuals and the social dynamics that this entails, the inclusion of violence as a persistent and complex fact, not restricted to a social group or period of history, it follows that violence is considered a social phenomenon, not related to individual and biological human nature, but to collectivity.

Sexual violence, as a nerve point of approach in this investigation, surpasses the act of rape and penetrates into more subtle webs. Normatively, there is in Brazil (2020), through Law nº 11,340 of 2006, also known as the Maria da Penha Law, mention to the different ways in which sexual violence is perpetrated, which are:

> Art. 7. They are forms of domestic and family violence against women, among others: [...] III - sexual violence, understood as any conduct that constrains her to witness, maintain or participate in unwanted sexual intercourse, through intimidation, threat, coercion or use of force; which induces it to market or otherwise use its sexuality which prevents it from using any contraceptive method or which forces it into marriage, pregnancy, abortion or prostitution by coercion, blackmail, bribery or manipulation; or that limits or annuls the exercise of sexual and reproductive rights. (BRASIL, 2020b, s.p.).

The context involving children and adolescents is more specific, encompassing several behaviors that reach the sexual integrity of those, also recalling that this nature of infraction has an intense harmful potential in the psychological aspect, bearing in mind that, in addition to all the disgust that the fact alone already causes, the victims are notably fragile people (either because of their young age, physical condition or developmental stage).

When drawing a parallel on such a phenomenon with gender issues, the link seems to be mistaken, at least in a more simplistic view. This is due to the belief that the gender approach is restricted to adults, in typical domestic and family violence relationships. Between these two worlds that inhabit social life (the childish and the childish), coexist the significant power relations, responsible for the link between violence and gender, in a considerable number of cases.

It is from an early age that typical gender-biased manifestations are imposed, many of them covered up by "naturalness". They consist of an ordered[4] symbolic set of behaviors, preferences, games, colors (and even the expectation of activities considered "obligatory"), which differentiate girls and boys in rights and duties. Campaigns to combat gender inequality in childhood are carried out with commitment by the non-governmental organization "Plan International", which defends the rights of children, adolescents and young people, in Brazil, since 1997, developing campaigns focusing on the promotion of gender equality, thus combating various forms of violence against children and adolescents.

In a research by the Collective Não Me Kahlo, on the construction of femininity, data from a study conducted by Plan International Brasil were listed, verifying that from an early age "the girls learn that they must take care of the house, while their siblings are playing, watching TV or studying, they are washing dishes, tidying the beds or earning their first broom". The survey also considered concrete data on the reality of the country: "A study conducted with Brazilian women aged 6 to 14 years concluded that 81.4% of them make their own beds,

4 The meaning and symbolic term, as power, come from the studies developed by the sociologist Pierre Bourdieu (1989), when analyzing the informal relations of power. Symbolic power assumes a condition of invisibility, present between the lines of social relations. It operates through systems also symbolic, such as language, and symbols (by senses and representations). Symbols are part of how reality and the world are seen, including by repetition, understood as "[...] elements that, in the anthropological sense, produce meanings and meanings in the social field, so that they create social integration' [...]" (BURCKHART, 2017, p. 208-209) and consensus on an order in society. "Reproduction is the condition by which the symbolic diffuses, producing its effects on a large scale" (BURCKHART, 2017, p. 209), creating what Bourdieu calls habitus. Through them, values are consolidated and integrate the culture, which can produce instruments of domination and its legitimation, especially in the field of gender in patriarchal societies. For more information about this power, see the work "The symbolic power", by Pierre Bourdieu (1989).

while only 11.6% of the boys do the same. They not only devote more time to the task, but are charged unevenly" (LARA; RANGEL; MOURA; BARIONI; MALAQUIAS, 2016, p. 17).

These disparities are accentuated in adult life, in which multiple domestic and family relationships are demarcated by woman's submission and man's independence. An intra-family space is built to exercise power by the male figure, based on remote social and cultural constructions, initiated in the childhood phase and reinforced in adult life.

Data from the Federal Government's Epidemiological Bulletin (BRASIL, 2018) affirm the majority presence of the male figure in the condition of sexual abuser of children and adolescents, which reinforces the importance of inserting gender in this discussion. The perpetrator of violence, in this case, avails himself of abuse to manifest power and dominion over a body. The specificity of the infantojuvenil case is that the abused person is severely vulnerable, especially in physical and psychic conditions, as a child or adolescent. Sexual abuse is therefore the ultimate form of domination by the male figure,

> That is, contrary to the will of the woman or child, the man has sexual intercourse, thus proving his ability to submit to another party (be it children or adults) to domination. In other words, man subjects the child to submissive sexual intercourse, thus proving the dominant ideology in which he has no right to desire and the right of choice. [...] Powerless in their situation, the only way they find to exercise their male power is against those who are in a position inferior to their, not only economic, but gender. (SANFELICE, 2011, p. 93).

The understanding of gender is also designated by social identification, which can transcend the binary classification between female and male. Based on this form of identification of the subjects, the system was constructed based on inequality between rights and duties, initially through the division of labor (DUSSEL, 2013). This division is still present in Brazilian society, in which, due to being a girl or a woman, many obstacles arise for the realization of fundamental rights. Also comes stipulated roles, in the form of stereotypes, consigning that certain behaviors, accessions and rights focus on one figure: the male.

In a research carried out by Monique Soares Vieira (2016) on sexual violence against children, it was emphasized that inequalities were accentuated with the capitalist economic system, which led to the trivialization of the human being and the dehumanization of personal relations. As for sexual violence, he pointed out its naturalization, stemming from a patriarchal system (in which the dominating agent, endowed with authority, focuses on the figure of man); still, the objectification of the child and the adolescent, as property of the family. Recently, this view about the infant has been modified, especially on the legal plane with the advent of the Statute of Children and Adolescents. On the other hand, there remains an outlook that disregards the psychic constitution of the child and the adolescent, making them easily submissive, dominated and objectified. That is, these two visions are present today: one protective and the other rapist.

It is observed that the interindividual violence (of which the sexual one is the most radical example) is not the exclusive result of maladjusted, violent or abusive personalities. To a great extent it reflects the culture of violence (in any of its forms) present in society, in which the other, by not being seen as an equal, despite their differences, becomes the object of control, power, domination. Moreover, it is emphasized that it is not delimiting that only girls are the target of violence in their sexual form; however, daily, reports, indexes and news reports

emphasize that gender inequalities affect female children and adolescents with much higher incidence than those of males.

3. SEXUAL VIOLENCE AS A MANIFESTATION OF POWER, NOT DESIRE: THE RAPE CULTURE

"No one ever knows if I'm dying to laugh or cry... so my verse has this almost noticeable tremor... Life is sad, the world is crazy! Nor is it worth killing yourself for it. Nor for anyone. For no love... Life continues, indifferent!" (QUINTANA, 2005, p. 114). It is never one of the poems that integrates the work "The color of the invisible", by Mario Quintana. The writing is compatible with the theme under analysis, in that the daily encounter with reports of sexual violence makes believe that the world is effectively "crazy", and life, for those who suffer the indelible pains and marks of this violence, is certainly sad, inhuman and indifferent.

Among the framework of sexual violence, rape is the best known form. It is representative of this kind of violence, carrying the characteristics of being repugnant, sick, vilipendious and painful, at the same time indescribable and traumatic. Despite this, its practice is not only common, but trivialized, to the point of affirming the existence of a "rape culture", in both senses that the expression allows. The rape culture is present in a context that, from so common and frequent cases, its practice becomes naturalized. On the other hand - which does not disregard the previous one, but complements it -, the expression corresponds to the guilt of the victims of such acts, because sexual violence is supposedly part of a behavior of men (NIELSSON; WERMUTH, 2018).

Nielsson and Wermuth (2018) analyze the massive presence of sexual violence in the country, both today and in the past. That is, since the period in which the Tupiniquin lands were colonized, with the abuse of indigenous women, followed by those who were forced to enter the territory. Notwithstanding the fact that this scenario has not changed at the present time, in its true roots, the conclusion that "rape" integrates cultural logic is not from Brazil, whose term "[...] was first used by American feminists in the 1970s and suggests that a certain society cultivates beliefs and conventions that naturalize sexual violence against women" (NIELSSON; WERMUTH, 2018, p. 174).

The act of rape is present in an individual and collective way, being considered, the latter, a collective characteristic that denounces rape as a cultural character, in the sense of anthropologist Debora Diniz, a professor at the University of Brasilia (COLLUCCI, 2017). Data from the Ministry of Health released by the newspaper Folha de São Paulo show that, in Brazil, per day, there are an average of ten collective rapes. Acre, Tocantins and the Federal District lead the rates per one hundred thousand inhabitants (COLLUCCI, 2017). However, the conclusions of the research may be even more alarming, given the fact that occurrences of this nature often do not come to the attention of public bodies (which is recognized by underreporting). Its possible factors are: the guilt of the victim, especially in sexual crimes (as one of the circumstances that repress the police record of the fact); the violence practiced by the public apparatus itself, in the form of evidence production; without forgetting social tolerance (COLLUCCI, 2017; PAPLOWSKI, 2018).

According to Daniel Cerqueira, a researcher at IPEA (Institute of Applied Economic Research), these data are only a portion of the effective occurrences: "unfortunately, it is only the tip of the iceberg. Sexual violence against women is an invisible crime, long taboo behind this lack of data" (COLLUCCI, 2017, s.p.). And he adds: "Many raped women do not press charges. Sometimes they do not even speak at home because there is a culture of blaming them even if they are the victims" (COLLUCCI, 2017, s.p.). As with adult women, it is repeated in the face of children and adolescents, by a complex and multifaceted set of motives, such as fear, guilt, lack of understanding of reality and also the syndrome of secrecy. Acknowledging this fact also means acknowledging that the figures may be higher.

The perpetration of rape in general, from 2011 to 2016, practically doubled in Brazil. In 2011, about 12,087 cases were recorded from data from health units. In 2016, this number reached 22,804 (COLLUCCI, 2017). In a Technical Note issued by IPEA in March 2014, from the analysis of records of the Information System of Notifiable Diseases (SINAN), managed by the Ministry of Health, it was found that on average 527 thousand attempts or cases of rape consummated in the country occur annually, of which 10% are reported to the police (CERQUEIRA; COELHO, 2014). Again, the margin of real quantitative ignorance of sexual violence that occurs in the Brazilian country is evident, which causes greater need to discuss the issue. There is also the possible absurd proportion of cases of the type, a circumstance devoid of parallel social discussion, except for certain cases that are recognized as the apex.

The number speculated by IPEA (of 527 thousand occurrences) is extremely serious and reveals that, in one hour, about sixty people are victims of the attempt or consummation of rape in Brazil. The same research showed that, among the victims, approximately 90% of the cases are women; as for the age of the victims, 70% are children or adolescents (only 30% are older than 18 years). He also indicated that "the overwhelming majority of aggressors are male, regardless of the age group of the victim, and women are perpetrators of rape in 1.8% of cases, when the victim is a child" (CERQUEIRA; COELHO, 2014, p. 9). The gender circumstances that mostly demarcate the victims and aggressors converge to the discussion about how gender stereotypes influence the behavior and lives of people in today's society.

It is estimated that during childhood and youth the aggressors are those who have greater contact with the child or adolescent, precisely those who have affection and/or familiarity with the abused. However, the scenario changes in the course of the age of the victimized person:

> [...] 24.1% of children's abusers are their own parents or stepfathers and 32.2% are friends or acquaintances of the victim. The unknown individual gradually becomes the main perpetrator of the rape as the victim's age increases. In adulthood, it accounts for 60.5% of cases. Overall, 70% of rapes are committed by relatives, boyfriends or friends/acquaintances of the victim, which indicates that the main enemy is inside the home and that violence is born within the homes. (CERQUEIRA; COELHO, 2014, p. 9).

From this perspective, the constant relationship of closeness that the perpetrator of sexual violence has with the offended person is clear, especially when the victim is a child. Often, aggressors record violence in the form of videos and photographs, as if the horrendous practice were a merit. The guilt, pain and shame fall, on the contrary, on the offended person, while the perpetrator demonstrates to exercise control over the body of others without remorse. The social environment, upon becoming aware of such facts acts as perquiridor of the causes

of violence, but paradoxically, it questions the habits, the clothing and the behavior of the abused person, mostly female. "We call this guilt of the victim, behavior directly related to the rape culture" (LARA, RANGEL; MOURA; BARIONI; MALAQUIAS, 2016, p. 164).

Lara, Rangel, Moura, Barioni and Malaquias (2016) analyze sexual violence against women as a symbolic violence, through which rape does not manifest itself directly, but through habits, speeches that justify and tolerate certain acts of abuse. This culture (co) exists in a country that criminalizes its practice, including as a heinous crime, subject to more severe repression. The authors maintain that, like domestic violence, rape is only the extreme visualized, that is, the tip of the iceberg, "whose part submerged and that gives support to all this are subtle violence, naturalized and reproduced in common sense" (LARA, RANGEL; MOURA; BARIONI; MALAQUIAS, 2016, p. 165). They are the same conducts that invisibly reinforce the male superiority over the female and intensify, from then on, diverse practices truculentas, even if they leave no material traces.

It can be said that rape represents rather the exercise of power over the body than the satisfaction of sexual desire. To put it another way: that rape is based on social and cultural issues above those of a psychological order. In the contexts of sexual violence in the face of children and adolescents, "this violence manifests, concretely, a power relationship that is exercised by the adult or even not adult, but stronger", in a "[...] process of appropriation and domination not only of destiny, discernment and the free decision of these, but of their person as another" (FALEIROS, 1998, p. 43).

In this same perspective, Vera de Andrade (2005) argues that desire is not a basic element to the practice of rape: "it is known, today, [...] that this is not a conduct focused, primarily, on the satisfaction of sexual pleasure (unbridled lust), as also advocates the official Criminal-Legal and Crime discourse and common sense" (ANDRADE, 2005, p. 95-96). It also points out that the space in which sexual violence occurs most frequently is within the domestic space, in the context of the previously constituted relations between offender and offended, with the use of sexuality being a mode of expression of power relations. continues and points out that:

> Women have begun to realize that rape (as well as mistreatment, incest, prostitution, sexual harassment at work, etc.) are phenomena of a power structure, existing between men and women, and the argument of individual violence was giving way to the argument of structural violence. (ANDRADE, 2005, p. 96).

That's how the portrait repeats itself. The characters change, but the scenario is the same: intra-family sexual violence (which is also perpetrated externally to the core relations) against children and adolescents has been going on for a long time. It happens that their practice, from the beginning, is veiled, in the same way that little credibility is given to the word of the child, seen in this context as seductive and malicious or, still, as fanciful.

4. SEXUAL ABUSE AGAINST CHILDREN AND ADOLESCENTS: APPROACH TO PAEDOPHILIA AND OTHER BASIC CONCEPTS

Countless researchers(s) who study this theme want in their works, beforehand, a world of more love and respect for children and adolescents. It is not new to affirm the doctrinal, legislative and scientific recognition of the peculiar conditions of development on the children and adolescents. If it were not enough, the academy discusses daily about their rights, however not always under the eyes of the violence they suffer, but about their "plus" (understood as the added protection promoted by the doctrine of integral protection). In opposition to the debate, however, regarding the phenomenon of sexual violence, silence prevails. Anthony Giddens (2008), regarding the visibility of the problem, says that child sexual abuse has gained space for discussion in recent decades and that, faced with taboos concerning sexuality, this practice was uncommon. However, it did reveal a frighteningly banal fact. Nowadays, both the knowledge of sexual violence and the existence of protection mechanisms have become more accessible by the media in general.

The understanding of sexual violence against children requires the use of specific basic concepts, such as abuse, sexual exploitation and pedophilia (specific objective of this section). This will be possible through normative analysis (from law to thesis), jurisprudential (from a certain judicial decision), doctrinal (in the scope of psychology and law) and news collected when the research is carried out (which includes the production of journalistic materials).

The realization of sexual violence is due to what it preferred to call normatively exploitation and sexual abuse, different forms of that. The first has a close relationship with the idea of remuneration and compensation, which does not exclude the violating character of the conduct, especially if practiced against the public mentioned here, taking into account the physical and mental conditions of development of children and adolescents. The sexual act, in exploitation, is an exchange, which can be observed through values or gifts, over objectifying the infant. Regarding abuse, it can be any situation in which the infant is used "for sexual gratification of others" (PÖTTER 2016, p. 97). In this scenario there is not the character of the child as a commodity (as in the case of sexual exploitation), but as an object for adult sexual satisfaction or stimulation, usually occurring in conjunction with psychological violence, in the form of threats. In this regard, Law 13,431, of April 4, 2017, in force since April 2018 - which establishes mechanisms to control institutional violence (resulting from the process of investigation of violence) -, distinguishes sexual exploitation abuse in its article 4, item III, in verbis:

> Art. 4o For the purposes of this Law, without prejudice to the typification of criminal conduct, are forms of violence: [...]
>
> III - sexual violence, understood as any conduct that constrains the child or adolescent to practice or witness carnal conjunction or any other libidinous act, including exposure of the body in photo or video by electronic means or not, comprising:
>
> a) sexual abuse, understood as any action that is used of the child or adolescent for sexual purposes, whether carnal conjunction or other libidinous

> act, performed in person or by electronic means, for sexual stimulation of the agent or third party;
>
> b) commercial sexual exploitation, understood as the use of the child or adolescent in sexual activity in return for remuneration or any other form of compensation, independently or under the patronage, support or encouragement of a third party; whether in person or by electronic means. (BRASIL, 2020c, s.p., grifted).

In this regard, it is worth noting the normative mention that indicates the characterization of violence even if it is not done in person, that is, if practiced by electronic means (as in social networks). In both, in exploitation or abuse, present is the character of domination and abuse of power over the children's bodies, which are subjected to the will and interest of the abuser, induced to maintain the relationship, injuring the right to live in conditions free from any violent, aggressive or offensive behavior. "It is a violation of universal human rights and the rights peculiar to the developing person, denying to it the right to healthy development of its sexuality" (CHILDHOOD, 2017, s.p.). The criminalization of harmful conduct depends on the current legal system, which is governed by the principle of legality. It should be noted that the form called "sexual abuse" is not nationally typified as a crime. It is, in fact, an expression to characterize several other acts, such as rape.

Pedophilia, on the other hand, is not a criminalizing norm in itself, but a psychic behavior. It's on the medical before the legal. According to the psychoanalytic doctrine, pedophilia is characterized by deviation, disorder in sexual conduct. It is sometimes referred to as perversion, whose term was initially approached by Sigmund Freud (CASTRO; BULAWSKI, 2011). The World Health Organization, in its International Register of Diseases[5] (ICD 10), catalogues pedophilia as a sexual preference disorder (F65.4). It is from psychoanalysis that the relationship of pedophilia with the impotence of the individual is also extracted, which sustains a "pedophile" act to exercise its sexuality over someone of greater vulnerability. "As a sexually inhibited person, the agent tends to choose as a partner a vulnerable person, possessing an illusion of potency" (CASTRO; BULAWSKI, 2011, p. 8). It is in this way that it exerts the idea of dominance, control and power, without the need of effective contact or sexual act with the infant, sufficing, to be considered clinically as a pedophile, the agent that nourishes constant and obsessive desire, sexual fantasies and/or attraction to children or adolescents (CASTRO; BULAWSKI, 2011).

Há que se observar, no entanto, que nem todas as pessoas que violentam sexualmente crianças e adolescentes são pedófilas, porquanto para assim incorrerem haverá de se fazer presente a patologia e seus elementos caracterizadores (tais como a reiteração de atos, atração sexual compulsiva e obsessiva por infantes e adolescentes, entre outros). Do mesmo modo, ser pedófilo não significa ser abusador, necessitando exteriorizar sua conduta e atingir direitos de outrem para assim ser caracterizado, seja através de contato físico ou virtual. Pontua-se que há pessoas portadoras do desvio sexual que, no decorrer de toda sua vida, jamais violaram a dignidade sexual de infantes, apenas nutrindo na sua esfera íntima a perturbação sexual.

5 The International Statistical Classification of Diseases and Related Health Problems, or ICD, is the international standard for recording, analyzing, comparing (among others) diseases and deaths. The document is the basis for identifying global health trends and statistics, developed by the World Health Organization (WHO). For each state of health a single category is assigned, which corresponds to a code. A new version will come into force from 2022 (11th version) (PAHO, 2020).

Embora considerada doença, pairam constantes dúvidas a respeito da possibilidade de cura, cuja incidência doutrinária repousa na impossibilidade. Nessa toada, Denis Caramigo (2017) observa a inexistência de cura para a pedofilia e que, quem dela padece, "[...] deve ter acompanhamento clínico constante para que não exteriorize a sua patologia. Há de se dizer que nem todo pedófilo é um 'criminoso'. Só comete crime aquele que exterioriza a sua pedofilia" (CARAMIGO, 2017, s.p.).

Em uma rica análise social do fato, Jane Felipe (2012) estuda a pedofilia como prática social contemporânea, visivelmente no cenário nacional, na medida em que vige uma proteção normativa a crianças e adolescentes, ao mesmo tempo em que há a disponibilização dos seus corpos, sobretudo os femininos, como desejáveis (ao que denomina de espetacularização dos corpos e da sexualidade) – comportamento que se apresenta através de letras musicais, imagens editadas por revistas, meios de comunicação, dentre outros. Em suas palavras, são vislumbradas contradições que se mostram interessantes nas sociedades contemporâneas,

> [...] because, at the same time as laws are being put in place to protect children and adolescents from ill-treatment, neglect, abandonment, sexual violence/abuse, sexual exploitation and paedophilia, this same society legitimises certain social practices, whether through the media - advertising, novels, humorous programs -, or through music, films etc., in which the children's bodies are visibilized in an extremely erotic way, through expressions, gestures, clothes and talks, ways of being and behaving. Bodies placed as objects of desire and consumption. (FELIPE, 2012, p. 32).

In this regard, there is the case of the "hypersexualization" of 13-year-old actress Millie Bobby Brown, a member of the cast of the American series "Stranger Things". [6]The girl, when seen on the screens, presents herself as a child, beginning her adolescent period. However, his social media profiles, the magazine covers he starred in, and the series' promotional images denote being an adult person, much older than he appears. This phenomenon is called "adultization", which is the anticipation of the end of childhood. In a report prepared by the Collective Non Me Kahlo (ALVAREZ, 2017), which addressed the issue from the critical point of view, it was possible to identify the specific issues in Millie's images, with clothing intentionally organized by the television production, aiming to appear to be an adult person as a form of social acceptance. "This shows us how the entertainment industry subtly encourages childhood sexuality. Although not in an explicit way, this influences children to feel the need to be sensual" (ALVAREZ, 2017, s.p.).

The mismatch pointed out by the educator Jane Felipe (2012) becomes easily noticeable, because the advances aimed at children and adolescents in rights and guarantees ends up camouflaging the paradoxical social context that sexualizes them constantly, in addition to imprinting them the "desire to be an adult" as natural and typical of every child. And that doesn't just refer to the Brazilian reality, it's a global behavior. There is, in this step, an inversion of roles, since, to be accepted socially (emphasizing the fuss about the female bodies), the girls must be endowed with sexual behaviors, polemically, a slender and attractive body.

6 In free translation, "Stranger Things" means "stranger things". The series is a production of global provider Netflix and has, until June 2020, three seasons. Science fiction develops from the disappearance of a young boy, when the whole city undertakes searches to find him. However, what it presents are secrets, supernatural forces and a girl.

That is, it is for the acceptance by the male audience, which visualizes it as an object of desire and for the satisfaction of personal interests.

The local reality, the Brazilian one, also has its contexts of early erotization of girls, as is the case of Gabriella Abreu Severino (or MC Melody). The girl, born in 2007, is a singer of the pop and funk styles, whose rise in the music world became a very commented case, especially in 2015, when she was eight years old. Despite her young age, Gabriella was already inserted in an adult and sexual universe, recording music videos in which she sang lyrics with high sexual content (DEBORA, 2018). Family negligence in this sense and the individual and collective impact that hypersexualization causes promote distorted views about the girl itself, as well as about other children, who understand an acceptance profile and tend to reproduce it. Consequently, childhoods are driven by careless personal/social conduct, the media and the "appreciation" of their content by the public.

Another important theme in this set of debates is incest. This is because, when assessing statistical data that indicate the large number of cases involving sexual violence within the family, this also implies the observation of what relationship the aggressor has with the person being raped. Incest is a sexualized relationship that occurs between people in the same family. As a possible cause of incestuous family dynamics is the crisis of family structure (PÖTTER, 2016). Together, economic and social conditions also exert influence, such as the lack of physical space and the use of psychoactive substances (with emphasis on alcohol). In specific terms, incest is also known as intrafamily sexual abuse.

> The presence of marital crises, as well as the lack of love of parents or guardians, father or mother sexually disturbed, subverting the norms, values and social expectations of family members end up weakening relationships and fostering violence that harms family members, especially children and adolescents. Dysfunction in the family structure can thus lead to incest. (PÖTTER, 2016, p. 69).

Pedophilia and incest as contemporary social practices are present not only in the television segment, but also in music, with popular acceptance that leads us to believe in the lack of social perception of the pretension of lyrics. In line with the above, about the double scenario that is observed in Brazil, because infants enjoy legislative protection at the same time that there is incentive to expose their bodies, the band "Bidê or Balde[7]" released in 2000 a song that became controversial. The song's lyrics, called "And why not?" has been the subject of discussion for apologising for paedophilia and incest, as well as for trivialising violence against juvenile offenders:

> I'm loving my girl
>
> And how I love your skinny little legs
>
> I'm singing to my girl
>
> To see if I can talk her into my
>
> And why is that?
>
> Your blood is like mine, it's like mine
>
> Your name I gave

7 Band formed in Porto Alegre, in the state of Rio Grande do Sul, in 1998. In the rock genre, he participated in the project "Acústico MTV: Bandas Gaúchas", by MTV Brasil.

I've known you since birth
And why is that?
I'm loving it
See my little girl
With some colleagues
Hers from high school
I'm in love
For my little girl
The way she talks, look,
The way she walks.
(BEOLCHI, 2018, s.p.).

The evidence of incest encouragement is emphatically given when the lyrics mention "Why not?" , if your blood is equal to mine, if your name was I who gave, making clear a bond of affiliation between the one who speaks and the girl (the one with skinny legs, accompanied by colleagues). The sound of the musical lyrics causes disgust, since the character of a certain desire nurtured by a father for his daughter, which aims for the infant to "enter into mine". Undeniable, therefore, is the reference, the incentive and the trivialization of intra-family sexual violence.

Faced with the flagrant offense to children's fundamental rights, the Public Ministry of the State of Rio Grande do Sul, through the Specialized Prosecution of Children and Youth of the District of Porto Alegre, promoted Public Civil Action in the face of the musical group, from Acit Comercial Fonográfica and Sony Music Entertainment. In access to the decision-making content of the instrument[8] aggravation appeal , brought by the parquet, judged by the Seventh Civil Chamber of the Court of Justice of Rio Grande do Sul, in December 2005, it is noted that it was partially provided. The goal was to get, in the first place, a ban on the release of CD's of Banda Bidê or Balde ("Acústico MTV Bandas Gaúchas" and "Se Sexo é o Que importa, só o Rock é sobre Amor"), in addition to the track of said song that was on DVD, through state media outlets, under penalty of daily fine for the benefit of the State Fund for the Rights of Children and Adolescents. In addition, it was postulated as an anticipation of guardianship notification of the record companies and the band for publication of a press release, as well as gathering digital content in the market, under penalty of fine (RIO GRANDE DO SUL, 2018). It is necessary to transcribe part of the statement of reasons given by the Rapporteur (Judge Ricardo Raupp Ruschel), who well analyzed the view addressed here:

> As you can see, it is not a question, to the evidence, of poetry of fatherly love, but that carnal love "for my girl", since no father nourishes "adoration of his skinny legs" and does not need to "sing... to see if I convince her to enter mine". Ratifies such an interpretation the circumstance of the known suppression, of the original text, of the word "no" of the verses of the chorus: "Thy blood (no) is equal to mine... Your name (no) was I who gave...." revealing an effective confession of the provocative, offensive and criminal purpose, offending the fundamental rights to dignity, respect and freedom, as human persons, of children and adolescents, so clearly set out in Article

8 Of nº 70013141262, Seventh Civil Chamber, Court of Justice of RS, Rapporteur: Ricardo Raupp Ruschel, judged on Dec 7. 2005.

> 227, caput, CF, and ratified in Articles 3 and 4 of Law 8.069/90. (RIO GRANDE DO SUL, 2018, s.p.).

In addition, Judge Luiz Felipe Brasil Santos narrates that it is necessary "[...] note that the musical lyrics under examination, although not ostensibly pornographic, is more serious than this, as it contains a clear suggestion that pedophilia and incest are perfectly acceptable behaviors (and why not?')", and adds: "when we all know that it is an unhealthy manifestation of personality (technically a perversion'), which causes deep and indelible trauma in its victims, who will carry for a lifetime" (RIO GRANDE DO SUL, 2018, s.p.).

The insertion of sexual violence into the family environment is not always accompanied by force. It is sometimes naturalized, which occurs without the perception of its occurrence, especially when we are talking about children, given the peculiar cognitive development. At the same time, the psychological representation of the father figure (authority for the infant) must be taken into account, in addition to the fact that the parent represents the righteous, correct and ideal bearer of the discourse of truth (which can make it seem that incest is something normal). Thus, the existence and acceptance of musical lyrics that encourage incest can become even more pernicious in the context of intrafamily violence, because they corroborate the acceptability and normality of abuse. Regarding, the eminent Judge Luiz Felipe weaves that:

> Note this remark that the so-called "subtle coercion" constitutes, in many cases, the strategy of incestuous parents. In fact, it is precisely in this context that works, called "artistic", like this one, are inserted, because, to the extent that it seeks to present incest as something absolutely normal and acceptable ("AND WHY NOT?"), contribute to the "subtle coercion" reaches its abject purpose. Note that for the child, the father, being the greatest authority figure, is the bearer of the discourse of truth. Therefore, what he says is, in principle, right and fair. In this way, especially in young children, incest may seem, at first, to be absolutely right and normal, because it is thus presented by the father. This strategy is greatly reinforced if works that seek to trivialize this conduct are considered acceptable. (RIO GRANDE DO SUL, 2018, s.p.).

Since the deed was processed under secrecy of justice, it was not possible to assess the terms of his sentence, subsequently drawn up. However, as an injunction, there was no ban on the dissemination and commercialization of the content, but it remained imposed the need to convey that the lyrics contain stimulus and trivialization to sexual violence against children, as well as fine on billing. The song has been re-recorded, with some modifications.

Subtly, coexistence in society is accompanied by the historical, cultural and social habit that sexualizes infants. Watching over the dignity of children, the National Council of Justice, in October 2017, launched the campaign "Children Do Not Date", in order to provoke the debate on the subject under consideration, rooted in the most diverse societies (BRAZIL, 2018). Such behavior, which early attributes the development of sexuality to children, represents what is known as adultization, that is, the suppression of the childhood and adolescence phase by the insertion of conceptions of adult life. On the other hand, it is healthy to emphasize that the visibility of such problems still faces many challenges, especially in the domestic environment, where there are difficulties for a conscious and reflective dialogue. Not least because, following the example of the practice of incest, before narrated, many of these corrosive acts are practiced in the midst of unstructured families . If it already shows such failure, what about the dignity of children?

Many of the issues discussed here, therefore, are concealed in two ways, either through the secrecy that prevails in the violent environment, or through social concealment (with emphasis on the media industry). It becomes crystal clear one of the steps necessary to face sexual violence (especially if considered in its intrafamily sphere): make it visible. And, for it to be discovered, the breaking of the "pact of silence" is essential. However, it is not possible to blame only the offended person for facing the cruel process that he endures, thus it is necessary to take preventive measures that address the causes of the phenomenon, whose depth goes far beyond what approaches the distracted eyes. Its impediment also needs important changes in the cultural aspect, since the customary practices have been rooted, since a long time, violence, especially of gender, marked by relations of power and domination, as specifically observed in a previous moment (on the rape culture).

FINALS CONSIDERATIONS

Considered a crime, traumatic event and even disease, violence surrounds large fields, whose emphasis in this brief study was given in the sociological sense. The transcendence of the phenomenon of sexual violence of the exclusive discourses that justify it in the field of (in)human consciousness, to sustain pathologies and desires, allowed it to be rethought as a social phenomenon, through the problem of trivialization of violence itself, female body, gender issues, rape culture, among others.

In the social space, many causalities emerge from deeper origins than initial understandings may believe. These are situations that most often develop in a veiled way, among them violence, especially in its sexual form. In order to discuss it, especially the one practiced against children and adolescents, feel it and face the turmoil, that the present work was developed.

In the family environment and close relationships with children and adolescents, the majority of cases of this type are concentrated, affecting equally the various social and economic classes. Violence itself, which unfolds in so many ways of being, has in the sexual form the extreme painful character, being repeatedly accompanied by other modalities, such as the psychological one. In this sense, there is the pact of silence, which is a great characteristic of the process of intra-family violence and ensures its maintenance. Pedophilia, on the other hand, is a disease that affects a number of abusers, but not its entirety, and is present in various ways in social behavior, reproduced by the media.

In fact, it becomes clear the erotization of children's bodies on the national stage, along with the struggle for the integral protection and realization of human rights to the infantojuvenil population. It was found that, from the data collected by IPEA (2014), 88.5% of the cases of rape recorded female victims and more than half of them were younger than thirteen years, which, without hesitation, is extremely alarming, in view of the devastating psychological consequences, especially for people in training. As for the author, the majority of aggressors are male, regardless of the age of the offended person, whose records point to authorship by women in less than 2% of cases (CERQUEIRA; COELHO, 2014). The same research also shows

that people close to them are often perpetrators of violence (such as parents, stepfathers, friends and family members).

As the age of the victim increases, the unknown individual also fits into this horrendous list, whose causes vary and are accentuated in the contexts of dysfunctional families (in the sense drawn by Luciane Pötter)with a history of violence and psychological and social disturbances. However, it is well known that, due to the particularities of crimes of this nature, many facts do not even come to the attention of public bodies, which is called underreporting.

Sadly, the victimization process does not end with the primary act of violence, and what is called re-victimization, consistent with the repetition of violence, which is equally painful to the victim, led by the public bodies responsible for the protection of victims and prosecution. The social space sometimes also appears as a repeater of violence (such as when blaming the victim). In addition to silence, the identification of facts encounters strong obstacles. Rape, more corrosive mode of violence on screen, has more ease to be characterized, this because of physical signs, noting that it affects not only girls, but also boys, currently facilitated by the worldwide network of computers.

By the frequency and duration of this phenomenon, which accompanies the history of humanity, it is possible to state that cultural issues are at the root of the problem and are inserted in this scenario by disregarding the human condition of others, the objectification of being through violence and the domination of bodies as typical behavior of patriarchal culture. Emphasizing the social aspect of the problem does not mean disregarding the relationship with other areas, which was constantly emphasized in the study. The intention, in this feeling, is to remake the path dominated by hegemonic discourse, of which certain conducts find support exclusively in pathological logic and desire, so as to make it possible to understand how culture and human relations create conflicts and are silent to situations of bitterness and consternation. Making the problem visible is a major step forward, and for that it is necessary to discuss it.

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THE QUESTION OF THE MINIMUM LUGGAGE ALLOWANCE IN THE BRAZILIAN AIR TRANSPORT UNDER THE PERSPECTIVE OF THE ECONOMIC REGULATION THEORY

PRÁTICAS RESTAURATIVAS: UMA NOVA ABORDAGEM DAS POLÍTICAS PÚBLICAS DE PREVENÇÃO A VIOLÊNCIA DOMÉSTICA CONTRA MULHERES

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ABSTRACT

The present work aims to investigate the regulation of luggage allowance in the Brazilian civil aviation sector based on the Economic Regulation Theory proposed by George Stigler. This is a bibliographic study, with emphasis on Brazilian and foreign doctrines on the economic regulation theory as well as on the regulation of the air transport sector. The method used was predominantly deductive, starting from general analyses on the economic regulation theory and the air transport sector to the applicability of the Economic Regulation Theory into Resolution 400/2017. In conclusion, we understand that, contrary to what has become popular, the end of the regulation for luggage allowances in Brazil, as a measure of economic liberalization, benefits the airline industry as a whole, favoring competition, consequently, consumers.

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RESUMO

A violência de gênero tem assumido uma posição crescente e constante nos dados oficiais e, por isso, há a necessidade ainda maior de promover mecanismos de prevenção e de enfretamento. Diante desse cenário, o presente artigo pretende verificar se as práticas restaurativas de fato promovem a efetivação dos direitos de humanos das mulheres que sofrem violência de gênero. Nesse contexto, questiona-se: as práticas restaurativas promovem a efetivação dos direitos de humanos das mulheres que sofrem violência de gênero? Para chegar-se a algumas respostas, buscou-se realizar levantamento de dados sobre os atuais **índices** *de violência de gênero no país; analisar quais são as normativas que disciplinam a aplicação de práticas restaurativas no Brasil e, por fim, trazer alguns exemplos de projetos que já fazem uso de práticas restaurativas em situações envolvendo violência de gênero. Na construção do artigo, usou-se como método de abordagem o dedutivo e como técnicas de pesquisa a bibliográfica e a documental.*

Palavras-chave: *Gênero. Práticas restaurativas. Políticas públicas. Violência doméstica.*

INTRODUCTION

The civil aviation sector is always a worldwide subject for relevant discussions, especially with regard to the regulatory part. The relatively low number of companies on the market, the high cost of operations and government incentives are factors that hinder free competition. In effect, the issue involves the role of economic regulation, notably with regard to consumer protection.

The Brazilian regulatory system went through several regulatory phases throughout the development of the civil aviation market, one of the main marks of this history being the creation of the National Civil Aviation Agency (ANAC). Since its creation, it has already issued several regulatory acts for the sector, proving to be an important instrument for the regulation of the Brazilian aviation market.

Recently, another regulation was issued, which gained great national repercussion: the end of the luggage allowance. This regulatory initiative guaranteed passengers the right to have checked luggage weighing proportionally to the size of the aircraft. As of the edition of this regulation, the baggage check could be charged separately, with the alleged objective of cheapening the ticket price for those passengers who did not checked their luggage. This decision was the target of several criticisms, mainly in the consumer protection agencies, which saw the measure as a setback.

Economic regulation, in turn, is based on the belief that full liberalization may not be as advantageous, notably due to the existence of market failures. Therefore, some theories were created to explain the regulatory phenomenon, such as the public interest theory, which argues that economic regulation exists in the interest of everyone and the capture theory, proposed by Stigler, who argues that, in fact, economic theory serves exactly the regulated companies that capture the regulatory entities.

That said, the objective of this paper is to investigate, from the point of view of economic regulation theories, the end of the luggage allowance in the Brazilian civil aviation from the

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formulation of the following question: Having the phenomena described by the Theory of Captura as basis, the end of the baggage allowance rule would or not be beneficial to the brazilian air sector? The research method predominantly used will be the deductive method, where from an analysis of the theories of economic regulation, emphasizing the theory of capture, about the regulation of the airline sector in Brazil, starting with a specific analysis about the regulation of the luggage allowance in Brazilian civil aviation and its allocation in the capture theory.

The predominantly used research technique will be the bibliography review, adopting ANAC Resolution 400/2016 as a primary source, secondary sources to Brazilian and foreign doctrine, with emphasis on the air sector and materials related to the theories of economic regulation, having as reference the George Stigler's work "Theory of Economic Regulation".

The first topic dedicated to a thorough analysis of the regulation theory proposed by Stigler, by verifying its main positive and negative points, starting with an analysis on the regulation in the airline sector, with emphasis on the United States of America. In this referred country, the matter on regulation was the first initiative. Subsequently, a historical view of the regulation of the Brazilian air market will be demonstrated with a more in-depth analysis of the end of the luggage allowance. After this brief analysis, we will try to make a correlation between the elements of the capture theory and the regulation of the luggage allowance within the Brazilian law, seeking to understand the similarities and the distinctions between them.

By the final part of this work, the hypothesis will develop towards the promotion of economic freedom, which is the goal of the end of luggage allowances; although *a priori* it can demonstrate a relationship with the capture, *a posteriori* it can mean progress, considering that it promotes free competition, thus reducing the possibilities of capture.

1. THEORY OF ECONOMIC REGULATION: EVOLUTION AND PRIMARY CONCEPTS

The movement favouring state intervention on the economic domain arose between the end of the 19th century and the beginning of the 20th century. It is clear that the self-regulation model proposed by Adam Smith could trigger what is commonly named "market failure". In this case, the intervention would serve to maintain the Pareto balance of perfect competition, which cannot occur in the presence of these failures (STIGLITZ; ROSENGARD, 2015).

Stiglitz; Rosengard (2015) point out six market failures considered to be basic. The first is imperfect competition, which occurs when, for various circumstances, the offer is concentrated in a monopoly or oligopoly. The second is the existence of public goods, which consists of those goods where demand is not controlled, such as the provision of national security or navigation channels. The third market failure is presented by the externalities, which are facts that are alien to the transaction itself but that interfere with it. The fourth failure is the incomplete markets, which are situations in which there is no supply even if the costs do not exceed the benefits. The fifth failure consists on information failures, which are the situations

in which buyers do not have as much knowledge as the sellers about the products purchased and, finally, unemployment, inflation and imbalance.

Regarding economic regulation, Moncada (2007, p. 45) and Chang (1997) note that, indirect intervention goes through three major phases from the post-war period. The first phase is named the "Era of Regulation", which lasted between 1945 and 1970, marked by a strong interventionist character to guarantee the public interest; the second phase is named the "Transition Period", between the 1970s and 1980s; and, finally, "the Era of Deregulation" that began in the 1980s and continues to this day.

In the transition period, from 1970 to 1980, it was questioned whether the welfare government could consider the public interest an absolute truth. Indeed, government failures arose. In this sense, Oliveira (2015, p. 139) argues that the key feature is found in state paternalism, which ends up reducing the individuals' private autonomy and "regulatory asphyxiation", where excessive regulation ends up preventing the exercise of economic activity. According to the author "Regulatory asphyxiation" is the term used by the doctrine to designate "excessive regulation, which makes the economic activity unfeasible, as well as the absence of regulation, compromising equality in the market full of failures" (2015, p. 21). Also, that it is "the infeasibility of exercising economic activities due to the excess of state restrictions, configuring, in some cases, indirect expropriation of the right to exercise a certain economic activity" (2015, p. 140).

There are still two major arguments that developed from the analysis of government failures, the first of which is the rent seeking theory*:* the monopolies are created through governmental regulatory impositions, being a direct consequence of this and not an evil to be drifted away. And the theory of regulatory capture or capture theory, a direct consequence of regulation would be the control of regulation by the interests of the regulated sector, to the detriment of consumers, and that is the theory adopted for this research (CHANG, 1997, p. 740).

The capture theory, defended, initially, by the American economist George Stigler, arises out of the simple assumption that the regulation is a product and, as any other, can be easily traded on the market. The only difference between the usual products and regulation is that in the second one the market structure is defined by the political process and not by the economic one (CARRIGAN; COGLIANESE, 2016, p. 4). In other way, it means that those who offer the regulation have a coercive power over those who "consume" them.

The "consumers" of regulation are the economic sectors that can benefit from it. According to the author, there may be four ways of regulatory politics that an economic sector can take advantage of. The main one is the direct grant, where the State gives money directly to the economic agents, followed by the state restriction for the entry of new competitors on the market by both the adoption of strict rules for it or even the full prohibition; restriction that may affect the producers of substitute products, such as margarine restrictions to benefit the butter industry or ethanol restrictions to benefit the gasoline industry and, by the end, price politics (STIGLER, 2017).

In his articles, published for the first time in 1971, Stiglitz emerged as one of the most important critics of those who justified the state intervention as an instrument for consumers protection and mitigation of competition imbalance, and furthermore evaluated the state

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action by its intention and not its results. In other words, those who defended the intervention from what it should be and not what it actually was (FIANI, 2004). In contrast, Stigler studied the regulation from a realistic point of view and in accordance with its consequences. Additionally, he brought several empirical examples to justify his point.

Another critic of this "romantic" view of state regulation was Richard Posner (2017) that, when stating critics over the public interest theory, told that, among other characteristics, there are no means to guarantee that the public opinion would translate into legislative action for the public interest. Additionally, according to the author, however there may be problems on Stigler's theory, it may be the most correct one, since it is the one that illuminates other areas beyond the market behavior.

After Stigler and Posner, several others studied the capture theory. The one that most stood out, according to Fiani (2004), were Peltzman with his "result idea" from 1976, Becker in 1983 with his "efficient regulation" idea and Loffont and Tirole with their "cost function specification of the regulated form" in 1993. However, for this research, considering also its juridical point of view, we will adopt the general ideias proposed by Stigler.

2.1 ECONOMIC REGULATION IN THE NORTH AMERICAN AIR TRANSPORT SECTOR

In the United States, air transport regulation began in the 1920s with the so-called "Kelly Act" which consisted of direct government subsidies to airlines. After that, in 1938, Civil Aeronautics Board was created, a regulatory agency responsible for the sector that, among other restrictions, prohibited price competition between companies, still with the focus of protecting the sector and promoting its development (CHMURA, 1984)

Although it is easy to conclude that the few companies existing on the market at the time have benefited from this regulation, both by state aid and the restricted competition, reinforcing the capture theory proposed by Stigler. Chmura (1984) states that American civil aviation would not have developed or stabilized so quickly without government assistance, however, the high growth of companies was justified by government subsidies. From it, complaints about the sector began, causing a movement of deregulation, which started in the 1960s.

Gowrisankaran (2002) states that, since the beginning of deregulation and the consequent freedom of route operation and pricing by companies, the North American air market faced considerable growth. According to the author, the number of passengers between the years 1975 and 2000 more than tripled, while ticket prices fell by less than half, showing that the self-regulation market mechanisms, in several cases, promote growth.

However, it is important to highlight that, due to the peculiarities of the sector, some type of regulation becomes necessary and shows positive effects. One example is the regulation to create barriers to develop monopolies. Leaving mergers and acquisitions of free companies at the discretion of economic agents can often promote the creation of monopolies, which is disadvantageous for consumers.

2. THE REGULATION OF BRAZILIAN AIR TRANSPORT: INTRODUCTORY REMARKS

According to the Administrative Council for Economic Defense (CADE), this means of transportation, following the global trend of the time, was strongly regulated by the State (2019, p. 3). Its historical milestones in Brazil point out that the first companies and regular airlines date from the 1920s, from the last century. In 1931, the Department of Civil Aviation (DAC) was created, initially called the Department of Civil Aeronautics, predecessor to ANAC (2006) and in 1938 the Brazilian Air Code was published.

The regulation of the air transport market for passengers in Brazil, according to Oliveira (2007), has undergone two major regulatory reforms. The first, started in the 1970s, known as "Controlled Competition" and the second, starting in the 1990s, named "Flexibility Policy", that is, followed the same order as the United States. The first was marked by intense regulation, including price controls, while the second reform was characterized by greater market liberalization. For Oliveira (2007), these two major reforms can be subdivided into six stages of regulation: the first stage, the regulation as an industrial policy for development; the second, regulation as an active stabilization policy; the third, liberalization as an inactive stabilization policy; the fourth, liberalization as a constraint on the stabilization policy; the fifth, quasi-deregulation and the sixth, re-regulation, which started in 2003.

Clearly, an abrupt process of economic deregulation was not applied to the aeronautical modal, that is, the Brazilian State did not choose to adopt a consolidated package of liberal measures, choosing a gradual evolutionary process. In 2005, after the creation of ANAC, several other measures were taken to stimulate competitiveness and free competition in the sector. Among them, Guaranys (2010) points to the establishment of pricing freedom and of supply by law in the strict sense. Another important measure, the restriction of the role of the regulatory agency when indications of competitive illicit acts were identified, where its role would be only to communicate it to the competent authority, in that case, the Brazilian competition defense system.

Finally, it should be noted that an important chapter in the history of regulation of the Brazilian airline sector occurred between 2018 and 2019, with the edition of Provisional Measure 863/2018 and its subsequent conversion into Law No. 13,842/2019. This regulation modified the Brazilian Aeronautical Code, allowing companies with 100% foreign capital to enter the national market, provided that they have their headquarters and administration in the country. Previously, 4/5 of the capital should belong to Brazilians and the management functions should also be exercised by Brazilians.

2.1 THE LUGGAGE ALLOWANCE ISSUE

The National Civil Aviation Agency (ANAC), from 2000 until the adoption of Resolution No. 400/2016, obliged air transport companies to offer their passengers a minimum luggage allowance. It corresponded to 23 kilos, on domestic flights on airplanes with a capacity above 31 passengers, being 30 kilos for passengers flying in first class, 18 kilos for aircrafts of 21 to 30 seats and 10 kilos for aircrafts of up to 20 seats.

To delimit the General Conditions of Air Transport and build the Resolution 400/2016, the National Civil Aviation Agency used Regulatory Impact Analysis (RIA) [4], in which it assessed that the sector's regulatory proposals should address both the issue of freedom of establishment tariffs and differentiation of services to air operators and also the point of mandatory maintenance of the right to franchise.

This RIA is the result of research by the Agency since 2013 and, with regard to the baggage allowance, it is guided by the guidelines of the International Civil Aviation Organization (especially Doc. 9587) and international experience on the subject. RIA's studies culminated in Public Hearing No. 03/2013, in which several consumer protection agencies - such as the National Consumer Secretariat (SENACON), São Paulo Consumer Protection and Defense Attorney (PROCON/SP) and Consumer Guidance Service (SOS Consumidor) - argued that the separate purchase of the baggage delivery service would harm consumers. However, ANAC noted that state intervention in the baggage allowance rules did not offer economic efficiency gains to passengers and prevented the development of the air carrier business model. In addition, the stipulation of baggage allowance in this mode lacked technical fundamentals, since old regulations on the subject needed to adapt to the new context of civil aviation, according to parameters of a market economy that is both more evolved and mature, able to assimilate the best ones competition practices in an increasingly competitive market (BRASIL, 2013). For these reasons, the Agency concluded that the free franchise model was more beneficial to the sector, both in relation to domestic and international transport.

In 2016, with the maturing of debates[5], the Resolution No. 400 gave a new shape to the general conditions applicable to the regular air transportation of passengers (domestic and international), such issues related to the provision of the service; alteration and termination of the air transport contract by the passenger; check-in and presentation for boarding.

Specifically regarding our object of study, the standard defined that the transportation of checked luggage is an accessory contract and companies are free to determine the rates applicable to their respective services. Considering that, the checked luggage allowance was no longer mandatory. On the other hand, hand luggage per user, established at 10 (ten) kilos per person, remained mandatory - the previous estimations was only 05 (five) kilos.

Resolution No. 400/2016 became effective in March 2017, however the provisions on checked luggage were suspended by decision of the Federal Court[6][7]. Consumer agencies promoted Public Civil Actions claiming that the exclusion of the luggage allowance excessively burdened the consumer and caused an imbalance in consumer relations.

4 Available at: https://www.anac.gov.br/participacao-social/consultas-publicas/audiencias/2016/aud03. Accessed: Ago 21, 2020

5 Verify other public hearings that contributed to the formation of Resolution No. 400/20016 at: https://www.anac.gov.br/participacao-social/consultas-publicas/audiencias-encerradas/audiencias-publicas-encerradas-de-2013 .Accessed: May 21, 2020.

6 Four Public Civil Actions (ACP) were processed against ANAC, with the Superior Court of Justice (STJ) defining that the 10th Federal Court of the Judiciary Section of Ceará was the competent judge for the trial (asserted jurisdiction). Of the other three ACPs, one had been filed by the Consumer Protection and Defense Management of Pernambuco (Procon / PE), and the other, proposed by the Brazilian Bar Association, was being processed at the 4th Federal District Court. The fourth, from the 22nd Federal Civil Court of the São Paulo Judicial Subsection, proposed by the Federal Public Ministry. It was in the midst of this last Public Civil Action that a preliminary injunction remained to suspend articles 13 and 14 of Resolution 400/2016.

7 According to data available on the ANAC website, airlines have only effectively applied the unbundling of baggage handling services as of June 2017. See: https://www.anac.gov.br/assuntos/setor-regulado/empresas/envio-de-informacoes/tarifas-aereas-domesticas-1.

The Brazilian Bar Association and the Municipal Department of Consumer Protection and Defense - PROCON, of the Municipality of Fortaleza (author of Public Civil Action No. 0816363-41.2016.4.05.8100), reasoned that the regulatory body when issuing the Resolution failed the provisions of article 734 of the Civil Code[8], since the transport of people would include, in addition to the passenger himself, the luggage. For them, the national legal system perceives the transportation of luggage as an accessory provision immanent to the transportation of people and, therefore, the conclusion established by article 13 of Resolution 400/2016 from ANAC would not be correct. There would be a transfer of responsibility and operation costs of the luggage clearance service to the consumer, without requiring any compensation from the carrier.

In the merit judgment, the Federal Court ruled that the request was unfounded. First, by observing that the Consumer protection agencies described that, necessarily, the modifications of Resolution No. 400/2016 would cause losses to air transport users, however such an explanation is not immediately extracted from any provisions of the normative act depleted. In fact, as will be shown in a timely topic, the path of economic deregulation of air transport has proved to be effective in the interests of consumers. Secondly, it was found that the burden of carrying luggage in contracts for the transport of people in general (Article 734 of the Civil Code) does not oblige the carrier to take any and all luggage, in any quantity or weight. Thus, it is legitimate for the provider to stipulate reasonable conditions of service and, in the case of air transport, it is legitimate for the National Civil Aviation Agency to list such restrictions in advance. Third, already in appeal, the Federal Regional Court of the 5th Region recognized that, according to a study developed by the Secretariat for Economic Monitoring of the Ministry of Finance (Sae/MF), of the 3rd Coordination and Review Chamber of the Federal Public Ministry (3rd CCF/MPF). In addition to the Legislative Consultancy of the Chamber of Deputies, the sale of airline tickets with checked luggage allowance is of a "tied sale" nature, a circumstance prohibited by article 39, I of the CDC. In this regard, Silva & Gonçalves (2017) observe that this "grouping of services" - passenger transportation and luggage transportation - referred to in the specialized literature as bundling, obliges the passenger to necessarily pay to take luggage, even if he does not carry any volume. That is, for each and every passenger, both the transportation of a person and his luggage are sold, although only a few are interested in checking luggage[9].

The costs of transportation services are passed on by the carrier to the user, the amount related to the availability of the checked luggage allowance is shared by all users. However, it is clear that only those who actually use the service should pay for using the transport of volumes. Thus, ANAC regulations are legal by allowing travellers who do not wish to dispatch any volume to purchase tickets where the value of this accessory service is not included.

Concluding the legal arguments favorable to the removal of the mandatory luggage allowance, the 1st degree merit decision of Public Civil Action nº: 0816363-41.2016.4.05.8100 highlights other important arguments presented by the Agency (2017, p. 8):

> [...] "currently the imposition of the 23kg offered for checked luggage is far beyond the national average, which, according to Technical Note 11/2016 /

8 Brazilian Civil Code (Law No. 10.406 / 2002), article 734: The carrier is liable for damages caused to the persons transported and their luggage, except for reasons of force majeure, any clause excluding liability being null and void.

9 Technical Note nº 11/2019 / DEE / CADE

> GEAC / SAS, is below 12kg per passenger", arguing that "saying that the transport of luggage is essential to the air transport service is fallacious, whereas 35% of passengers transported today travel without luggage, according to data from the Civil Aviation Secretariat of the Ministry of Transport, even with this included in the ticket price. In this sense, a state imposition of this value imposes unnecessary costs on the provider of transport services, which are passed on to the consumer. The cost of transporting luggage, in turn, is shared by all, without this having to constitute an obligation on passengers". It further claims that the referred release complies with the principles of freedom of tariffs and freedom to offer routes, which govern air transport contracts, under the terms of Law No. 11,182 / 2005, and that ANAC, contrary to what the author states, subsidized technical and historical elements to edit the regulation in question, specifically with a comparative study of the reality of several other countries, in which it was found that Brazil would be among the most restrictive countries with regard to the regulation of luggage transport, both on domestic as well as international flights, which significantly increases the cost of air transportation for consumers, since "the fare for air tickets includes, by the regulation prior to the Resolution now under attack, among its costs, those pertinent to the luggage dispatch in the franchise maximum allowed (23kg and 2x32kg) in any period. Certainly, this cost is passed on to the passenger, at any time of the year, on any route and even if he/she checks in less weight luggage or even that he/she does not check luggage." Thus, "the expectation is that the release of the luggage allowance will allow the airline to set fares with different luggage allowances and it will be up to the consumer, in his free choice exercise, to choose the one that best suits his profile. It also tends to provide the opportunity cost on the part of the airlines, in order to allow them to manage the hold and cargo transportation, which will contribute to the profitability of a flight and the consequent reduction of prices in passenger transportation".

Thus, in line with the understanding of the Federal Court of the 5th Region, there are no indicative assumptions of legality bias in the provisions of Resolution 400/2016. On the contrary, the maintenance of the "grouping of services" is that, in addition to being out of alignment with liberal market ideas, it violates the national order, according to the diction of article 39, item I of the Consumer Protection Code.

Still, according to Bastos et al (2017), ANAC argues that deregulation favors the creativity and free choice of airlines. Collaborative thinking in other countries, which also allow collection, however, the measure displeased several consumers, in addition to institutions such as the Public Ministry. They then manifested themselves in disfavor of the resolution as it represented a setback in guaranteed rights.

3. APPLICABILITY OF THEORY OF ECONOMIC REGULATION TO THE REGULATION OF THE LUGGAGE ALLOWANCE

In the field of applicability of the theory of economic regulation in relation to the consumer of aeronautical services, two large groups are identified, both supported by the argument that consumer protection is a fundamental principle of the economic order, article 170,

of the Federal Constitution of 1988. This argument demonstrates, from different perspectives, the need to regulate the dispatch of luggage in the air modal. On the one hand, based on the conception that consumer protection will take place with the evolution of the aeronautical market and in favour of eliminating luggage allowance. On the other, consumer dissatisfaction with prices and quality of services. This confrontation of ideas involves the old discussion about the role of the State in the face of the markets, it supports the confrontations of the conceptions of regulation in the public interest *versus* economic regulation.

In this scenario, there are those who argue that the dissolution of the luggage handling service will result in immediate benefits for consumers, considering that it will lead to a reduction in the value of tickets. This conclusion is supported by the numbers reached by air navigation after the beginning of the policy of freedom fare.

ANAC concluded that "freedom fare is one of the pillars that support the low prices of airline tickets, social inclusion and the growth of air transport" (BRASIL, 2012, p. 28). According to the figures released at a seminar held in 2012, the average utilization rate of aircraft[10] in the transport of domestic passenger improved significantly, from 57% in 2002 to 70% in 2011, and the number of paid passengers transported for the same period rose from 33 to 85 million, with an average growth of 11.2% per year.

The Domestic Air Fare Report for the 4th Quarter of 2018 points out that the average air fare[11] decreased from R$ 499.62 in 2009 to R$ 348.46 in 2018 [12] (BRASIL, 2019, p. 13). As a result, the modal, previously very expensive, became popular, demanding greater efficiency from companies in managing their costs and tariffs in the face of new market conditions and competition (BRASIL, 2012, p. 28). This process of popularization ratifies the statistical data of 2018, in which 6.7% of the total tickets were sold with fares below R$ 100.00 and 50.9% below R$ 300.00, while the tickets over R$ 1,500.00 represented only 0.8% (BRASIL, 2019, p. 12).

Resende (2018, p. 11), in an analysis of the Air Transport Statistical Database (BDETA), found that in the months following the breakdown of the dispatch service, there was a significant and gradual decrease in the average number of luggage checked per passenger and a reduction in more than one kilogram in the average amount of checked luggage per person. In addition, using mathematical and statistical modeling, he found an average reduction of R$ 14.85 in the price of airfare fares.

However, the checked luggage allowance is not the most determining variable in the calculation of the carrier's expenses and, consequently, in the prices required in the fares. The largest expenditures of aviation companies are with fuels and lubricants, which account for 32.2% of expenses, and aircraft leasing, insurance and maintenance amounts, corresponding to 20.3% (BRASIL, 2019, p. 7). In this way, fluctuations in the price of oil or even variations in

10 Passenger demand (in paid passenger-kilometers transported, treated by the acronym RPK) for available seats (in seats offered kilometers, ASK). The formula for calculating aircraft utilization is RPK / ASK.

11 Average amount paid by the passenger on a trip to his destination due to the provision of air transport services. The indicators were presented in nominal values and in real values (deflated by the IPCA). Until the making of this article, ANAC had not released the general statistics for 2019.

12 Values related only to the routes monitored by Decrees 1,213 / 2001 / DGAC / 2001 and 447 / 2004 DGAC / 2004. Only from July 2010, when Resolution No. 140/2010 came into force, did all domestic lines begin to be monitored. The "general" airfare as of 2011 also declined, from R$ 472.45 that year to R$ 426.54 in 2018.

the exchange rate directly influence the costs of aeronautical service, factors that are independent of companies or consumers.

Consequently, the reduction of air fares is not an immediate consequence of the post-Resolution 400/2016 regime[13]. Fortunately, consumer protection is not only achieved by decreasing the values of products or services, being the limitation to State intervention in the aeronautical services market and the formation of another item of differentiation of services and prices offered for the choice of passengers the positive highlights of the normative instrument.

The reduction in state interventionism, similar to that already practiced in the rest of the world, allows the availability of different offers from transport companies for the free choice of passengers, according to their different needs, preferences and payment disposition[14] (BRASIL, 2019, p. 8). In other words, fare freedom gives companies the opportunity to apply different prices to transportation services, in order to capture different segments of the public, based on the economic theory of price discrimination.

In his studies of microeconomics, Varian (2015, p. 658) subdivides price discrimination in three degrees. In the first degree, named perfect discrimination, there is the sale of units to the person who attributes the greatest value to the asset, confirming the transaction only for the maximum price that person is willing to pay. In the second, there is the sale of different units of product at different prices, but each person who buys the same quantity of goods pays the same price (prices differ with respect to units of good, but not with regard to people). And, in the third degree, exemplified in the practice of discounts for elderly people and students when the production is sold to different people with different prices, but each unit sold to a certain person is sold at the same price.

Airlines usually use the second degree of price discrimination (non-linear pricing), notably regarding the distinction between first class and economy class (2015, p. 664). By launching different packages, companies provide consumers with an incentive to self-select based on the quality of the offer. The main strategy is to convince the public most likely to pay higher prices to choose the highest quality services and, for that, there is a reduction in the quality of the services offered in the simplest packages.

If there were no consumers of the best quality packages, the economy class would obtain a higher quality product, but at a higher price. On the other hand, without consumers in the economy class, those in the first class would benefit from the reduction in the price charged, however they would register a surplus equal to zero[15]. Fare freedom gives companies the opportunity to explore the relationship with both classes, to which Varian (2015, p. 665) observes an important social utility in the price discrimination system, once otherwise companies could decide that it would be great to sell only to high demand markets.

13 Assessing the problem, this is how ANAC positioned itself: "The context of the various variables that influence the entire market and the economy in general within a period can be quite different from the other period to be compared.The price difference cannot be expected to be explained by a single factor in isolation.The association of fluctuations in prices to any possible cause, such as the transport of luggage, necessarily depends on a robust time series with several indicators, so that it is possible to isolate the impacts of each variable considered "(2019, p. 9).

14 Domestic airfares report 3rd Quarter 2019.

15 Consumer surplus is the difference resulting from the consumer purchasing a product for less than the highest price he would be willing to pay. See: http://robguena.fearp.usp.br/Introducao/excedente.imp.pdf

Even so, there are those who resort to the propositions of the regulation theory in the public interest and question the feasibility of the State intervening in the values practiced in checked luggage fees or even in the global-final price, in order to establish maximum amounts for charging consumers[16]. As Trindade (2019, p. 55) explains, the theory of regulation by the public interest incorporates non-economic aspects such as the well-being of the population and the interests of the community. That way, the economic views on the market lose strength in the face of the responsibility of promoting benefits to the general population, especially to consumers. In the present case, the logic would be that "the exclusion of the luggage allowance should excessively burden the vulnerable part of the consumption relationship, unbalancing the subscription contracts of the passenger air transport" (OAB, 2019, p. 3).

It urges to recall that the present work has already demonstrated the negative aspects of luggage allowance, notably by forcing all passengers to pay for the checked luggage even if they are not using it. Furthermore, the legal impracticability of the measure remains clear, since the maintenance of luggage allowance violates the precepts of the Consumer Protection Code, as it is a kind of tie-in sale. The thesis raised by entities, such as the OAB, cease asking who are the real beneficiaries; who bears the burden of regulation; what is the form of this regulation; and, what are the effects of this on the allocation of resources. In fact, Stigler (2017, p. 31) undoes the principles of regulation by the public interest exactly through these questions. The American economist argued that the benefits of State intervention in the markets fall short of the losses caused to the rest of the community (2017, p. 40). For example, imagine that the regulation of the air sector could, in theory, favor its companies, promote improvements to airports, and improve, in general, the service to consumers. Such a privilege given to the State to a specific sector of the market causes damage to other means of transport, such as road modal, which is a competitor (substitute) for the aeronautical service. Indeed, caution is needed regarding the perception that the State moves imbued with collective values and that this intervention is positive for the social body.

As Trindade instructs (2019, p. 56), state regulation is a "product" shaped from prevailing interests. The point is that, in capitalist systems, the state's interference in the market enhances the propensities of economic agents, often to the detriment of social interests.This is due to the power of influence of these agents to make regulatory acts more palatable or even favorable to their own objectives[17].

16 There are those who defend the need for the Brazilian State to adopt the price cap regulation technique. According to *Investopedia*, "price-cap regulation is a form of economic regulation generally specific to the utility industry in the United Kingdom. Price-cap regulations set a cap on the price that the utility provider can charge. The cap is set according to several economic factors, such as the price cap index, expected efficiency savings and inflation". (Https://www.investopedia.com/terms/p/price-cap-regulation.asp). Observing the proposals to change the regulation of the airline sector, as in the case of the Conversion Bill (PLV) 06/2019, CADE analysed the possible competitive effects of the adoption of this regulatory model for airline ticket prices, detailing its conclusions in Technical Note No. 12/2019/DEE/CADE.

17 In Posner's view, "a serious problem with any version of the public interest theory is that the theory does not define any exchange or mechanism by which a public interest conception is translated into legislative action.In market theory, it is explained how the efforts of individuals to promote their own interests through transactions generate an efficient allocation of resources.There is no similar articulation of how public opinion about which legislative policies or measures could maximize social welfare is translated into legislative action, it is not enough to just say that the voter will vote for the candidate who promises to develop public policies that voters conceive to be public interest; other policies may benefit a specific voter more.Policies that benefited 51% of voters could impose much higher costs on the other 49%, a situation in which the majority would be forced to face a conflict between principles and interests - and no theoretical doctrine or empirical evidence suggests that they would probably choose the principles " (2017, p. 64).

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The more the market is adorned with intervening state acts, the greater the likelihood that the regulator will dominate by economic agents. In this way, it could be said that the capture theory ignites an alert similar to the sociological conception of the constitution - proposed by Ferdinand Lassalle - that there are real factors of power that dominate and build the "real constitution". The apparent vision of that regulatory acts are forged only by the public interest vanishes from the discovery that these acts are tied to private interests of small groups, especially economic/financial agents, given the "capture" of the regulator to conceive the regulation desired by the regulated (TRINDADE , 2019, p. 74).

For these reasons, at the end of the luggage allowance in the Brazilian civil aviation market, there is a positive factor for limiting a possible capture by the regulator, since it reduces the possibilities of capture of the regulatory power by the regulated.

FINAL CONSIDERATIONS

We started this study with the debate about the theory of economic regulation, exploring its main elements, also explaining what it consists of and how it has evolved over the years. Then, we started to analyze the main aspects regarding the regulation of air transport, with emphasis on the United States, considering the great growth experienced by this country in its regulatory experiences.

It appears that, historically, the regulation of the Brazilian airline sector, from the 1930s to the present day, the trajectory of state intervention in the sector and, from there, the first attempts to regulate luggage allowance until the edition Resolution 400/2017 are shown. It functioned as a propaedeutic reference for the study we set out to carry out. It is possible to analyze the end of luggage allowance on three perspectives: (a) by the theory of price discrimination; (b) by the consumerist bias; and (c) industry statistics in recent years. First, the elimination of luggage allowance is supported by the theory of price discrimination (second degree discrimination, according to the lessons of Hal Varian), with, therefore, economic-scientific support for the measure. In turn, it is considered a compliance with the consumerist norm, since the aggregation of services (transportation of luggage and people) constituted a type of tie-in sale, a practice prohibited by Law 8.078 / 1990 (article 39, I). Finally, the statistical results of the previous stages of the economic freedom process in the airline sector confirm the effectiveness, for consumers and air transport companies, of promoting greater freedom in this modal.

Moving forward, it is still possible to analyze the measure proposed by Resolution No. 400/2016 for the lessons of the economic theory of regulation, especially regarding the perception of the effects of state intervention in the market and the understanding of the real beneficiaries of state interference, as assessed by the theory of capture. In this sense, the present research demonstrates that the promotion of greater economic freedom is beneficial to the airline industry, as it reduces the effects of the capture of the regulator by sectoral economic agents, so that, however the end of baggage allowance could fit the Theory of Capture *a priori, a posteriori* the expansion of the economic freedom for companies may result in gains for both consumers and businessmen.

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SUMMARY JUDGMENT AGAINST THE CLAIM DUE THE EXTINCTIVE PRESCRIPTION AND VIOLATION OF PRIVATE AUTONOMY

IMPROCEDÊNCIA LIMINAR DO PEDIDO POR PRESCRIÇÃO E A VIOLAÇÃO DA AUTONOMIA PRIVADA

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ABSTRACT

The article examines the assumptions and consequences of the summary judgment against the claim due the verification, by the judge, of the occurrence of the extinctive prescription. To this end, examines the legal provisions of the Brazilian Civil Procedure Code of 2015, pointing out distinctions and approximations in relation to the legal provisions of the Brazilian Civil Procedure Code of 1973, focusing the meddling of the judiciary in private autonomy, which was ensured by the 1988 Brazilian Constitution. In the writings, the inconsistencies of this kind of judgment are indicated, considering not only the civil and procedural civil codifications, but also the Brazilian constitutional discourse. The formalized research, based on bibliography and documents, is exploratory and explanatory in its objective, also adopting the comparative and hypothetical-deductive methods. It elects the neoinstitutionalist theory of the process as a theoretical background.

Keywords: Summary judgment against the claim. Extinctive prescription. Private autonomy.

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RESUMO

O artigo examina os pressupostos e desdobramentos do julgamento liminar pela improcedência do pedido em razão da verificação, pelo juiz, da ocorrência da prescrição. Para tanto, além de abordar os dispositivos que tratam do tema no Código de Processo Civil brasileiro de 2015, indicando distinções e aproximações em relação às normas que dispunham sobre a temática no Código de Processo Civil de 1973, debruça-se sobre a questão da intromissão do judiciário na autonomia privada, cuja existência é assegurada pela Constituição de 1988. No escrito, apontam-se as inconsistências do referido julgamento diante não só das codificações civil e procedimental civil, como também do discurso constitucional brasileiro. A pesquisa formalizada, de base bibliográfica e documental, é, quanto ao seu objetivo, exploratória e explicativa, adotando, ainda, os métodos comparativo e hipotético-dedutivo. Elege a proposição neoinstitucionalista do processo como marco teórico.

Palavras-chave: *Improcedência liminar do pedido. Prescrição. Autonomia privada.*

1. INTRODUCTION

Em 7 de fevereiro de 2006, foi publicada a Lei nº 11.277, que buscava atribuir "racionalidade e celeridade ao serviço de prestação jurisdicional" (BRASIL, 2004). A lei que acrescentou o art. 285-A ao Código de Processo Civil de 1973 previa a possibilidade do julgamento liminar pela improcedência do pedido, que ganhou novos contornos com a edição da Lei nº 13.105, de 16 de março de 2015.

With the advent of the Code of Civil Procedure 2015, the injunction of the application is authorized, among other hypotheses, when the judge verifies the occurrence of the prescription, even before determining the citation of the defendant. It is, however, a questionable faculty, including from the perspective of private law, since, by the exercise of the option provided in art. 332, § 1º, from CPC/15, the possibility of waiver of the prescription in the pre-decision procedural space is removed and, therefore, the opportunity to fulfill the natural obligation arising from the extinction, by time, of the claim deduced in court by the plaintiff party is excluded.

Thus, in addition to all the difficulties correlated with the recognition of prescription, office, by the magistrate, the current Code of Civil Procedure ceases to consider that, with the establishment of the paradigm of the democratic rule of law in Brazil, "public/private dichotomy and the rationality of the legal system" (CASTRO, 2010, p. 223), which is why, since 1988, the Brazilian State can no longer appropriate a space that was theorized for the exercise of individual freedom.

Therefore, the hypothesis that is aimed to test, in the formalized writing, is that the preliminary dismissal of the request by statute violates the constitutional right to private autonomy, which, in democratic law, can not be removed in favor of efficiency, already from the performance of the committee of notable jurists appointed by the Federal Senate to the preparation of the Preliminary Draft of the Civil Procedure Code, it was announced as one of the scopes to be implemented by the legislation to be published[3].

3 The commission of notable jurists responsible for the production of the Preliminary Draft Code of Civil Procedure was instituted, in the Federal Senate, by President Act nº 379/2009. Throughout its performance, the assembly of experts was attended by Luiz Fux (president), Tereza Arruda Alvim Wambier (general rapporteur), Adroaldo Furtado Fabrício, Humberto

Regarding the approach to the problem of paradigmatic incompatibility of preliminary dismissal of the application, therefore, the research adopts the comparative and hypothetical-deductive methods (POPPER, 2009, 2004, 1999). Accepting the neo-institutionalist proposition of the process as a theoretical framework (LEAL, 2017, 2016a, 2016b, 2013), the research is exploratory and explanatory as to the objective and, by the techniques employed, it is bibliographic and documentary.

2. DISMISSAL OF THE APPLICATION AND RECOGNITION OF THE LIMITATION PERIOD BY JUDGE SOLIPSISTA

The injunctive dismissal of the application is standardized, in Brazil, although under a different label, since the year 2006, when Law 11.277 came into force, which disposed about the so-called trial of repetitive[4] processes. According to this law, we added art. 285a to the 1973 Code of Civil Procedure, an injunction for the dismissal of the application was authorised when the matter at issue was solely of law and, in the court hearing the proceedings, a judgment of total dismissal had already been issued in other similar cases. According to Law nº 11.277/06, in this case, the summons of the defendant could be waived and, immediately, the sentence delivered, reproducing the content of the previously issued decision.

In fact, by the legislation published in 2006, the verification of the limitation of the claim deduced by the plaintiff, at the first moment for the examination of the original petition, was not considered as an authoritative hypothesis of the preliminary dismissal of the application. In the 1973 Code of Civil Procedure, for its art. 219, § 5, the judge was obliged to pronounce, by letter, the statute of limitations, even before the defendant was summoned, but, contrary to the Code of Civil Procedure 2015, this attitude concerned the rejection of the original petition.

It is for this reason that, focusing on the 1973 Code of Civil Procedure, it is possible to state that not all the determinative hypotheses of the rejection of the original petition were related to the existence of the so-called insane procedural defects, different from what appears in the 2015 Civil Procedure Code. The normative inclusion of the limitation clause as a cause of rejection of the original application required, paradoxically[5], the pronouncement of a decision on the merits even before the citation of the defendant, in a manner opposed to what occurred when the rejection of the original application was based onwhether in the ineptitude of this petition, in the manifest illegitimacy of the party, in the absence of proce-

Theodoro Júnior, Paulo Cezar Pinheiro Carneiro, José Roberto dos Santos Bedaque, José Miguel Garcia Medina, Bruno Dantas, Jansen Fialho de Almeida, Marcus Vinicius Furtado Coelho, Elpídio Donizetti Nunes and Benedito Cerezzo Pereira Filho. (BRAZIL, 2010).

4 To access a summary of the legislative procedure preparatory to Law 11,277/06, check out, mainly, the scientific article called Critical notes on the injunctive dismissal of the application, which was produced by Vinícius Lott Thibau (2019).

5 The paradoxical character of this possibility is that, according to the explicit prediction of art. 267, I, of the CPC of 1973, the rejection of the initial petition was determinative of the extinction of the process without resolution of merit. By art. CPC 269 of 1973, however, the statute of limitations was pointed out as one of the hypotheses in which the judge should render a final sentence, that is, a resolution of merit. The confrontation of referred assistance is relevant, since the expression "of logo", present only in art. 295, IV, of the CPC of 1973, could indicate the existence of two possibilities of judgment related to the verification of the statute of limitation: no resolution of merit, if the statute of limitation had already been perceived in the first judicial review of the initial petition, or, on the contrary, with resolution of merit, if this perception had occurred in a subsequent procedural moment.

dural interest, and in the failure to carry out the amendment, that they were presented as situations that were impositive of the delivery of a terminative sentence.

The taxionomic framing of prescription as a determining hypothesis of the rejection of the initial petition has always caused concern, since prescription is a legal institute that relates to the so-called material law. The standardisation of the occurrence of the prescription as one of the situations that imposed the rejection of the original petition, however, did not mean a one-off slip by the legislator, but a deliberate attempt to conceal the possibility of a meritorious decision to close the proceedings even before the so-called procedural relationship was formed.

If this possibility were openly foreseen by the law, many could be the obstacles imposed on its approval, as shown in the Magisterium of Araken of Assisi (2015, p. 128, v. III):

The 1973 CPC proved to be advanced for its time. The original version of the second unitary procedural code already authorized the rejection of the initial application in case the judge ascertains the expiration of the limitation period or decay. It was forecast of wide range, partly camouflaged among the terminative sentence hypotheses to avoid more forceful resistances. [...]

The location of the issue of prescription and decay in the context of the rejection of the original application is formally inappropriate. The judge judges the merits. However, at the time when the 1973 CPC came into force, autonomous and prominent device would arouse sensitivity and tenacious opposition and, in any case, the legislator did not dare to bold step.

It should be noted that, precisely because linked to the so-called material law, the prescription never occupied the list of preliminary matters referred to by art. 301 of the 1973 Code of Civil Procedure. In this regard, moreover, no changes were made to the 2015 Code of Civil Procedure, which, however, took care to exclude the issue of the limitation of the determinative hypotheses of the rejection of the original petition, in order to standardise the approach to the situations that they provide, by terminative sentence, the judgment of negative admissibility of that petition.

Thus, at the present time, the rejection of the initial petition will only occur when any of the hypotheses foreseen in the art are identified. 330 of the Code of Civil Procedure. By the labeled New Brazilian[6] Code of Civil Procedure, the verification of the prescription of the claim deduced by the plaintiff at the time of the first analysis of the initial petition is authorizing the injunctive dismissal of the application (art. 332, § 1º, of the CPC), which receives criticism that, although under the previous codification they could already be formulated in relation to the rejection of the original petition by statute, they gained great repercussion with the advent of the Code of Civil Procedure 2015.

This is because, unlike what happened with the 1973 Code of Civil Procedure, which was in force during the period of democratic restriction in Brazil, the 2015 Code of Civil Procedure expressly undertook to align its rules to constitutional[7] provisions, promise to which Law

6 To access a criticism about the novelty of the Civil Procedure Code 2015, check out the scientific article entitled Proof and Jurisdictionalism in the new Brazilian CPC, authored by André Cordeiro Leal and Vinícius Lott Thibau (2017).

7 In the Explanatory Statement of the Code of Civil Procedure 2015, which, strangely, reproduces what was presented by the committee of notable jurists appointed by the Federal Senate, it states that the "the need to make clear the harmony of the ordinary law in relation to the Federal Constitution of the Republic made it possible to include in the Code, expressly, constitutional principles, in its constitutional version. On the other hand, many rules were conceived giving concretion to

13.105/15 failed, ostensibly, also by the ruling of the injunctive dismissal of the request. It's just, by the norm in art. 332, § 1º, the Code of Civil Procedure 2015 violates the right to private autonomy that is constitutionally conferred on the legal community of those legitimated to the process (art. 1º of the CB)[8], thus devaluing what Jürgen Habermas announces as "untouchable private life configuration domain" (2003, p. 137, v. II).

The verification of the statute of limitations by the judge, at the first moment dedicated to the examination of the original petition, is, however, just one of the questionable hypotheses of the possibility of the injunction for the dismissal, which, in the Code of Civil Procedure 2015, is regulated as follows:

> Art. 332. In cases which dispense with the opening procedure, the judge, regardless of the defendant's summons, shall dismiss the request contrary to:
>
> I - statement of summary of the Supreme Federal Court or the Superior Court of Justice; II - judgment delivered by the Supreme Federal Court or by the Superior Court of Justice, in trial of repetitive appeals; III - understanding signed in incident of resolution of repetitive demands or assumption of competence; IV - statement of summary of court of justice on local law.
>
> § 1º. The judge may also dismiss the application if it is found, from the outset, the occurrence of decay or prescription.
>
> § 2º. The defendant shall not be summoned from the judgment under Art. 241.
>
> § 3º. Upon appeal, the judge may recant within 5 (five) days.
>
> § 4º. If there is retraction, the judge will determine the continuation of the process, with the summons of the defendant, and, if there is no retraction, determine the summons of the defendant to present contrarrazões, within 15 (fifteen) days. (BRAZIL, 2015).

Thus, by a comparative analysis of the standards drawn from the arts. 285a of the 1973 Code of Civil Procedure and 332 of the 2015 Code of Civil Procedure shall be assessed by the legislation in force, the judge is obliged to dismiss the application from the outset if it contravenes a mandatory precedent or a summing statement of the Supreme Court, the Superior Court of Justice or the Court of Justice, in which case if the statement concerns local law. Different from what the norm laid down in art. 285a of the Code of Civil Procedure 1973[9], in the Code of Civil Procedure 2015, to dismiss the request from the outset is not a faculty granted to the magistrate, except when it ascertains, from the outset, the prescription and decay.

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constitutional principles". (BRASIL, 2015, p. 26). However, "it is taken from the CPC of 2015 that, on the pretext of offering answers to the changes required by the Constitution to which it appeals, only colonizes the constitutionality itself with concepts rooted in a traditional civil procedural law, which present themselves absolutely misaligned to the Brazilian democratic project that aims to overcome the aging ideological foundations of the Liberal and Social States. Hence, when referring to the Brazilian Constitution, what announces the 2015 CPC Explanatory Statement is a reading contrary to the constitutionality that he claims to obey, since it is based on concepts that, by their origin, they are irreconcilable with a democratic project not welcoming from the historical-civilizing perspective of the conquered peoples." (LEAL; THIBAU, 2018, p. 42). The text makes reference to the archaism of the concepts of action, jurisdiction and process adopted by Law 13.105/15.

8 The expression juridical community of legitimized to the process is adopted as synonym of total people by the neoinstitutionalist theory of the process. In this sense, check out the publications of Rosemiro Pereira Leal (2017a, 2017b, 2016a, 2016b, 2011, 2010, 2009, 2008, 2006).

9 To access fourteen consistent questions concerning the normativity set forth in art. 285-A of CPC/73, check out the writings produced by Cassio Scarpinella Bueno (2011), Ronaldo Brêtas de Carvalho Dias and Carlos Henrique Soares (2011), Humberto Theodoro Júnior (2009), Elpídio Donizette Nunes (2009), Antônio da Costa Machado (2008), Rosemiro Pereira Leal (2007), Luiz Guilherme Marinoni and Sérgio Cruz Arenhart (2007), Nelson Nery Junior and Rosa Maria de Andrade Nery (2007), Paulo Roberto de Gouvêa Medina (2006) and Eduardo Cambi (2006).

In addition, by the norm of preliminary dismissal of the application in the Civil Procedure Code of 2015, other amendments are noted as to what was established by Law 11.277/06. As stated by Trícia Navarro Xavier Cabral (2016), by art. 332 of the current Code of Civil Procedure:

[...] (b) the legislative criterion of application is no longer the existence of a matter solely of law, but the causes that dispense with the investigative phase; (c) the requirement of others judged in the same judgment has been withdrawn; (d) the legal requirement became only the existence of understandings signed by hierarchically superior courts; (e) there was express provision for cases of prescription and decay; and (f) in procedural aspect, in case of no retraction, the defendant shall be subpoenaed from the final decision.

For all this, part of the specialized literature adds that the current normative forecast of the injunction of the application represents a theoretical advance. Studies by José Eduardo Arruda Alvim Netto (2017), Trícia Navarro Xavier Cabral (2016), Cassio Scarpinella Bueno (2015a, 2015b), Guilherme Rizzo Amaral (2015), Georges Abboud and José Carlos van Cleef de Almeida Santos (2015) explain the occurrence of an improvement in the thematic regulation, since, by the provisions of art. 332 of the Code of Civil Procedure of 2015, no longer support some of the criticisms that were offered, specifically, the standards provided in art. 285a of the 1973 Code of Civil Procedure.

It should be considered, therefore, that not all technical-scientific deficits related to the injunction for the dismissal of the application were removed by the rules of the Code of Civil Procedure 2015. It is not even feasible to state that, with the publication of Law 13.105/15, the preliminary dismissal of the request aligned itself with the legal democraticity. The regulation of the injunction judgment by the dismissal of the request in the Civil Procedure Code 2015 only made possible the offer of problematizations that, based on the determinations of Law 11.277/06, could not be formalized, including the solipsistic verification of the statute of limitations by the judge.

3. PRELIMINARY RULING ON THE NON DETERMINATION AND THE IMPOSSIBILITY OF WAIVER OF THE STATUTE OF LIMITATIONS IN PRE-DECISION PROCEDURAL SPACE

The Code of Civil Procedure 2015 provides for the judicial recognition of the prescription of the claim deduced by the plaintiff through various provisions. As for the procedures for settling rights, the norms set out in the arts stand out. 332, § 1, and 487, single paragraph, which, although they are agreed upon as to the possibility of recognition of the statute of limitations, ex officio, by the judge, diverge in part from the necessity that, before the occurrence of the statute of limitations is affirmed, the parties are offered the opportunity to make their views known.

It's just, despite the art. 5th, LV, the Constitution, ensure the contradictory to the parties - which is also extracted from the fundamental standards of civil procedure (arts. 7º, 9º and 10 of Law 13.105/15) -, by art. 487, sole paragraph, of the Code of Civil Procedure 2015, the

opportunity to pronounce the parties on the limitation period must be installed, provided that the hypothesis provided in art is not fulfilled. 332, § 1, Law 13.105/15.

Hence, the mood in the arts. 332, § 1, and 487, sole paragraph, final part, of the 2015 Civil Procedure Code, except for the mandatory hearing of the parties prior to the issuing of the decision acknowledging the occurrence of the statute of limitations, with explicit violation of constitutional rule; and also, of fundamental norms integral to the codification itself, since, according to the art. 9th, sole paragraph, of the current CPC, only in the hypothesis of provisional protection of urgency, of provisional protection of evidence based on items II and III of art. 311 And in proceedings brought against a party, a judgment contrary to one of the parties may be rendered without its prior hearing.

For these reasons, what is arranged in the final part of the art. 487, sole paragraph, of the Code of Civil Procedure 2015, which ratifies the provisions of art. 332, § 1º, of the same Code, has been especially criticized by Fredie Didier Júnior (2018), José Miguel Garcia Medina (2017), Ronaldo Brêtas de Carvalho Dias, Carlos Henrique Soares, Suzana Oliveira Marques Brêtas, Renato José Barbosa Dias and Yvonne Mól Brêtas (2016), Flávio Tartuce (2016), Georges Abboud and José Carlos van Cleef de Almeida Santos (2015) and Humberto Theodoro Júnior, who, when pronouncing on the judicial recognition of the prescription of the claim deducted, states:

> Despite the Code dispenses with the previous manifestation of the litigants in the hypothesis under analysis, no judge has, in practice, conditions to, by the simple reading of the initial, recognize or reject a prescription. It is not just a question of law, as is the decay, which is measured by a simple calculation of the time after the birth of the potestative right of predetermined duration. The prescription does not operate ipso iure; it necessarily involves facts verifiable outside the legal relationship, the presence or absence of which are decisive for the configuration of the extinguishing cause of the dissatisfied creditor's claim. Undoubtedly, the questions of fact and of law are deeply interwoven, so that one cannot treat the prescription as a simple question of law that the judge can, ex officio, raise and resolve preliminary, without the contradictory between the litigants. The prescription involves, above all, questions of fact, which, for dealing with events not known by the judge, inhibit premature pronouncements and unrelated to the allegations and conveniences of the holders of the conflicting interests.
>
> If it is difficult for the judge to decree ex officio and liminally the objective prescription of the Civil Code (arts. 189, 205 and most of the paragraphs of art. 206), it will be impossible to do so in cases of subjective prescription, as that of art. 27 of the Consumer Protection Code and some items of art. 206 of the Civil Code. In these cases, besides the interference of impediments, interruptions and suspensions, there is the imprecision of the initial term of the prescription that relates to a personal and subjective data: the date of the "knowledge of the damage and of its authorship".
>
> Other laws that authorize decree of prescription in the tax land, without provocation of the debtor party, do not, however, without conditioning the decision to a prior hearing of the Treasury creditor (Law 6.830/1980, art. 40, § 4º), caution that, with due notice, could not have been omitted by the new Code of Civil Procedure on the pretext of preliminary rejection of the application. (2015, p. 761).

The practical and theoretical weaknesses alluding to the decree of prescription without the previous reading of the author are not presented as novelties. Even before the advent of the 2015 Civil Procedure Code, Caetano Levi Lopes (2007, p. 14) already announced that the Brazilian legislation no longer considered that the prescription "is much more complex and requires a broader deepening of the test than the decay. It happens that the term of the last institute is peremptory and nothing prevents, suspends or interrupts its course. Thus, it is extremely easy for the judge to pronounce, of office, the decay", contrary to what happens with the prescription.

However, that is not all that should be problematized. By authorizing the judicial recognition of the limitation period to take place without, before, being granted the opportunity to pronounce the defendant, the Code of Civil Procedure 2015 also causes legal prejudice, because, despite the decision rendered on the basis of art. 332, § 1º, is unfavorable to the plaintiff, the dismissal of the hearing of the defendant is an obstacle to the exercise of the faculty of waiver of the prescription, which, in addition to being expressly guaranteed by the rule provided in art. 191 of the Civil Code, is ensured by the right to private autonomy that is imposed as one of the normative bases of the paradigm of the Democratic State of Law (art. 1º of the CB)[10].

It is to be noted, in this sense, that notwithstanding the express provision that the prescription reaches the claim born of the violation of a right (art. 189 of the Civil Code), nothing prevents the defendant from renouncing the prescription only so that it has the opportunity to makeit was formally resisted, in the exact terms of the Liebmanian cogitations on the work. In such a case, it would be possible to obtain a judgment on the merits against the plaintiff's request, whereby it would be agreed that the defendant never committed the act violating rights imputed to him.

Although the decision acknowledging the occurrence of the statute of limitations by a solitary act of the magistrate is prima facie detrimental only to the plaintiff, it is also detrimental to the defendant, who, in the face of the preliminary dismissal of the request, is unable to do so, at the beginning of the procedure, to choose to add, on account of very personal ethical or moral convictions, a natural obligation arising from the occurrence of the prescription of the claim deduced by the plaintiff, also finding itself prevented from sustaining and seeing right, in its favour, the past absence of infringement of rights.

As stated by Cristiano Chaves de Farias and Nelson Rosenvald (2017, p. 739-740), under private law, the prescription is available and therefore:

> [...] one cannot fail to point out the regrettable misunderstanding of the legislator in allowing it to be known ex officio by the judge. Apart from any justification based on the economy and speed of the procedure, it is true that its private and available nature do not justify its knowledge of a letter of formal notice. However, with the writing of art. 487, II, of the Code of Civil Procedure 2015 the doubts remain dispelled, not without a clear strangeness, remaining settled that, really, the magistrate can, motu proprio, know the prescription,

10 On the democratic status conferred on law by the perspective of the neo-institutionalist theory of the process, check out, above all, the productions of Rosemiro Pereira Leal (2017a, 2016a, 2016b, 2013), Roberta Maia Gresta (2014), André Del Negri (2017), Francisco Dourado Rabelo de Andrade (2017), Luís Henrique Vieira Rodrigues (2019), Vinícius Lott Thibau (2018), Bruno Rodrigues Leite (2017), João Carlos Salles de Carvalho (2018), Dário José Soares Júnior (2016) and Luís Gustavo Reis Mundim (2018), Flávia Ávila Penido (2016) and Luiz Sérgio Arcanjo dos Santos (2016).

despite being, thereby, meddling in a clearly private relationship (patrimonial).

Moreover, it is worth noting that the fact that the Code of Civil Procedure allowed the magistrate to know, ex officio, the prescription did not matter in change of its private nature. So much so that it is still possible to waive the statute of limitations, for example by spontaneously paying a prescribed debt. It is a mere consequence of private autonomy itself, which derives from constitutionally guaranteed freedom itself. In this touch, including, Enunciation 295 of the Civil Law Day was edited stating that the fact that the magistrate can recognize "the office of prescription, does not remove from the debtor the possibility of waiver admitted art. 191 of the Coded Text".

What is not clarified by the speech of Enunciated No 295 of the VII Day of Civil Law of the Federal Court, however, as well as the provisions of the Code of Civil Procedure 2015, is how the waiver of the statute of limitations may be carried out by the defendant, in the event that the judge takes the occurrence of the prescription even before determining the citation, as authorized by the rules provided in the arts. 332, § 1st and 487, sole paragraph, final part, of the 2015 Civil Procedure Code.

In Law 13.105/15, as well as in the speech of Enunciation nº 295 of the VII Civil Law Day of the Federal Court, there is no procedure established to exercise the waiver of the statute of limitations in space-time preceding the time of the injunction trial by the dismissal.

4. CONCLUSION

Based on the articulated, it is concluded that if the magistrate exercises the faculty disposed in art. 332, § 1º, of the Code of Civil Procedure 2015, will be violated the right to private autonomy of the accused party. If the injunction trial is carried out for the dismissal of the request by statute, therefore, there will be an injury to the constitutional rule aligned with legal democracy, authorized by infraconstitutional legislation.

In this case, legal damage is imposed on the defendant, which, in the face of the injunction of the application, will have impeded his right to waive the statute of limitations in the procedural space established to the settlement of rights.

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DISCRICTIONARIETY, INDETERMINATED LEGAL CONCEPT AND ACCOUNTABILITY IN THE CONTEXT OF TAX INCENTIVES

DISCRICIONARIEDADE, CONCEITO JURÍDICO INDETERMINADO E ACCOUNTABILITY NO CONTEXTO DOS INCENTIVOS FISCAIS[1]

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ABSTRACT

The historical construction of the Brazilian State points to a marked degree of regional inequality between the federal units. As a result, several member states have adopted the ICMS tax incentives as a mechanism for socio-economic development and development. In this context, a major problem emerges: the control and limitation of tax incentives. In this context, the present study sought to analyze the incidence of discretion, the indeterminate legal concept and accountability in the ICMS incentives granted by the State of Goiás. For that, the hypothetical-descriptive method was used, using the literature review and the critical exposure of the topics covered. Thus, the central aspects related to the duality between type and concept, discretion, undetermined legal concept and accountability were understood, founded on the theoretical references of Humberto Ávila, Maria Sylvia Di Pietro, Floriano de Azevedo Marques Neto and Luis Felipe Sampaio. Furthermore, the analysis of the Fomentar, Produir and Pró Goiás programs was also central to this research, as well as the observation of the current administrative concepts mentioned above in the context of such tax incentive programs. Thus, it was found that the discretion of the incentives in question must be limited by the realization of judicious and effective accountability.

KEY WORDS: Accountability. Discretion. Undetermined legal concept. Tax incentives.

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RESUMO

A construção histórica do Estado brasileiro aponta para acentuado grau de desigualdade regional entre as unidades federativas. Em decorrência disso, diversos Estados membros passaram a adotar os incentivos fiscais de ICMS como mecanismo para fomento e desenvolvimento socioeconômico. Nesse contexto, emerge um problema de grande monta: o controle e a limitação dos incentivos tributários. Nesse contexto, o presente estudo buscou analisar a incidência da discricionariedade, do conceito jurídico indeterminado e do accountability nos incentivos de ICMS concedidos pelo Estado de Goiás. Para tanto, se utilizou o método hipotético-descritivo, recorrendo-se à revisão da literatura e a exposição crítica dos temas abordados. Dessa forma, compreendeu-se os aspectos centrais relativos à dualidade entre tipo e conceito, discricionariedade, conceito jurídico indeterminado e accountability, fundados nos referencias teóricos de Humberto Ávila, Maria Sylvia Di Pietro, Floriano de Azevedo Marques Neto e Luis Felipe Sampaio. Ademais, a análise dos programas Fomentar, Produzir e Pró Goiás também foi objeto central desta pesquisa, bem como a observação dos atuais conceitos administrativistas acima citados no contexto de tais programas de incentivo tributário. Dessa maneira, restou constatada que a discricionariedade dos incentivos em comento devem ser limitadas pela realização de criterioso e efetivo accountability.

PALAVRAS-CHAVES: *Accountability. Conceito jurídico indeterminado. Discricionariedade. Incentivos fiscais.*

INITIAL CONSIDERATIONS

The construction of the Brazilian state took place, historically, in an unequal way and without the elaboration and consistent execution of some project that considered the national territory as a whole, thus favoring the emergence of considerable regional disparities, so that, alongside the existence of economically active centers, there are regions with a lower socioeconomic development index.

Given this reality, as well as the persistent absence of effective and lasting national public policies aimed at the development of regions with lower socioeconomic rates, Member States, having observed the obstacles they have to the development of their territory to a greater degree, began, throughout the 20th century, to adopt the institution of VAT incentive programs for attracting greater private sector investments.

Given the importance of such tax incentive programmes over the last few decades, especially for states in the North-Central regions of the country, research into this phenomenon has become of prime importance, particularly as a result of the considerable power that such incentives confer on political representatives, given that their tax relief is high.

Aware of the relevance that such forms of economic development present to a large part of the Brazilian states, this research will focus on the analysis of current concepts involving Administrative Law, in particular those of discretion, indeterminate legal concept and Accountability, so that it is possible to understand the existence of possible typological failures by the programs object of this study.

The analysis of tax incentives under the bias of such concepts provided by the jus administrativist discipline stems from the central problem that this study will address: the misappropriation of ICMS tax incentives. Due to the weight that such benefits have, the rulers

are imbued with considerable political power in their hands to dispose, and it is necessary, therefore, effective control over their concession and execution.

This control, it should be emphasized, becomes a priority precisely because the outbreak of anomalies in the treatment of tax incentives is detrimental to the Member State that instituted it, not only because of the effects on the public finances of each federal unit, as well as the inefficiency and ineffectiveness that can result from them, contributing to the worsening of the precarious socioeconomic conditions of the instituting state.

Thus, making an epistemological cut in the State of Goiás, this article will focus on the analysis of the main fiscal-financial incentives instituted by this unit of the Federation, in this case, the programs Foment, Produce and Pro Goiás.

Thus, it is verified that the State of Goiás, through its programs of development, will be object of this research, delimiting the analysis now elaborated to the territorial limits of this political entity. Moreover, it is pointed out that the time lapse under study dates back to 1984 until the present day, considering that the first of these programs instituted, namely, the Foment, was promulgated by state law that dates from the same year of the 1980s.

In this sense, in view of the problem mentioned here, which is, the possible typological misappropriation of tax incentive programs from the perspective of central elements of the current Administrative Law, the general objective of this research is to understand how it should and how the incidence of discretion, the use of indeterminate legal concepts and Accountability occurs in the legal acts instituting such incentives for economic development, in view of the central importance such tributary possessions currently have for the economy of the Member States establishing them.

To this end, we will seek, as a specific objective first, the understanding of the three fundamental concepts brought to the fore of this research: discretion, undetermined legal concept and Accountability. Moreover, the understanding of the tax incentives institute, based on a conceptual and typological analysis, becomes of utmost relevance.

Then, in order for the concrete study of the programs that are the object of this research to materialize, this research presents as second specific objective the description and understanding of the laws instituting the programs Foment, Produce and Pro Goiás.

It also manifests itself as a specific objective of this research, an understanding of how the impact of the three jus administrativist elements raised from the perspective of the aforementioned laws governing these tax incentive programs granted by the State of Goiás should be addressed.

Accordingly, the methodology used to achieve the desired result, namely the analysis of discretion, of the undetermined legal concept and of Accountability in tax incentive programmes, will be the bibliographic review for the meaning of the concepts raised, as well as the exhibition of the current state of the art involving such a theme. In addition, the hypothetical-deductive method will be used, constructing conjectures with high probability of occurrence, for the subsequent analysis of the relevance of the hypothesis launched.

In this sense, the hypothesis to be tested is precisely that tax incentive laws grant a high degree of discretion to rulers through the large-scale prediction of indeterminate legal con-

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cepts, Control and Accountability are of paramount importance in order to avoid the misappropriation of these mechanisms.

Finally, it should be noted that the structure of this article is based on six chapters, the first being related to the exposure of the three elements jus administrativistas object of this study, while the second will be analyzed tax incentives from the dual perspective of type and concept. From the third to the fifth chapter, we will talk about each of the incentive programs established by the State of Goiás: Foment, Produce and Pro Goiás, respectively. Then, in chapter six, in the concrete form of the hypothetical-deductive method, there will be the incidence of the larger premise, namely, the discretion, the undetermined legal concept and Accountability, on the smaller, that is, the tax incentive programs under consideration. Finally, in the conclusion, the results obtained from this research will be exposed.

It now enters into the understanding of administrativist and tributary concepts necessary for the analysis it proposes to carry out.

1. DISCRETION, UNDETERMINED LEGAL CONCEPT AND ACCOUNTABLITY AT THE CURRENT STAGE OF ADMINISTRATIVE LAW

It is appropriate to emphasize, first, that this research is based fundamentally on the conception of type and concept raised by the specialized tax doctrine (ÁVILA, 2018, p. 11) but of great value and applicability to the terms jus administrativistas that consist at the heart of this study.

Thus, the meaning given to the term type should be treated as "the description of usual characteristics that usually occur, and should be analyzed together" (ÁVILA, 2018, p. 12) so that such an expression is limited to describing typical properties that are constantly observed, but such properties are not necessary and sufficient for type verification.

In this perspective, when a certain category is understood as typological, it implies to say that it is possible to expose certain generic characteristics to it. However, in the absence of any of these characteristics, the identification of the category in question will not be compromised by itself, and may be observed in the presence of other elements that will serve as a substrate for its individualization.

In general, the typological category will have a higher degree of abstraction and generality, and its occurrence can be verified from the presence of properties that commonly, but not necessarily, occur.

On the contrary, the term concept brings the idea of properties necessary and sufficient for its verification, in the sense that without certain property the concept does not manifest itself, the same as with such properties the concept is confirmed (ÁVILA, 2018, p. 11). The consequence of this is that, unlike type design, the concept will consist of rigid, limited and exhaustive structures.

Thus, the conceptual category will be present only when all the elements that consist in its requirements are present, which confers a higher degree of concreteness to this category, distinguishing, at this point, the typological category.

In the tax field the idea of concept can be easily verified, given the fact that its essence is to be composed of norms that aim to limit the state power to tax. Thus, the generating fact itself in the Tax Law, for example, is a conceptual category, because, if a certain necessary and sufficient element is not present for its occurrence, this fact will not materialize and the tax obligation will not be born.

In this study, however, despite the tax nature intrinsic to tax incentives, these will be analyzed from the perspective of structures that are primarily part of the administrativist jus-crop, because both branches are affiliated to Public Law and thus having a similar legal regime in some respects.

Among these aspects that allow communication between Tax and Administrative Law emerges the concept we have of the terms discretionary, undetermined legal concept and Accountability, which gain considerable relevance in relation to tax incentives, because, through them, the legal control of the institution and execution of these benefits can be realized.

In this context, it is essential to understand that the three terms jus administrative in comment are typological category, so that the structuring elements of such expressions are fluid, unlimited and exemplifying.

This distinction is fundamental to understand the control of tax incentives in a more appropriate way, especially given the fact that a rigid structure for the configuration of Accountability or the indeterminate legal concept is not observed, so that the discretion of the governor in this respect must be carefully controlled and supervised, otherwise damaging the misappropriation of tax incentives, which leads to considerably perverse consequences for public finances, the state economy and, consequently, to social conditions.

Specifically entering into the analysis of each typological category under study, it should be emphasized, regarding the discretion, that this will manifest itself in the hypotheses in which the power of the Administration can adopt the casuistic solution based on criteria of opportunity, convenience, justice and equity, given the absence of conceptual definition by the legislator (DI PIETRO, 2016, p. 254).

It should be noted, however, that such a perspective of discretion does not presuppose that power is unlimited; on the contrary, the freedom of action of the public administrator will find limitation traced by law.

In any case, the control of the discretion of the competent agent, even if the administrative merit and political judgment deserve to be respected, is of considerable importance, given the juridical power that is conferred to such agent.

The understanding of this power goes back to the expansion of legality (DI PIETRO, 2012, p. 3), which, by governing the whole structure of the rule of law, limits the power of state representatives, emerging the discretion as a vast space of action of the public agent in the broad sense, which now has a considerable share of legal power for the exercise of its competence.

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In this context emerges the typological understanding of an undetermined legal concept. This arises in the legal debate based on the theory of determining motives, which limited administrative discretion to the extent that it enabled the judiciary to examine the legality of the motives raised by the administrator (DI PIETRO, 2012, p. 10).

The consequence of this was the assessment of the facts, followed subsequently by the legal qualification of the facts presented in the motivation by the public administrator. With this, it became possible to examine the indeterminate legal concepts, terms with broad and open meanings, eminently typological, being understood, in short, as the granting of discretion to the Public Administration (DI PIETRO, 2012, p, 10). In any case, to the extent that the Judicial Branch was granted the examination of the indeterminate legal concepts used by the public administrator, there was a natural reduction of administrative discretion, and the latter began to live with greater limitations and control.

On the other side of the perspective of the performance of the public administrator, at a time when the manifestation of discretion and the realization and fulfillment of indeterminate legal concepts is present, the idea of Accountability, focused, above all, on the idea of accountability, accountability (MARQUES NETO, 2010, p. 2).

It should be emphasized that discretionary power is a fundamental prerogative for the social democratic rule of law that is built. This is because only through the freedom of action of the public administrator will it be possible to think, develop, build and implement efficient and effective public policies for the guarantee of rights ensured by the legal system.

In this way, the Public Administration's fully linked action does not meet the needs and demands of a highly complex society like the present one. The discretionary power of the public manager emerges precisely at that moment, before the possibility of choosing, according to criteria of convenience and opportunity, the legal mechanisms to be elaborated and materialized by the Public Administration.

It happens that, as already demonstrated, the performance of the Public Administration, when imbued with discretion, cannot occur in an unlimited way. The conception of undetermined legal concepts emerges precisely because of this commotion, aiming to confer prerogatives of control by the Judiciary in the task of assessing acts of the public administrator endowed with discretion.

In the same way, although discretionary certain choice, it must meet the control requirements established by law, being corollary of this requirement what is conceptualized as Accountability, that is, the accountability and accountability of the public manager for the acts prepared.

In the present case, such elements assume contours of higher importance, in view of the openness assumed by tax incentives, from their legal and factual assumptions, through the mechanisms provided by the legal order for its elaboration and endingwhether within the scope of the control to be carried out after its granting.

In view of all the above, it should be emphasized the relevance of the types presented here, due to the fact that, although the performance of the public administrator in relation to the granting of tax incentives is discretionary, it cannot be considered arbitrary, Limits and criteria should be established on the basis of the fulfilment of the indeterminate legal con-

cepts surrounding the matter, as well as the stipulation of a careful and clear Accountability by the granting administrative authority.

2. TAX-FINANCIAL INCENTIVES - REGULATORY UNDERSTANDING AND TYPOLOGIES

Having understood the administrative typological terms fundamental to this research, it is now entering the field mainly tax and financial, from the study of fiscal incentives, both in its conceptual perspective, and through the understanding of its typologies.

Traditionally, the tax is taken from its fiscal purpose, aimed at the collection and supply of public revenue to the State, so that it can execute and add to the obligations contracted. In this perspective, one has the understanding of the State Tax Distributor, being the entity that taxes those who have more, as far as possible, to pass on to those who need more, either through the services or public goods, or through the monetary itself (MACHADO; MOREIRA, 2019, p. 157).

Through the tax concept, the tax assumes a priority role in the financing of fundamental rights (CORREIA NETO, 2019, p. 185). This is because the public funds collected by the collection of taxes demanded from the taxpayer will, later, be reverted to the financing of the most diverse obligations assumed by the State, highlighting, in this perspective, the implementation of fundamental rights, be those related to the defence, to the participation or to the actual provision by the state entity.

However, the tax does not assume exclusively fiscal purpose. According to a peaceful understanding of the tax doctrine, taxes may also have an extrafiscal connotation, in the sense of stimulating or discouraging certain economic activity (MACHADO, 2015, p. 36). Thus, it is precisely in this tax sense that the phenomenon of tax incentives emerges.

In this way, tax incentives manifest themselves as an instrument provided for in the Federal Constitution to combat the country's internal inequality, enabling regional development in a broad and egalitarian way. In this perspective, development should be seen not only as an element of quantitative order, but as an equitable one, thus differentiating itself from mere economic growth (BERCOVICI, 2003, p. 103).

Thus, tax incentives will manifest themselves from the perspective of taxation from the inductive function, motivating the economic agent as a leveraging factor of the economic development of a certain region of the country (BEVILACQUA, 2013, p. 162).

It should be emphasized that, contrary to the types presented in the above topic (discretion, undetermined legal concept and Accountability), tax incentives have a conceptual characteristic, being a term of closed connotation, composed of elements necessary and sufficient for its manifestation.

This meaning of tax incentives is in line with the logic-semantic constructivist method (PIVA, 2018, p. 36). Through it, the juridical phenomenon is analyzed from the language (constructivism), indicating syntactic analysis of the language from the logical perspective, as

well as the relationship of the signs with the objects being constructed (semantic perspective).

Based on this method, tax incentives are understood as legal rules that change the configuration of the tax incidence matrix rule, either by means of change in the antecedent (material, spatial and temporal criteria) or in the consequent (personal and quantitative)so that a normativity of induction and attraction of investment will be established, thus taking into account the extra-fiscal purpose of the tax.

Once the conceptual aspects of tax incentives are understood, it is now necessary to mention the typologies that such a legal phenomenon assumes. Such classification is of great relevance, especially in relation to the Foment, Produce and Pro Goiás programs, which may also take the perspective of financial incentive and not merely fiscal.

The relevance of the proper understanding of this classification increases as the Federal Constitution was not based on a strict technical criterion for the definition and delimitation of tax incentives. Thus, the terms tax benefits and incentives (Articles 43, §2, 151, I, 155, §2, XII, g, 156, §3, III, 195, §3, 227, §3, VI, CF and Articles 40, 41 and 88, II, ADCT) are found in the constitutional text, indicating, in short, the same phenomenon, although these concepts differ.

Therefore, for tax benefits should be understood legal rules that interfere with the rule of tax incidence, decreasing or eliminating the amount of money due, without, however, seeking to induce the conduct of the taxpayer. Thus, it is the case of benefits granted as an IRPF exemption (art. 6º, Federal Law n. 7.713/1988), which have no intention of inducing the conduct of the taxpayer.

On the contrary, tax incentives are also manifested by the interference in the tax incidence matrix rule, decreasing or eliminating the amount of money due, however, for the extra-fiscal purpose, to induce the behavior of the private agent. On the other hand, the financial incentives differ from the fiscal ones, since they are not within the scope of Tax Law, in that they grant privileges after the abolition of the tax obligation, and therefore such relationships are imbued with extra-tax character (PIVA, 2018, p. 195).

Thus, understanding the meanings given to fiscal incentives in a broad sense, is now being incorporated into the analysis of each of the programs that are the subject of this study.

3. THE PROGRAMME TO PROMOTE

Understanding the theoretical aspects that underlie this research, it is now necessary to specifically enter into the study of the financial-fiscal incentive programs of ICMS established by the State of Goiás over the last decades, beginning with Fomenting, promulgated by State Law No. 9,489 of 19 July 1984.

Thus, through the aforementioned legislative act of Goiás, the Fomenting, Participation and Promotion Fund for the Industrialization of the State of Goiás was established, created with the aim of increasing the industrial sector of the State, either through the implementation, through the expansion of existing activities (GOIÁS, 1984, Article 1).

Thus, it can already be observed that the scope of such fiscal-financial incentive consists precisely in the development of the industrial sector of the economy of Goiás, based on the assumption that such a productive area would need stimuli from the state entity in order to be more and/or better developed.

For the composition of this fund, the law listed as sources the State Treasury, budget credits allocated by the Government, resources made available by public or private institutions, income from its operations (financial charges, repayment of capital and other charges), proceeds from the disposal of shares, debentures and other securities or assets acquired or incorporated into the Fund and rents arising from securities.

It is important to stress this point in order to highlight, first and foremost, the nature and origin of the funds that make up the Fund in question, so that, in the case of public finances, monitoring must be rigorous, due to the fact that the State needs to be in financial health in order to be able to enforce the rights to which it was obliged (HOLMES; SUSTEIN, 1999, p. 23).

Finally, this law also established (GOIÁS, 1984, article 8) the creation of the Deliberative Council, composed of secretaries of state, representatives of federations and unions, as well as the Executive Board, under the responsibility of the State Development Bank of Goiás, which would exercise the administration of Fomento.

This administrative structure should be emphasized from now on, because, as will be seen below, it consists of one of the central aspects of the research. This is because the law confers powers to the Fomenting Deliberative Council, especially for the suspension and revocation of the granted benefits (GOIÁS, 1990, article 6).

However, the creation of such a fund has not yet served to leverage the industrial sector of the State of Goiás. Thus, six years later, the State Law n. 11,180, of April 19, 1990, was enacted, establishing modifications to the Foment program and thus creating the financial incentive-tax that would seek the induction of economic agents for the development of this sector of the economy of Goiás.

The difference, therefore, was that the law enacted in 1984 only created the Foment fund, but it was only in 1990 that the fiscal-financial incentive was created.

In this context, four stimuli were established for industrial enterprises from Goiás (GOIÁS, 1990, Article 2): (i) sale of land in the industrial districts of the State, (ii) construction of civil construction works in urban areas owned by the State of Goiás considered of high relevance for regional development, (iii) payment of the ICMS rate of 7% (seven percent) in the operations they carry out with other industrial establishments also beneficiaries of the program with own manufacturing products and covered by the project approved at the Foment Deliberative Council and, finally, (iv) loans of up to 70% (seventy percent), via budget resources, the ICMS that the company has to collect from the state exchequer, except the tax arising from the exit of merchandise as a bonus, donation, gift or similar operation, this being the core of the program.

This legal provision thus establishes a financial legal relationship, since the beneficiary will keep the full collection of the ICMS due; however, this will be done by means of financing before the competent agent maintained by the State. In the words of Lucas Bevilacqua (BEVILACQUA, 2013, p. 64), this practice can be summarized as follows: "the taxpayer discharges

the tax obligation with the loan taken before the financing agent, forming a second legal relationship of a non-taxable nature".

As a result of this system, the incentive of Fomento has a fiscal-financial nature, and not merely tax, since it extrapolates the legal-tax relationship between State and taxable person.

Finally, it should be noted that, as well as the other programs under analysis, Foment can be taxed as an incentive at zero cost (BEVILACQUA, 2013, p. 177). This implies the granting of a certain stimulus for previously nonexistent ventures, so that the current tax collection will not suffer any direct impact arising from this incentive, which current exclusively on the new ICMS generated.

4. THE PROGRAMME PRODUCE

Aiming to expand the effects of the Foment program, the State of Goiás, aiming to increase its developmental policy in the industrial sector, created the program Produce, through the State Law n. 13.591, of January 18, 2000, as the new instrument for implementing the industrial policy of the State of Goiás.

In order for a particular private agent to benefit from the incentive under consideration, the law establishes as a framework criterion the presentation of a project of economic and financial viability that meets the requirements related to the beneficiaries and the priorities determined by the law (GOIÁS, 2000, Article 4).

The evaluation of such project will be the responsibility of the Executive Committee of Produce, with competence for the approval of such requirements. Again, it is important to highlight this aspect, having knowledge of the administrative structure that such programs present for decision-making

. In this context, it should be noted that Produce provides for the creation of two administrative competence centers in its structure: the Executive Committee and the Deliberative Council. The difference between the two, in addition[4] to the powers provided by the law, consists of the composition of each: while the former has four representatives of the State (three being Secretaries of State and the Director-President of Fomento S.A.) and three from civil society, the Deliberative Council presents twelve representatives of the State and eleven of civil society.

4 State Law n. 13.591/2000: Art. 11 - The Deliberative Council will have the following tasks: I - approve the annual programming, budget and report; II - establish the guidelines, priorities and strategies of action; III - submit annually to the Chief Executive, detailed reports on the implementation and the results achieved by PROD; IV - suggest to the Executive Branch modifications in the legal discipline of PROD; V - authorize the use of FUNPROD resources, promoted by the Superintendency of Fomenting/Producing of the Secretariat of Industry and Trade, aiming at attending programs of interest for the development of the State; VI - other general tasks. Art. 12. The Deliberative Council will have an Executive Committee consisting of the Secretaries of State for Economic, Scientific and Technological Development and Agriculture, Livestock and Irrigation, Farm, Management and Planning and the Director-President of the Financial Agent of the PRODUCE Program, representing the State of Goiás, and also by the Presidents of the Federation of Industries of the State of Goiás and the Association for Industrial Development of the State of Goiás - ADIAL, as well as by 02 (two) members elected by the representatives of the participating civil society entities, with the following tasks: I - preparation of the annual programming proposals and the budget; II - preparation and presentation to the Deliberative Council of the Annual Report of the PRODUZIR activities; III - approval of operational standards and procedures; IV - approval of the project and grant of benefits; V - monitoring of the implementation of the PRODUZIR and the assisted projects, in liaison with the Financial Agent and the other governmental bodies involved; VI - other tasks defined in the Regulation.

As will be best outlined and deepened below, it can be seen that the opening of the Produce programme to civil society is a valid and important mechanism of democratic legitimacy, with a view to enabling the participation of representatives of civil society in the decision-making of the programme.

Once the incentive has been granted, the beneficiary may benefit from the following benefits, as approved by the competent Council of Produce (GOIÁS, 2000, article 20): (i) financing up to 73% (seventy-three percent) of the ICMS due to the State Treasury arising from its own industrial operations; (ii) investment subsidy of up to 100% (one hundred percent), if it is intended for the expansion or modernization of the industrial park; and (iii) payment of the ICMS for the rate of 7% (seven percent) operations with their own manufacturing products carried out with other industrial establishments benefiting from the Fomenting or Producing programs. Once again, the program's priority attraction is the financing of the ICMS due to the State of Goiás, as was the case with the Fomenting, but this time, up to 73% (seventy-three percent).

It turns out that on such financial-fiscal incentive the beneficiary must make the following payments (GOIÁS, 2000, article 20): (i) advance of at least 10% (ten percent) of the value of the monthly ICMS portion encouraged; (ii) interest incidence of up to 0.2% (two-tenths per cent) per month, non-capitalizable, whose payment will be made monthly; and (iii) 15% of the ICMS collection encouraged by the Protege Fund[5] (GOIÁS, 2003, article 9).

In this point it should be noted that the Protege Fund consists of funds for the provision of social services, especially in the areas of nutrition, housing, health, education, basic sanitation, social assistance, family income reinforcement (GOIÁS, 2003, Article 1). In short, it is a mechanism created by the State of Goiás to create a fund aimed exclusively at the provision of assistance activities, so that the entire regulation of budget execution can be reduced.

Still, important to note that, despite, at first glance, the tax waiver involved is in the 70% (seventy percent), the effective incentive will remain established in much lower amount, before all the rules of counterpart that the legislation establishes to enjoy the benefit in comment.

Another aspect of great relevance of the Produce Law is the establishment of objective criteria to fully enjoy the value of the tax financed (GOIÁS, 2000, article 20-A). Accordingly, the law provides for discount factors that will act on the amount of financing agreed between the Government and the private sector, such factors being linked to the adimplence, the acquisition of certain goods, the maintenance of employment, environmental issues and investment in certain sectors of state action by the beneficiary of Produce.

The rules on such discount factors are a mechanism aimed at ensuring the efficient and responsible enjoyment of the incentive by the beneficiaries, in view of the fact that obtaining the benefit under review will not be sufficient, and should be presented, monthly, the compliance with the discount factors to which it was obliged to meet, under pain of the incentive suffer significant affectation and decrease.

5 State Law No. 14,469/2003: Art. 9th Is the Chief Executive authorized to: II - condition the enjoyment of tax benefit or incentive, granted by state law, to the contribution to the Fund dealt with by this Law corresponding to the percentage of up to 15% (fifteen percent) applied on the amount of the difference between the value of the tax calculated with the application of full taxation and that calculated with the use of a tax advantage or incentive

Finally, it should be indicated, regarding the structure and procedure of Produce the creation and operation of Agência de Fomento de Goiás S.A., as Financial Agent of the program. This is because obtaining the benefit in comment only materializes with the stipulation of the contract with such legal entity, and this will act as the agent financing the incentive.

5. THE PRO GOIÁS PROGRAM

After the twenty-year duration of the Produce program, the State of Goiás established its new tax incentive program, Pró Goiás, through State Law n. 20,787, of June 3, 2020. This program was developed based on three priority criteria, namely, the alignment to the Complementary Law n. 160/2017, the search for a greater reduction in the bureaucracy of fiscal incentives and the fight against legal uncertainty in this sector.

Thus, it should be noted that the priority north of the new tax incentive program of the State of Goiás dates back to the discipline given by Complementary Law n. 160, of 7 August 2017 to exemptions and incentives and tax or financial-tax benefits. Based on this rule, the possibility remains for member states to adhere to tax incentive programs granted by other component states of the same region, during the term that lasts the benefit in the creative federated unit (BRASIL, 2017, Article 3). Therefore, based on the adhesion to Complementary Law n. 93/2001 and to State Law n. 049/2011, both from the State of Mato Grosso, the State of Goiás created the aforementioned Pro Goiás program.

Like its historical predecessors, Pró Goiás seeks the socioeconomic development of the State through the implantation, expansion and revitalization of the industrial establishments of its territory, so that the beneficiaries will be based on these categories. (GOIÁS, 2020, Article 3).

With regard to the incentives granted, the programme provides for the granting of credit, which means that this time it is an eminently fiscal incentive, rather than a financial-fiscal one. The credit granted may be of two categories, always considering the positive value resulting from the confrontation between debts and tax credits: (i) 67% (sixty-seven per cent) for the establishment located in a municipality considered as a priority (to be determined in regulation), choose collection targets or belong to a company whose annual gross revenue does not exceed the Simple National framework limit; or (ii) variable between 64% (sixty-four percent) to 66% (sixty-six percent)according to the elapsing time of enjoyment of the incentive, for the period of up to 12 (twelve) months, from 13 (thirteen) to 24 (twenty-four) months (percentage of 65%) or from the 25th (twenty-fifth) month, respectively (GOIÁS, 2020, article 5). Still, it remains also possible, by authorization of specific decree, the replacement of the credit granted in comment by the enjoyment of presumed credit, provided that the person concerned has benefited from the programme and is granted credit for the purchase of raw materials, secondary material, inputs and packaging materials.

In any case, in order to benefit from this incentive, the beneficiary must present as a counterpart: (i) payment to the Protege Goiás Fund of the percentage of 10% (ten per cent), 8% (eight per cent) or 6% (six per cent), depending on the period of enjoyment of the program, having regard to the value granted by the incentive; (ii) the realisation of the investments

undertaken; and (iii) the granting of the request by the Goiás State Industrial Development Council, having heard the State Secretariats of Industry, Trade and Services and the Economy, and the application must be in accordance with the program Pro Goiás and meet the criteria of convenience and opportunity of the public interest (GOIÁS, 2020, article 11).

For the enjoyment of said incentive, the beneficiary establishment will not be able to enjoy the incentives Promote or Produce, nor to exercise certain productive activities listed by the law under review (GOIÁS, 2020, article 6). However, despite such legal limitations, the prerogative of the Chief Executive remained established, via state decree, founded on relevant economic, social, fiscal or improvement interest of the Goiás production chain, to remove such fences.

It can be seen, from now on, that the law of Pró Goiás presents notorious distinction with respect to its predecessor programs, being the largest concentration of powers in the hands of the Governor of the State the main one of them, as opposed to further decision-making devolution to the Deliberative Council and the Executive Committee foreseen in the Produce.

Thus, the existence of these two consultative and decision-making bodies is replaced by the presence of the Industrial Development Council of the State of Goiás (GOIÁS, 2020, article 15), composed of the Governor and four Secretaries of State. The opening for the participation of civil society only occurs, now, through the Advisory Council, composed of eight civilian representatives, however having its structure linked to the Industrial Development Council, without decision-making power and having its duties established, once again by decree of the Governor.

On the other hand, establishing as obligations to be followed by the beneficiary of the program, the law of Pro Goiás determines that the taxpayer will be the tax substitute back in relation to the primary products purchased, at the same time as it provides for the possibility to carry out the settlement of the ICMS incident in the import of raw material, secondary material and fixed assets by debiting the tax book. Regarding this last permission, the law, another one provides, provides the Governor of the State the prerogative to exclude it, considering market conditions (GOIÁS, 2020, article 6).

In any case, in view of the structure of the new incentive programme of the State of Goiás, it can be seen that the search for the reduction of bureaucracy is achieved through the following changes: the extinction of the decision-making powers of the councils with representatives of civil society, concentration of power in the hands of the Governor, as well as his direct representatives, extinction of Agência de Fomento S.A. as a financial agent and replacement of an incentive of a financial nature for one of a exclusively tax nature.

Despite the scope for seeking greater legal certainty and less bureaucracy, such changes may be detrimental to the implementation of the tax incentive in question, especially in the face of the concentration of decision-making powers and the reduction of administrative bureaucracies itself, which also served the beneficiary as an instrument of defence in the face of possible arbitrariness of the Executive Power. However, these aspects will be duly examined in the following chapter.

6. THE FINANCIAL-TAX INCENTIVE PROGRAMMES OF THE STATE OF GOIÁS FROM THE PERSPECTIVE OF CURRENT ADMINISTRATIVE LAW

Given all the above, standing out and analyzing the basic peculiarities of each program under study, demonstrating the course adopted by the State of Goiás since the 1980s, in an attempt to promote its industrial park, it is understood that the Pro Goiás manifestsif, in fact, as an innovative program and that changes the paradigm of action of the state of Goiás, although the common north of all incentives persists.

The changes resulting from Pró Goiás in relation to Foment and Produce can be divided critically into three groups: the nature of the tax incentive granted, the amount of the effective benefit and the structuring of administrative competencies to govern the program.

In this way, it is necessary to emphasize, first, the nature of incentives. Whereas the Foment and Produce programs consisted of tax-financial benefits, since in addition to the tax relationship between beneficiary and State there was also the contractual relationship between the first and the financial agent of the program, Pró Goiás is characterized by being an incentive of exclusively fiscal nature, because it is a credit granted by ICMS, so that the Fomento S.A. Agency does not even exist anymore in this program.

However, the core of this study goes back to the other two changes coming from Pró Goiás. Thus, in relation to the quantitative aspect of the programs under analysis, that is, one must immediately analyze the quantum that the respective state laws provide for incentive for the beneficiaries. This is because the power of a certain tax incentive program manifests itself precisely with fulcrum in the greater or lesser amount of tax burden encouraged, thus becoming a political instrument of greater or lesser reach based on this question.

In this sense, as shown above, the Foment program provides financial incentive of 70% on the new ICMS generated by the beneficiary, and the counterparts will be: collection of 15% (fifteen percent) on the encouraged value for the Protege Fund, interest rate of 0.2% (two tenths per cent) per month on the amount financed and monetary correction of 25% (twenty-five percent) of the remaining amount to be benefited.

Thus, it can be concluded that the final incentive of the Foment dates back to the approximate percentage of 59.38% (fifty-nine integer and thirty-eight hundredths percent) of effective financial incentive, disregarding the annual monetary correction to be applied to the benefit.

Regarding the Produce program, the financial incentive granted will be up to 73% (seventy-three percent) over the ICMS generated by the beneficiary. As counterparts, the law provides for: 15% (fifteen percent) on the amount encouraged for the Protege Fund, incidence of interest of 0.2% (two tenths per cent) per month on the amount financed and the anticipation of 10% (ten percent) on the amount benefited. Considering all these values, the final effective incentive will be approximately 54.64% (fifty-four integers and sixty-four hundredths percent) of the new ICMS that would be due by the beneficiaries to the state coffers.

Finally, regarding the Pró Goiás program, the incentive, of fiscal nature, granted consists of credit granted up to 67% (sixty-seven percent), and, as a counterpart, the law establishes

up to 10% (ten percent) for the Protect Fund in the enjoyment exercised in the first year of incentive, reducing to 6% (six percent) from the third year onwards.

Consequently, it is noted that in the first year, the Pro Goiás will grant effective incentive of 60.3% (sixty whole and three tenths per cent), while from the third year, this benefit will rise to 62.98% (sixty-two whole and ninety-eight hundredths per cent) effective incentive of ICMS.

From the above figures, it is noted that the incentive of Pró Goiás, despite the increasing criticism made about the possible excess in the granting of tax incentives of ICMS, which would result in high tax waiver by the State, even if it is a tax that, as a rule, it would not be generated (GOIÁS, 2019, p. 12), is, in final terms, percentually higher compared to the predecessors Foment and Produce.

Thus, as discussed in this research, the Pró Goiás program, in fact, results in a political instrument of greater power, given the concession of benefits effectively superior to the Foment and Produce programs.

At the same time, it can be seen that the elaboration of the new tax incentive program of Goiás, aiming at reducing bureaucracy in the granting of benefits, extinguished the old Deliberative Councils, which would have the task of evaluating and approving the economic projects presented, being composed of representatives of civil society.

In return, the Industrial Development Council was established, composed exclusively of state secretaries. Thus, the former representativeness of organized civil society remained configured only in the forecast of the Advisory Council, which will have exclusive powers of advice in decision making, which will be the responsibility of the said Development Council.

Thus, the third notable change coming from Pró Goiás dates back to the reduction of competence and, consequently, representation of civil society, concentrating the powers in an eminently political body and with direct connection to the State Government.

In addition, there is also a reduction in the complexity of the treatment of the program. Production had an entire administrative structure, composed of the Administrative Council and Executive Committee, as well as the existence of the Fomento S.A. Agency for the conclusion of financing contracts, in addition to the need to present a feasibility economic project. On the other hand, in the sphere of Pró Goiás, the entire elaborate structure was deconstructed: the Council and the Commission have undergone the amendments set out above, Agência de Fomento S.A. no longer has tasks (for this programme) and the viability project becomes, according to the law, "simplified" in accordance with a pre-established model.

Finally, but no less important, complementing the analysis presented here, there is an increase in the competence of the Head of the State Executive Power on the implementation of the program. Thus, if in the context of Produce only a specific allocation to the State Governor was foreseen, which could extend the benefits granted under Microproduzir to industrial establishments framed in Produce, in the context of the Pro Goiás program such attributions gain greater importance: (i) power to remove the legal restrictions to the enjoyment of the incentive, based on criteria of relevant economic, social or fiscal interest, (ii) permissive to exclude the power conferred by law on beneficiaries to liquidate the ICMS of raw materials and purchased inputs; (iii) determination of the procedure of meetings within the Industrial and Advisory Development Councils; and (iv) permission to change the credit incentive granted to presumed.

The consequence of all these changes is, in fact, a reduction in the bureaucratization of the incentive, as a political objective guiding the new program. On the other hand, such a reduction implies a reduction in the representativeness of civil society in the decisions taken, as well as a reduction in the complexity of the debates held. All this transformation is added to the increase of the attributions and the concentration of competencies to the Head of Executive Power, who now directly manages and influences the program.

Described this new reality of the fiscal policy of the State of Goiás, it is now necessary to recover the understanding developed regarding typologies (ÁVILA, 2018, p. 13) categories defined by discretion, undetermined legal concept and Accountability.

Based on the concentration of greater prerogatives and attributions to the Chief of the Executive Branch, the legislature granted considerable discretion (DI PIETRO, 2012, p. 4) in the Governor's role in the exercise of his regulatory power.

Such discretion is materialized through the use of indeterminate legal concepts (DI PIETRO, 2012, p. 10), such as "relevant economic, social or fiscal interest" (GOIÁS, 2020, article 6) or even by defining the powers to be exercised by the representative bodies of organised civil society.

Added to this is the fact that the Pró Goiás program, despite the numerical appearance of granting less incentive, which, according to the above analysis, remains remote, manifesting itself as a politically more influential instrument than its predecessors, in the face of the increased tax burden encouraged.

Therefore, in addition to the change in the administrative structure of the programs having concentrated more powers in the hands of the State Governor and his Secretaries, The increase in the political power of Pró Goiás due to the higher tax incentive being also contributes to the widening of the discretion of public administrators.

In short, with the scope of reducing bureaucratization, the Pró Goiás ended up becoming a program that gives broad discretionary powers to the Governor and his immediate agents (Secretaries) through the use of indeterminate legal concepts instead of the greater plurality ensured by the participation of representatives of organised civil society in decision-making.

Thus, in order to avoid the misappropriation of the fiscal and/or financial-fiscal incentive policy in the State of Goiás, it is urgent to establish technical criteria and compliance with Accountability (MARQUES NETO, 2010, p. 2)It should require the clear and detailed provision of information on the decisions taken within the Pro Goiás, otherwise there will be a disastrous setback in the control of public policies of fiscal incentive.

In this perspective, the Accountability now defended as a control criterion of fundamental importance for ensuring the efficient management of the Pro Goiás program can be understood from three different perspectives (NASCIMENTO; RIBCZUK, 2015, p. 224)all of them related to the requirement of a transparent public management: accountability by the public agent, accountability for the acts performed and social control.

The first perspective highlighted above goes back to the understanding of Accountability as an act of an individual towards the State (SIU, 2011, p. 122). In this case it consists of accountability that must be carried out in a judicious and systematic manner by the Governor

and/ or Secretaries of State when they carry out any decision-making under the Pro Goiás, each of those decisions must be duly reasoned and in line with the public interest involved.

Regarding the meaning of Accountability from the point of view of accountability, it should be effective and occur when it remains configured the adoption of conduct that violates the state public finances, that disregards the isonomy or legality of taxation in the context of the granting of tax incentives or that extrapolates the discretionary power that each competent agent has, given that discretion cannot be confused with arbitrariness (DI PIETRO, 2016, p. 255).

The third perspective goes back to the idea of the State Act for Society (SIU, 2011, p. 122), revealing the guarantee of access to and publicity of information. In this context, the question that involves responsiveness emerges as a basic principle of contemporary administrative law.

In this field, we understand by responsiveness the instrumental action of democracy in the administrative field, conferring democratic legitimacy and conciliation with the expression of the popular will in the decisions made by public administrators (SAMPAIO, 2015, p. 10).

Notes that the legislative choice made by Pró Goiás, with regard to the excessive reduction of powers for the existing social representation bodies within the scope of Produzir, depriving them of their decision-making capacity and making them merely advisory structures, is conduct that, in theory, significantly reduces the responsiveness present in tax incentive programs in the State of Goiás, given that the democratic legitimacy arising from the participation of various representatives of organised civil society is too shaken.

Therefore, it is also noted that the choice of reducing bureaucracy consisted, in short, in the considerable decrease of both democratic legitimacy and the opening of tax incentive programs to civil society in Goiás. Although valid from the legal point of view, this change should be carried out with cleanliness and rigour, it is not permissible that the greater discretion of the powers of the Chief Executive under Pro Goiás makes the fiscal incentive policy of the state of Goiano a mere instrument serving political interests.

CONCLUSIONS

This study, based on the hypothetical idea that tax incentive laws grant a high degree of discretion to governments through the large-scale prediction of indeterminate legal concepts, what makes of fundamental importance the control and Accountability to avoid the misappropriation of these mechanisms, could conclude that, in fact, it will be precisely through careful systematization of Accountability that the discretion conferred by the tax incentive programs will not compromise the efficiency and effectiveness of such incentives, in particular the Pro Goiás, that significantly raised such a feature through the concentration of power in the summit of the state executive power.

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In order to make it possible to achieve such a result, it was necessary, first, to gain an understanding of certain conceptual aspects that consist in the theoretical substratum of this research.

Thus, the distinction between type and concept and the framework of the elements discretionary, undetermined legal concept and Accountability as typological categories consisted of the first understanding obtained in this study. Then, the critical explanation of each of these elements became possible to verify how these relate and can affect the tax harvest.

Having achieved these specific objectives, the analytical and critical description of the programs Foment, Produce and Pro Goiás demonstrated not only the structure and procedure of each of these incentives, as well as the most sensitive nuances regarding administrative structuring and empowerment of such benefits.

Finally, given the implementation of the hypothetical-deductive method, with the incidence of the jus-administrative typological structures occurring in the context of each of the programs under study, the extent of the discretion of Pro Goiás was verified compared to Foment and Produce, so that the control and Accountability of the latest fiscal incentive goiano should be even more judicious and rigorous

In any case, the changes in the administrative structure of Pró Goiás reported in the previous chapters do not in themselves serve to undermine the program's failure, nor to disqualify the political decisions that will be taken. Such analysis cannot be made in an aprioristic way, under penalty of bias the research, given the need for casuistic weightings.

However, the fact is that the change highlighted is of considerable importance, so that, given the choice made by the legislature of Goiás, which owes all deference, strict control should be exercised in the granting of such incentives, from the perspective of current jus administrativist debates, in particular the need for Accountability in the exercise of discretionary powers and in the complementing of indeterminate legal concepts.

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JUDICIARY CRISIS: THE ACCESS TO JUSTICE GUARANTEED BY THE APPROPRIATE DISPUTE SOLUTION METHODS

CRISE DO JUDICIÁRIO: O ACESSO À JUSTIÇA GARANTIDO PELOS MÉTODOS ADEQUADOS DE SOLUÇÃO DE CONFLITOS

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ABSTRACT

The work proposes to analyze the effectiveness of the principle of access to justice considering the hyperbolic Judiciary statistics. Initially, to understand the application of the principle, it will be studier its definition. Afterwards, the Judiciary's data will be analyzed to check the situation of the national courts. Finally, the alternative dispute resolution methods will be studied as a solution to guarantee the effectiveness of the principle and the reduction of the number of processes in progress. This article uses the deductive method and its theoretical framework is the Constitution of the Republic and the Justice in Numbers 2020 report.

KEYWORDS: Access to justice. Judiciary Crisis. Appropriate dispute resolution.

RESUMO

O trabalho propõe analisar a efetividade do princípio do acesso à justiça diante dos números do Judiciário. Inicialmente, para entender a aplicação do princípio do acesso à justiça será estudada a sua definição. Após, serão analisados os dados do Judiciário para que possa verificar a situação dos tribunais nacionais. Por fim, os métodos adequados de resolução de conflito serão estudados como solução para garantir a efetividade do princípio e a redução do número de processos em tramitação. O presente artigo utiliza o método dedutivo e tem como referencial teórico a Constituição da República e o relatório Justiça em Números 2020.

PALAVRAS-CHAVE: *Acesso à justiça. Crise no Judiciário. Métodos adequados de solução de conflitos.*

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1. INTRODUCTION

Brazilian society has a litigious tradition, in which in the face of conflicts, it seeks a third party (Judiciary) to protect its rights. Consequently, the national courts are overloaded with thousands of proceedings and new lawsuits are filed, making it impossible for the parties to obtain a full solution in a reasonable time. Currently, the labor force in the courts is not able to effectively and within a reasonable time render the merit decision, however, given the financial deficit of the Judiciary, hiring new professionals is not a feasible alternative.

This is an extremely important issue, since taking in consideration the scenario observed in the courts, the principle of access to justice is not effectively and fully achieved, since, although the judicial appreciation of conflicts (access to jurisdiction) occurs, they are not judged in a timely manner. Consequently, in view of the situation in which the judicial archive is found, it is not rare for the object of the lawsuit is lost due to the long period of time between the filing of the action and its final discharge, bringing losses and unnecessary costs to the State and to the parties.

In order to reduce the collection without depending directly on the Judiciary, the legislator stipulated in paragraph 3, article 3 of the Code of Civil Procedures (CCP) that the Law operators must, before and during actions, encourage usage of appropriate methods of self-composed conflict resolution. Thus, the work proposes to analyze whether, in view of the ineffectiveness of the principle of access to justice, proven by the numbers presented by the National Council of Justice, the adequate methods of conflict resolution are feasible to guarantee the solution of citizens' imbroglios, as well as reduce the number of lawsuits in the Judiciary.

In chapter two, a brief historical survey of the principle of access to justice since its beginnings was sought, followed in chapter three by its definition for State of Democratic Rule of Law. It was also emphasized that Justice cannot be confused with jurisdiction, so that in addition to guaranteeing citizens the right to seek a solution to their controversies in the Judiciary, they must be solved effectively and in a timely manner.

In chapter four, the 'Justice in numbers' report made available by the National Council of Justice (CNJ) for the year 2019 was used to confirm the hypothesis of a crisis in the judicial archives due to the high number of lawsuits in progress and the consequent losses that the delay in resolving disputes causes to the jurisdiction.

Finally, the last chapter presents the appropriate methods of conflict resolution as a solution to ensure the satisfaction of citizens who may together, or with the help of a third party, seek an agreement that brings benefits of mutual gain, removing the uncertainty of a judicial process and in less time, consequently, reducing the number of new lawsuits.

To enable the research, the hypothetical-deductive method was used, through a bibliographic research (books, articles, dissertations, theses, journals, legislation, among others) to seek to differentiate access to justice from access to jurisdiction and then, using data analysis, to ascertain the situation of the judicial collection in the country. Finally, appropriate methods of conflict resolution were presented as a proposal to ensure greater effectiveness of the principle of access to justice.

2. HISTORICAL EVOLUTION OF ACCESS TO JUSTICE

In its early days, the principle of access to justice was provided in the Magna Carta of 1215, which in its article 40 stipulated that "to no one we shall sell, to no one we shall deny or delay right or justice (LIBRARY, 2014, our translation[3]). However, because it was conceived on the concept of an absolutist state, individual freedoms were limited by nobility. However, even if almost the entire population lived under the low conditions imposed by the monarchy, Liberalism was only strengthened when the bourgeoisie dissatisfied with the lack of freedom to manage its profits and ventures took up arms with the revolution.

> In general terms, the Liberal State is characterized by its omission in the face of social and economic problems, not consecrating social and economic rights in its text beyond the basic rule of non-intervention in the economic domain. The liberal constitutions declare individual rights, understood as rights that regulate individual conduct and protect the sphere of individual interests, against the state, the limit of these rights being the right of the other, in addition to ensuring political rights. (MAGALHÃES, 2002, p. 63).

The bourgeoisie's quest to reduce state control in the private sphere, so that it could freely manage its wealth and enjoy it in the way it decides, is perfectly expressed by the famous phrase "laissez faire, laissez aller, laissez passer" which in literal translation means "let it do, let it go, let it pass". Moreover, for Adam Smith, the state or its representatives must limit themselves to defending the nation against enemies, protecting its citizens and guaranteeing basic conditions for public works (SMITH, 1996).

> As a result, the ratio between capital and income seems to regulate everywhere the ratio between working people and idle people. Wherever capital predominates, labor prevails; and wherever income prevails, idleness prevails. Therefore, any increase or decrease in capital tends to increase or decrease the actual amount of labor, the contingent of productive citizens and, consequently, the exchange value of the annual production of land and labor of the country, the real wealth and income of all its inhabitants. Capital is increased by parsimony and diminished by waste and mismanagement.
>
> [...]
>
> Just as an individual's capital can only be increased by what he saves from his annual income or annual earnings, so the capital of a society, which is equivalent to the sum of the capital of all its individuals, can only be increased in this way. Parsimony, and not labor, is the immediate cause of the capital increase. In fact, labor provides the object that parsimony accumulates. With all that labor can acquire, if parsimony did not save and accumulate, capital would never be greater. (SMITH, 1996, p. 129).

The minimal liberal state was the initial framework for the effective protection of the population's natural rights, with the state entity being responsible for abstaining from private matters and only guaranteeing the existence of rights.

> The bourgeoisie, the dominated class, at first and then the dominant class, formulated the philosophical principles of its social revolt.
>
> And, both before and after, it did nothing but generalize them doctrinally as common ideas to all the components of the social body. But by the time it

3 To no one will we sell, to no one deny or delay right or justice.

> takes political control of society, the bourgeoisie is no longer interested in maintaining in practice the universality of those principles, as the apanage of all men, only in a formal way does it sustain them, since at the level of political application they are in fact conserving the constitutive principles of a class ideology. (BONAVIDES, 2001, p. 42).

In the Liberal State paradigm (built on bourgeois ideology), methods of conflict resolution reflected the individualistic character of rights, that is, the State should keep its actions to a minimum, only guaranteeing order and protecting individual freedoms.

> Right to access to judicial protection essentially meant the *formal* (sic) right of the aggrieved individual to file or contest an action. The theory that while access to justice could be a 'natural right', natural rights did not require state action for their protection. These rights were considered prior to the state: their preservation required only that the state not allow them to be infringed by others. The state, therefore, remained passive in relation to problems such as a person's ability to recognize their rights and adequately defend them in *practice* (sic). (CAPPELLETTI; GARTH, 2002, p. 9).

According to the authors, still, for the liberal conception, it was not the obligation of the state entity to guarantee indiscriminately the judicial action, but only the formal access to justice (in a restricted way). Therefore, only citizens who could afford to defend their rights could seek judicial review of their disputes (CAPPELLETTI; GARTH, 2002).

The economic improvement and the consequent industrial development coming from the Liberal State led to an accelerated and unplanned rural exodus, creating overpopulated urban centers without basic health and work conditions for citizens who "survived" in precarious conditions. Formal equality, exploitation of the proletariat and self-regulation of the market, began the questioning of non-interventionism by the state.

> The Constitutions of Mexico (1917) and Weimar (1919) bring new rights that demand a forceful state action for their concrete implementation, strictly aimed at bringing considerable improvements in the material living conditions of the population in general, especially the working class. They talk about the right to health, housing, food, education, social security, etc. A new branch of Law is emerging, aimed at compensating, on the legal level, the natural unbalance between capital and work. Labor Law, thus, emerges as a valuable instrument aimed at adding ethical values to capitalism, thus humanizing the tormenting labor justice relations until then. In the legal scenario in general, the gestation of public order norms destined to limit the autonomy of will of the parties in favor of the interests of the collectivity is highlighted. (SARMENTO, 2006, p. 13).

Bourgeois society took advantage of general population mobilization to replace the feudal regime, but after its rise, it took over state power and created new forms of oppression. Using new technologies, it improved the means of production to be able to manufacture goods at lower costs than those of rival nations that were still regulated under the feudal regime, forcing these countries to adopt the same form of government, on pain of extinction of the state (MARX, ENGELS, 2014). As a result, the big cities received a population amount greater than their capacities, aggravating the degrading conditions that the citizens survived. In this way, the new revolutionary force considered it necessary for the state to abandon individualism and start to adopt community thinking in order to guarantee the interests of all. (MARX, ENGELS, 2014).

> In the form of machines, the working environment immediately becomes the worker's competitor. The return on capital is directly due to the number of workers whose conditions of existence have been annihilated by the machine. Since the tool is handled by the machine, the labor power loses in turn in its exchange value and in its use value. The worker, like paper money out of circulation, becomes non-marketable. The part of the working class that the use of machines turns at random into a superfluous population, that is, a population from which capital no longer has any direct need to secure its income, succumbs to the unequal struggle of the former professional or manufacturing exploitation against mechanical exploitation, filling the market and causing the price of labor to fall below its value. Workers thrown into misery have a double consolation, saying that their sufferings are passing and that the machine slowly invades a field of production, which breaks the intensity and extent of their destructive work. These two consolations cancel each other out. Everywhere the machine seizes an area of production, it engenders chronic misery in its competitor: the working class. (MARX, 2018).

Advocating the minimal state, the bourgeoisie considered it unfeasible to protect the population, but in the face of eminent revolutionary threats, governments were forced to adopt social proposals, especially those coming from the proletariat, which even though it was a fundamental part of the transition from Absolutism to Liberalism, did not have its desires and demands considered (ALBUQUERQUE; BARROSO 2018). As a strategy to halt these revolutions, mechanisms to protect the hypo-sufficient were adopted, such as material equality, state intervention and a better balance between market and society. Therefore, since one of the foundations of the Social State is the dignity of the human person, the State should not only create rights, but also establish sufficient instruments to make them effective.

The constant evolution of society has given rise to new forms of state, in which rights have abandoned their exclusively individualistic character in search of widespread protection for all their members. For the paradigm of the Social State, based on the solidarity and dignity of the human person, the state entity should not only create rights, but make possible instruments capable of making them effective.

> The basic difference between the classic concept of liberalism and that of the Welfare State is that, while that concept is only about placing barriers to the State, forgetting to set positive obligations for it as well, here, while maintaining the barriers, goals and tasks to which it did not previously feel obliged are added. The basic identity between the rule of law and the welfare state, in turn, lies in the fact that the latter takes and maintains respect for individual rights from the former and it is on this basis that it builds its own principles. (GORDILLO, 1977, p. 174).

Anew, resulting from the evolution of consciousness and society, the paradigm of the Democratic State of Law was conceived having as some of its fundamental principles popular sovereignty as the origin of State Power and the primacy of legality, mixing points of the Liberal and Democratic States (BOBBIO, 1986).

> Liberal states and democratic states are interdependent in two ways: in the direction that goes from liberalism to democracy, in the sense that certain freedoms are necessary for the correct exercise of democratic power, and in the opposite direction that goes from democracy to liberalism, in the sense that democratic power is necessary to guarantee the existence and persistence of fundamental freedoms. In other words: a non-liberal state is unlikely

> to be able to ensure the proper functioning of democracy, and an undemocratic state is unlikely to be able to guarantee fundamental freedoms. (BOBBIO, 1986, p. 20).

In this interlocution between paradigms, freedom can only be guaranteed by the State if there is a democracy that allows the conservation and development of individual guarantees based on the constitutional text. Thus, under the paradigm of the Democratic State of Law, the effective principle of access to justice is of fundamental relevance to individual, collective, diffuse and transindividual rights, because in the absence of the principle, the population would not have the means to enforce its fundamental guarantees.

> In this manner, the Democratic State of Law is a new order that adheres to the precepts of the paradigms of liberal law and social law, which means the joining of the principles of the State of Law and the Democratic State, that is, it promotes the limitation of the exercise of state power with the supremacy of the Constitution of the Republic and the democracy of process, in which the magistrate must remove the application of rules contrary to the Constitution of the Republic, always aiming at the realization of fundamental rights. (CAMARGOS, 2020, p. 20).

In Brazil, the principle of access to justice as a fundamental right was first stipulated in the 1946 Constitution of the United States of Brazil, and it was determined in paragraph 4 of article 141 that "the law may not exclude from the appreciation of the Judiciary any injury of individual right" (BRAZIL, 1946). However, in 1964 with the Coup d'Etat, the principle was first mitigated by Institutional Act no. 2, which excluded from the Judiciary's appreciation:

> I - the acts practiced by the Supreme Command of the Revolution and the Federal Government, based on the Institutional Act of April 9, 1964, this Institutional Act and its complementary acts;
>
> II - resolutions of the Legislative Assemblies and the House of Aldermen that have revoked elective mandates or declared Governors, Deputies, Mayors or Aldermen impeded, as of March 31, 1964, until the promulgation of this Act. (BRAZIL, 1965).

Later, when the Institutional Act No. 5 was promulgated, it was determined that:

> The President of the Republic may decree intervention in states and municipalities, without the limitations provided for in the Constitution, suspend the political rights of any citizens for a period of 10 years and revoke federal, state and municipal elective mandates, and make other provisions. [...]
>
> Article 11 - All acts performed in accordance with this Institutional Act and its Complementary Acts, as well as their respective effects, are excluded from any judicial review. (BRAZIL, 1968).

Such mitigation lasted until 1978, when Constitutional Amendment no. 11 in its Article 3 revoked the "institutional and complementary acts, insofar as they are contrary to the 1988 Constitution of the Republic, except for the effects of acts performed on the basis thereof, which are excluded from judicial review" (BRAZIL, 1978).

Finally, in 1988, with the promulgation of the Constitution of the Republic, the original constituent, playing the role of representative of the people, already instituted in the preamble, the adoption of the Democratic State based on the exercise and guarantee of social, individual, freedom and justice rights, among others.

3. THE PRINCIPLE OF ACCESS TO JUSTICE

In a society founded under the paradigm of the Democratic State of Law, making the principle of access to justice effective is of fundamental importance so that all rights (individual, collective, diffuse and transindividual) can be guaranteed to the population.

> The term 'access to justice' is admittedly difficult to define, but it serves to determine two basic purposes of the legal system - the system by which people can claim their rights and/or resolve their disputes under the auspices of the state. First, the system must be equally accessible to all; second, it must produce results that are individually and socially just. (CAPPELLETTI; GARTH, 2002, p. 8).

For the principle of access to justice to be effectively understood, a definition for justice must be sought. Aristotle, in his work Nicomachean Ethics initially defines it as "that disposition of character that makes people inclined to do what is just, that makes them act justly and desire what is just; and in the same way, injustice is understood as the disposition that makes them act unjustly and desire what is unjust. (ARISTÓTELES, 1991, p. 94).

Aware that the definition of justice is not a simple task, unscramble its affirmation, conceptualizing the just man as the honest and respectful individual who has the greatest virtues when exercising it before others, acting in a way that brings benefits to all and not only to himself (ARISTÓTELES, 1991). It is possible to perceive the outlines of material equality when the philosopher assimilates as each subject has differences, to be just is not to guarantee the same conditions, but to treat the equal in a similar way and the different in a different way.

> Now, in the dispositions they make about all matters, laws aim at the common advantage, either of everyone, of the best or of those who hold power or something of this kind; so that, in a certain sense, we call just those acts that tend to produce and preserve, for political society, happiness and the elements that compose it. And the law commands us to do both the acts of a brave man (for example, not deserting our post, nor running away, nor giving up our weapons) and those of a temperate man (for example, not committing adultery, nor indulging in lust) and those of a calm man (for example, not hitting anyone, nor slandering); and likewise with regard to the other virtues and forms of evil, prescribing certain acts and condemning others; and the well-drafted law does these things right, while the hastily conceived laws do them less good. (ARISTÓTELES, 1991, p. 96).

John Rawls in his work 'A Theory of Justice' teaches that all individuals must have unavailable rights, that is, those that even in the face of supposed social welfare cannot be mitigated (RAWLS, 2000).

> Each person possesses an inviolability based on justice that not even the welfare of society can ignore. For this reason, justice denies that the loss of freedom for some is justified by a greater good shared by others. It does not allow the sacrifices imposed on a few to have less value than the greater total of the advantages enjoyed by many. Therefore, in a just society, the freedoms of equal citizenship are considered inviolable; the rights guaranteed by justice are not subject to political negotiation or the calculation of social interests. The only thing that allows us to accept a mistaken theory is the lack of a better theory; analogously, an injustice is tolerable only when it is

> necessary to avoid an even greater injustice. Being the first virtues of human activities, truth and justice are unavailable. (RAWLS, 2000, p. 4).

In a society (faced with pre-existing differences as a social condition), it is common for citizens to suffer favors or detriment as a result of these conditions, and justice must protect these inequalities and guarantee that fundamental rights and duties are equally guaranteed among its members (RAWLS, 2000).

> In this way of considering the principles of justice I will call justice as equity.
>
> Thus, we must imagine that those who engage in social cooperation choose together, in joint action, the principles that should assign the basic rights and duties and determine the division of social benefits. Men must decide beforehand how they are to regulate their mutual claims and what the constitutional charter for founding their society should be. As each person must decide with the use of reason what constitutes his good, that is, the system of purposes which, according to his reason, he must pursue, so a group of people must decide once and for all what among them must be considered fair and unjust. The choice that rational men would make in this hypothetical situation of equitable freedom, assuming for the moment that the problems of choice have a solution, determines the principles of justice.
>
> In justice as equity the original position of equality corresponds to the state of nature in traditional social contract theory. This position is obviously not conceived as a real historical situation, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized in such a way as to lead to a certain conception of justice. (RAWLS, 2000, p. 13).

Rawls teaches that formal justice will only be effective when equitable justice (that which must be accepted consensually and applicable to all without exception) is accepted by citizens and in the face of the peculiarities of each case presented impartially handled by judges and authorities (RAWLS, 2000).

> Treating similar cases in a similar manner is not enough to guarantee substantive justice. This depends on the principles according to which the basic structure is put together. There is no contradiction in assuming that a slave or caste society, or some other society that sanctions the most arbitrary forms of discrimination, is administered in a balanced and consistent manner, although this may be unlikely. However, formal justice, or justice as regularity, excludes significant types of injustice. For if institutions are supposed to be reasonably fair, it is then of great importance that authorities should be impartial and not submit to the influence of personal, monetary, or any other irrelevant considerations when dealing with particular cases. Formal justice in the case of legal institutions is merely an aspect of the rule of law that supports and ensures legitimate expectations. One type of injustice is the failure of judges and other authorities to adhere to proper rules and interpretations when judging claims. A person is unfair in that by character and inclination he is willing to such acts. Moreover, even where laws and institutions are unjust, it is often best that they are consistently enforced. In this way, those who are submitted to them at least know what is required of them and can protect themselves adequately; while there is an even greater injustice if those who are already disadvantaged are treated arbitrarily in particular cases where the rules would give them some security. [...] In general, all that can be said is that the strength of the demands of formal justice, of the obedience of the system, clearly depends on the substantive justice of the institutions and the possibility of reform. (RAWLS, 2000, p. 62-63).

Rawls' thinking is perfectly suited to the reality of the Democratic Rule of Law because it has an inclusive character of individuals who aim to carry out personal projects under equal conditions (even if only formal) so that the citizen becomes the very author of the rules created and not just a recipient (MORAIS, 2007).

Mainly, in the Democratic Rule of Law, the access to Justice is part of the list of Human Rights, being fundamental it's guarantee so that the others can be recognized. Moreover, for society to have the effective guarantee of its rights, it is essential that it be expanded, become fairer and faster to provide judicial services, and it is the state's duty to devise instruments to achieve this (ANNONI, 2006).

In Brazil, in order to effect judicial appreciation of conflicts, the economic capacity of the parties cannot be an impediment, thus, through the gratuitousness of justice, the judicial costs will be suspended because the party is unable to afford them (BRAZIL, 2015). Also, special courts were created with exemption from costs, fees, expenses and attorneys' fees in the first degree (article 54 and following of Law 9.099/95) (BRAZIL, 1995). Finally, the Office of the Public Defender was established as a fundamental instrument for the promotion of human rights with the free and full defense of individual and collective rights to all those who do not have conditions but need judicial or extrajudicial protection (article 134 of CR/88).

> The 1988 Federal Constitution is considered one of the most complete in the world when dealing with fundamental rights and guarantees, since it consecrated material equality, guaranteeing all Brazilians the reduction of social inequality, as well as free legal assistance to the needy, the creation of special courts for less complex causes and crimes with less offensive potential, restructured and strengthened the Public Ministry and reorganized the Public Defender's Office. (SEIXAS; SOUZA, 2013, p. 82).

As Adriana Silva points out, justice should not be confused with jurisdiction, the former being related to the search for the solution of the conflict with the sanitation of divergences and the latter as "saying the right, giving the solution to the proposed case, without, however, necessarily worrying about the contentment or satisfaction of the parties" (SILVA, 2005, p. 87).

Corroborating this understanding, Bruno Salles presents the principle in two conceptions: the first, also called "Access to the Judiciary or to the Courts" is the one that is effective by guaranteeing the exercise of the right of action before a duly institutionalized Judiciary; the second, has a broader meaning, enabling the citizen to have ample legal information and other forms of accessibility to his/her rights, even if outside the Jurisdictional organization, being named by the author as "Access to the Right or to the Rights" (SALLES, 2019).

> Access to justice has been understood, for the most part, as the constitutional principle that underlies the right of access to the courts, the right to appeal the violation of subjective law. This meaning is in perfect harmony with the Democratic State, which must be built according to the commandment of the Constitution in its Article 1. However, access to justice, in our sense, encompasses other characteristics besides the procedural dimension. We consider this aspect to be extremely important, but by not bringing it into the discussion in its due relevance - impediments that make it impossible for citizens to have full access to justice - we will be emphasizing the pure instrumentality to the detriment of the substantiality of the constitutional precept. (ROCHA; ALVES, 2011, p. 133-134).

Aware that only ensuring that conflicts are appreciated by the judiciary does not guarantee the effectiveness of access to justice, the CCP in its article 4 stipulates that "the parties have the right to obtain within a reasonable time the complete solution of the merits, including a satisfactory one" (BRAZIL, 2015). Likewise, the European Convention on Human Rights, using the Universal Declaration of Human Rights as a basis, in view of the procedural effectiveness, has agreed that any person has the right "that his cause be examined, fairly and publicly, within a reasonable time by an independent and impartial tribunal established by law" (ECHR, 1950).

An excellent example of the guarantee of jurisdiction, but not justice, is the case distributed in 1885 by the Count and Countess of Eu claiming possession of the Guanabara Palace, which was the subject of a scuffle by Marshal Deodoro da Fonseca during the proclamation of the republic, which only after 125 years (in 2020) did the last appeals before the Supreme Court become res judicata. Two years earlier, more than 123 years after its distribution, Special Appeal No. 1.149.487/RJ[4] (BRAZIL, 2019a) and Special Appeal 1.141.490/RJ[5] (BRAZIL, 2019b) were judged by the Superior Court of Justice. Finally, after 125 years, the appeals of Bill of Review No. 761.820/RJ (BRAZIL, 2020d) and Bill of Review No. 764.506/RJ (BRAZIL, 2020e), were dismissed while awaiting the decision of the Superior Court of Justice (STJ), as well as the Regimental Appeal in Extraordinary Appeal with Bill of Review No. 1. 250.467/RJ (BRAZIL, 2020f) were known, but their follow-up was denied because no constitutional offense was identified.

The litigation initiated by the imperial family sounds like a distant reality, but the procedural delay brings losses to citizens in daily situations such as the divorce of a couple with minor children. According to article 733 of the CPC, even if there is an agreement between the spouses, if they have minor children, they must request the homologation of the agreement (BRAZIL, 2015). However, due to the delay resulting from the high procedural collection, that child, until then incapable, may reach the age of majority before the transaction is homologated and the parties may waive the dispute to perform the act in notary public. The problem in this situation is that the Judiciary, by not being effective, was unnecessarily moved, generating costs to the parties and to the State.

> The importance of the movement called access to justice and the mechanisms created to guarantee the inclusion of an increasing number of citizens in the judiciary is evident.
>
> These mechanisms of access to justice, which resulted in an avalanche of lawsuits, gave rise to another problem: the progress of litigation and the slowness of judicial delivery.
>
> Therefore, it is not enough to create only formal mechanisms of access to justice, allowing mere access to the Judiciary, without worrying about the progressive increase of litigation and the consequent slowness of judicial

4 The asset was obtained with the use of National Treasury resources as a dowry and could only be used as an address for the imperial family. With the proclamation of the Republic, the royal privileges and real estate titles were extinguished, as well as Laws 166/1840 and 1,904/1870 stipulated that the goods used for housing the imperial family were property of the National Treasury. Thus in the first degree it was understood that as the property belongs to the Union and with the end of the monarchy the counts no longer possess titles guaranteeing their property, there is no violation of the right of possession. This understanding was confirmed by the 2nd degree and by Superior's Court of Justice (STJ) Fourth Class.

5 The second achievement has as its object the claim action proposed by the heirs of the Count and the Countess of I requesting the restitution of the Palace to the imperial estate or, if it was not possible, the conversion into indemnity. In the first degree, the preliminary injunction was accepted, which was confirmed by the Third Class of the TRF-2nd Region and the Fourth Class of the STJ.

> protection. It is necessary to face the phenomenon of excessive mass litigiousness and ensure effective and timely judicial provision with isonomy. Fair tutelage is not only that provided in a timely manner. (ZANFERDINI; MAZZO, p. 94-95, 2015).

Furthermore, for the Democratic State under the Rule of Law, a conception of coexistential justice must be adopted that comprises not only the resolution of the dispute (in its entirety) but also the maintenance of relations among individuals. In a different way from "traditional justice" in which one of the parties is the winner and the other defeated, coexistential justice seeks the consensus of litigation (SILVA, 2005).

> Coexistential justice, on the other hand, is not destined to trancher (sic), to decide and define, but rather to patch up (precisely a mending justice), to relieve situations of rupture or tension, in order to preserve a durable good, that is, the peaceful coexistence of subjects who are part of a group or of a complex relationship, from whose means they could hardly be subtrairse (sic). Contentious justice is not so concerned with these values, since it looks more to the past than to the future. Contentious justice goes very well for traditional relationships, but not for those that have presented themselves with the most typical and constant of contemporary society, for which what sociologists call total institutions, that is, integral institutions, in which we, as members of various economic, cultural or social communities, are compelled to spend a considerable part of our life and activity: factories, schools, condominiums, neighborhood parishes, etc. [...]
>
> In these relationships the noble and bourgeois ideal of the struggle for the right is not easily adjusted. Kampf ums Recht should give way to a die Billigkeit, that is, to the struggle for equity (sic), for a just solution acceptable to all contenders. In these situations, that search for the truth to know who was right and who was wrong (in the past), must lead to the search for a possibility of permanence and coexistence (in the future), always in the interest of the parties themselves. (CUNHA, 2015, p. 66).

In this conception, Justice goes beyond the jurisdiction itself, and the State must guarantee (besides the solution of the dispute's merit) the due appreciation of the conflict, so that, when properly worked, the relations that are deteriorated or dismantled can be re-established.

Therefore, guaranteeing citizens the possibility of having their disputes reviewed by the Judiciary is only one part of the principle of access to justice, which in order to be fully complied with, it is necessary that the decision be prolonged in a timely manner. Therefore, using the appropriate methods of conflict resolution (CSSM), individuals will be able to jointly and with the help of third parties achieve justice in its broadest sense, which is to have the interest of each one assured in a satisfactory manner.

4. THE CRISIS OF THE JUDICIAL ACQUIS

The National Council of Justice (CNJ) was created by the constitutional amendment nº 45/2004 as the competent organ to control the administrative and financial performance of the Judiciary, being in charge of preparing an annual report on the situation of the Judiciary and proposing necessary measures according to the data presented (BRAZIL, 1988). Its mis-

sion is "to develop judicial policies that promote the effectiveness and unity of the Judiciary, oriented to the values of justice and social peace" (BRAZIL, 2020b).

Since 2004, the 'Justice in Figures' report, using data analysis and statistics, has contributed to the publicity and transparency of the judiciary by translating the reality of the national courts as to their structure, litigiousness, financial situation, time of proceedings, BRAZIL, 2020a).

> The Justice in Figures Report and the main document on the publicity and transparency of the Judiciary, which consolidates in a single publication general data on the performance of the Judiciary and covers information on expenses, revenues, access to justice and a wide range of procedural indicators, with variables that measure the level of performance, computerization, productivity and the appealability of justice.
>
> The diagnosis, prepared annually by the Department of Judicial Research (DPJ), under the supervision of the CNJ's Special Secretariat for Programs, Research and Strategic Management (SEP), presents detailed information by court and by justice segment, in addition to an 11-year historical series from 2009 to 2019. The information has been collected since the creation of the CNJ and the first report was prepared in 2006, with data from the 2004 base year. In 2009, in a process of broad revision and improvement of the glossaries and indicators of the Judiciary Statistics System (SIESPJ), important changes of concept were made, and therefore the data presented here adopt the time cut from that year on, maintaining the history for consultation on the CNJ's own website.
>
> The 16th edition of the Justice in Figures Report gathers information from the 90 organs of the Judiciary, listed in article 92 of the Constitution of the Federative Republic of Brazil of 1988, excluding the Supreme Court and the National Council of Justice. Thus, Justice in Numbers includes: the 27 State Courts of Justice (TJs); the five Federal Regional Courts (TRFs); the 24 Regional Labor Courts (TRTs); the 27 Regional Electoral Courts (TREs); the three State Military Courts (TJMs); the Superior Court of Justice (STJ); the Superior Labor Court (TST); the Superior Electoral Court (TSE) and the Superior Military Court (STM). (BRAZIL, 2020a, p. 9).

According to the report, in the year 2019 more than 30.2 million new achievements were distributed, while 35.4 million were definitively lowered, so that the Judiciary closed the year with a total of almost 77.1 million achievements in progress (BRAZIL, 2020a). Of this total, 14.2 million (18.5%) were suspended, demurrage or in provisional archive (BRAZIL, 2020a), but even if they are not actually being moved, expenses with servers in charge of the archives and expenses with their maintenance, for example, are necessary.

Table 1 - Judicial collection in 2019

	número de processos
In process	77.096.939
New	30.214.346
Completed	35.384.976
Total collection (in process + new - downloaded)	71.926.309

Source: Elaborated by the author with data extracted from CNJ (BRAZIL, 2020a, p. 49).

The year 2019 was marked by a 4.08% reduction in the number of lawsuits compared to the previous year, with the Labor and State Courts together reducing the stock by 2.7 million, the main responsible for the reduction (BRAZIL, 2020a). In turn, during the years 2018-2019, the accumulated index of reduction of the judicial collection was 3%, however, even if it seems promising, if the average annual reduction of 2.9 million cases is maintained, it will take 25 years to close the 72 million cases in progress in the national courts.

The work force in the judiciary in that year was 268,175 employees and 18,091 magistrates, with 15,552 judges assigned to the first instance and 2,808 accumulating special judicial functions and 1,115 in appeal classes (BRAZIL, 2020a).

Table 2 - Judiciary Labor Force

	Judges
Available positions	22.706
Vacant positions	4.615
In office	18.091
1st Degree	15.552
2nd Degree	2.463
Superior Courts	76

Source: Elaborated by the author with data extracted from CNJ (BRAZIL, 2020a, p. 86).

Table 3 - Servers Workforce

	Servidores
Available positions	276.331
Vacant positions	8.156
In office	268.175
Judicial area	211.295
1st Degree	176.992
2nd Degree	30.920
Superior Courts	3.383
Administrative Area	56.880

Source: Elaborated by the author with data extracted from CNJ (BRAZIL, 2020a, p. 86).

Based on the total number of cases in the judicial collection (71,926,309), the number of acting magistrates (18,091) and the total number of acting judges (268,175), at the end of 2019, each judge had 3,976 cases under his care and only 15 servers to assist them.

Based on these numbers, it is possible to notice that it is impracticable to guarantee the celerity of the proceedings and the reasonable duration (article 5, item LXXVIII of CR/88), as well as the integral solution of merit (article 4 of the Code of Civil Procedure) (BRAZIL, 2015).

In order to be able to verify the processing time of the proceedings before the courts, the CNJ analyzed the average time spent from the distribution until the rendering of the sentence; the average time off work, i.e., the starting date of each procedural phase until its termination (for example, the time spent between the distribution of the case until the beginning of the

execution phase); and, finally, the measured duration of pending proceedings (among other reasons, those that have been re-proceeded by decisions annulled in appeals or conflicts of jurisdiction) (BRAZIL, 2020a).

Table 4 - Average time for the Superior Courts

Office	Sentence	Finish	Pending
Superior Court of Justice	9m	1y and 6m	2y and 6m
Superior Labor Court	1y and 4m	1y and 6m	2a and 1m

Source: Elaborated by the author with data extracted from CNJ (BRAZIL, 2020a, p. 179).

Table 5 - Average processing time in 2nd Degree

Office	Sentence	Finish	Pending
Total	10m	10m	2y and 1m
State Courts of Justice	8m	1y	2y and 6m
Federal Regional Courts	2y	2y and 5m	2y and 4m
Regional Labor Courts	5m	10m	1y
State Recursal Classes	7m	8m	1y and 10m

Source: Elaborated by the author with data extracted from CNJ (BRAZIL, 2020a, p. 179).

Table 6 - Average processing time in the 1st Degree

Órgão	Sentença	Baixa	Pendente
Cognition Total	2y	1y	3y and 11m
State Courts	2y and 5m	3y e 7m	4y and 2m
Federal Courts	1y and 7m	2y e 10m	3y and 9m
Work Courts	8m	1y	1y and 1m
State Special Courts	9m	1y and 6m	1y and 10m
Federal Special Courts	1y	1y and 9m	1y and 5m
Execution Total	4y and 9m	6y and 6m	7y
State Courts	4y and 9m	6y and 11m	7y
Federal Courts	7y and 10m	8y and 3m	8y and 4m
Work Courts	3y and 11m	2y and 6m	4y and 10m
State Special Courts	1y and 2m	1y and 7m	2y and 3m
Federal Special Courts	7m	1y and 10m	11m

Source: Elaborated by the author with data extracted from CNJ (BRAZIL, 2020a, p. 179-180).

Adding up all the time needed in each instance and court, the average length of a case was 2 years and 2 months to be sentenced, 3 years and 3 months to be lowered and 5 years and 2 months when they were pending (BRAZIL, 2020a, p. 181).

It is clear that the high number of acts in progress causes damage to the population, because on average, each jurisdiction will have to wait more than 2 years for its litigation to be decided and if it is necessary to begin execution, the time required will increase to more than 3 years. Moreover, although the objective of the creation of the special courts is to guarantee greater speed to the deeds, the reality shows another, because the party will have to wait 9 months to obtain a sentence in the State Special Courts and 1 year in the Federal Special Courts.

Due to the long term in the resolution of the litigation, if the party withdraws from the action for the loss of the object, for having reached an extrajudicial agreement or any other reason, not only the parties, but the State will have unnecessary expenses with initial costs, attorney's fees, infrastructure, personnel, equipment, physical space, among others.

Maintaining self-sufficient organs capable of spending less on their functioning than the revenues received is essential for the population to have proper access to basic subsistence guarantees. However, the judiciary does not change this hypothesis, since in 2019, a total deficit of R$ 23.8 billion was registered, which needed to be complemented by public coffers. Likewise, in the two-year period 2017-2018, the percentage of spending required to maintain the Judiciary (2.6%) was practically inversely proportional to the reduction in its collection (3%), but in 2019 the total spent exceeded 100 billion reais, causing an increase of 7 billion reais compared to 2018 (BRAZIL, 2020a).

Therefore, considering the alternative of increasing the number of professionals in the courts as a way to reduce the judicial collection is unfeasible, since it would consequently increase the judicial deficit. However, self-composition is a viable alternative to guarantee access to justice, reduce the procedural collection and make the body self-sufficient. In this sense, the Code of Civil Procedure (CPC), determines that operators of the Law must encourage the use of self-composing methods (article 3 paragraph 3) and makes it mandatory after the distribution of the initial petition, the holding of conciliation or mediation hearings (article 334) (BRAZIL, 2015).

After the CPC came into force in 2016, there was an increase in the index of conciliations from 11.1% in 2015 to 13.6% in 2016, but the year 2019 was marked by the third consecutive year of reduction in the percentage of conciliations in the judiciary, being 13.5% in 2017, 12.7% in 2018 and 12.5% in 2019 (BRAZIL, 2020a).

Table 7 - Conciliation Ratio

Year	Ratio	Sentences Total	Homologatory sentences
2015	11,1%	27,5 million	3,05 million
2016	13,6%	27,7 million	3,77 million
2017	13,5%	28,3 million	3,82 million
2018	12,7%	29,5 million	3,75 million
2019	12,5%	31,7 million	3,96 million

Fonte: Elaborado pelo autor com dados extraídos do CNJ (BRASIL, 2020a).

Even if it presents itself as promising, the percentage of self-composed resolutions in the Judiciary compared to extrajudicial forms of conflict resolution is not as effective. In 2018[6], while the Judiciary obtained only 12.7% (BRAZIL, 2020a) of agreements signed in conciliations, the average percentage of resolution in the Procons was 76% and 81% in the platform Consumidor.gov.br was 81% (BRAZIL, 2019d).

5. ADEQUATE METHODS OF CONFLICT RESOLUTION

Out-of-court conflict resolution institutes are progressively gaining in importance and are now widely used, so the old name alternative methods is replaced by appropriate methods. When called "alternative" the institutes become a substitute option to the established (Judicial) system as the main predilection of the parties. However, when this presumption of hierarchy between methods is replaced with "adequate", they become similar and no longer "a second option".

> This is a terminological argument between the use of "alternative" or "suitable" methods. When the first is used, it is assumed that there is an ordinary and, therefore, a principal way. With the phrase "adequate methods" there is no predisposition in favor of one or other form of dispute resolution, and the topical evaluation of relevance is directed. In this case, it is undeniable that currently in Brazil there is wide adherence to the judicial heterocompositive way, which fully justifies the allusion to other forms of dispute resolution as alternative methods. On the other hand, the presentation of the subject as such conditions to a subsidiary choice behavior, which shows itself inapt to the promotion and potential they present, which seems to justify with even more intensity the choice for the second expression presented. (SCARPARO, 2018, p. 67).

In any human society conflict is inherent and inevitable (SAMPAIO, 2016) and if we consider that the hyperbolic numbers of the national judicial collection cause the impossibility of having a full resolution of the dispute in a timely manner, it is necessary to analyze the use of appropriate methods of conflict resolution as capable of guaranteeing effective access to justice.

Currently, the simplest adequate method is the negotiation that occurs directly among those involved, working the conflict among themselves without any intervention from third parties. Even if the act of negotiating can be done directly by the parties, if it is in their interest, they can choose to have it conducted by third parties as in conciliation and mediation.

The use of conciliation is indicated in situations where the conflict is objective, that is, the parties have no significant relationship or interest in creating one. They usually occur in consumer contracts, in which the citizen buys a good and in the face of a problem, wants only the solution of his situation.

> Art. 165. The courts will create judicial centers for the consensual resolution of conflicts, responsible for holding conciliation and mediation sessions and

6 The data from 2018 were used, since this was the year of the last report made available by SENACON and for this reason they were compared with the report made available by CNJ for the same year.

> hearings, and for developing programs to assist, guide and encourage self-composition.
>
> [...]
>
> § 2 The conciliator, who shall act preferentially in cases in which there is no previous bond between the parties, may suggest solutions to the dispute, being prohibited the use of any type of constraint or intimidation for the parties to conciliate.
>
> § 3º The mediator, who will act preferentially in the cases in which there is a previous bond between the parties, will help the interested parties to understand the issues and interests in conflict, so that they can, by reestablishing the communication, identify, by themselves, consensual solutions that generate mutual benefits. (BRAZIL, 2015).

On the other hand, mediation is the institute that attempts the healthiest solution for the imbroglio that may exist, in which the mediator will act in an indirect way, being the facilitator of communication between those involved in search of a mutually beneficial solution.

The CNJ defines mediation as an integrative negotiation (that the parties seek a solution in which both win) mediated by one or more impartial and neutral mediators, who will facilitate communication between the parties so that they can understand their interests and create solutions that bring positive change and mutual gain (BRAZIL, 2016). As Fredie Didier Júnior explains, the difference between conciliation and mediation is tenuous:

> The difference between conciliation and mediation is subtle - and perhaps, in a more analytically rigorous thought, non-existent, at least in its substantial aspect. The doctrine usually considers them as distinct techniques for obtaining self-composition.
>
> The conciliator has a more active participation in the negotiation process, and may even suggest solutions to the litigation. The conciliation technique is more suitable for cases in which there was no previous link between those involved.
>
> The mediator plays a somewhat different role. It is up to him/her to serve as a communication vehicle between the interested parties, a facilitator of the dialogue between them, helping them to understand the issues and interests in conflict, so that they can identify, by themselves, consensual solutions that generate mutual benefits. In the mediation technique, the mediator does not propose solutions to the interested parties. It is therefore more suitable in cases where there is a previous and permanent relationship between the interested parties, as in cases of corporate and family conflicts. Mediation will be successful when those involved manage to build a negotiated solution to the conflict. (DIDIER JÚNIOR, 2016, p. 274).

As its main objective is the consensus in any of the methods used, those involved are not obliged to reach a transaction at the end of the procedure used, being guaranteed that at any time the work will be interrupted, without this limiting the search by the Judiciary.

Carlos Vasconcelos teaches that in an adversarial dispute such as the judicial or arbitral one, the communication is already considerably lost and at each speech or argument, these will be received as an attack and instead of exposing what the real interests are, the opposing party will present a new argument to refute what was presented (VASCONCELOS, 2018).

> What usually occurs in conflict processed with an adversarial approach is the hypertrophy of the one-sided argument, almost no matter what the other

> speaks or writes. For this reason, while one expresses himself, the other already prepares a new argument. By identifying that they are not being understood, listened to, read, the parties exalt themselves and dramatize, further polarizing the positions.
>
> The transforming solution to the conflict depends on the recognition of differences and the identification of common and contradictory interests, which underlie it, because the interpersonal relationship is based on some expectation, value or common interest.
>
> [...]
>
> Conflict, when well conducted, can result in positive change and new opportunities for mutual gain. (VASCONCELOS, 2018).

For Roger Fisher, Willian Ury and Bruce Patton, in order for those involved to achieve their goal, techniques capable of maximizing the result must be used. The procedure proposed by the authors has four steps: separate people from problems, focus on interests rather than positions, create mutual gain options and focus on objective criteria (FISHER, URY and PATTON, 2018).

Separating people from problems means removing the emotional part of conflicts, so that the person involved can understand the discussion of a neutral position without its sentimental character. Normally, when an act is performed by someone with whom the individual already has a raid and by another person with whom he or she has great appreciation, in the first case it will be aggravated by negative feelings, while in the second it may be received without greater repercussions. Therefore, by taking the sentimental element out of the conflict, it is possible to observe it from a neutral position to increase trust between the parties and reduce noise in communication.

To focus on interests rather than positions is to understand what the individual really wants and not what he or she appears to want. Not infrequently, two people want the same object (positions), but for different reasons (interests). For example, two brothers are arguing to decide who will have the right to drive the family vehicle (that's their position, they want the vehicle), so the logical solution is for them to take turns doing good, which won't make them both happy. However, after going deeper into the conflict, they discover that one of the brothers wants the car to go to his college at night and the other at daytime (that's the interest).

After exploring the conflict, it is possible to look for mutual gain options. In the case presented as the interests are not conflicting, it would be enough to divide the use of the vehicle by period of the day and both will have their interests completely satisfied, unlike the solution based on positions, which besides not solving the imbroglio, would make the good idle in the moment that the other could use.

Finally, to focus on objective criteria the parties should not argue over parameters that are not possible to achieve, because no matter how much they agree, if it is unfeasible, maintaining the discussion at that point would only bring wear and tear and would further disturb the relationship. It can also be understood as the use of pre-established standards such as price lists, legal norms or expert evaluations.

> Any method of negotiation can be judged impartially according to three criteria: it must lead to a sensible agreement if possible, it must be efficient, and it must improve or at least not harm the relationship between the parties. (A sensible agreement can be defined as one that, as far as possible, meets the

> legitimate interests of each side, resolves conflicts of interest fairly, is durable, and takes into account the interests of the community. (FISHER; URY; PATTON, 2018).

Using the help of negotiation techniques, one abandons the amateurish and instinctive character of a negotiation to a technical and well worked out procedure in search of an agreement in which all interests are cured and none of the parties feels at a disadvantage in relation to the other.

Therefore, by using the appropriate methods of conflict resolution, not only the parties directly interested have benefited, because they will have their dilemma solved in a timely manner, adequately and certainly, as the structure of the judiciary, which with the consequent reduction of new cases may have a timely and adequate time to solve the existing collection and new cases that arise.

6. CONCLUSION

In view of the data presented, it is possible to see that the number of acts in progress in our courts makes it impossible for the parties to obtain the full result of the act in a timely manner, so that the principle of access to justice is not fully guaranteed. In the year 2019, even if it is closed with a reduction in the collection, the percentage is still low and if the trend is maintained, the time necessary for the achievements in progress will be several years.

Furthermore, the Judiciary has not been able to be financially self-sufficient, closing each year with a billionaire deficit, which makes it impossible to increase the existing labor force (servers and magistrates). Also, to demand that cases be judged in reduced time would lead to decisions that, without having spent the necessary time to convince the magistrate, would bring dissatisfaction for the parties and legal insecurity for the population.

Ensuring that the population can take their disputes to court is only part of the principle of access to justice, that to stop them being fully effective must be judged in an appropriate manner and in a timely manner.

To change this scenario, it is necessary to change the culture of society, which must give up litigiousness in order to initially use self-composition to resolve its conflicts and only when it is impossible to reach an agreement, to judicialize its claims. In this sense, the adequate methods of conflict resolution have faster and less costly procedures for the parties, as well as with the help of negotiation techniques allow the parties to understand the conflict and together aim for a mutually beneficial solution.

By using appropriate methods of conflict resolution (self-compositive), it is possible to reduce costs and provide greater speed in resolving conflicts, so that those involved can assume the role of key players in their demand. Likewise, when appropriately specialized professionals use negotiation techniques, it is possible that together they seek a solution that brings mutual benefits.

Regardless of the way the self-composition is worked out (a negotiation directly done by those involved or with the help of a third party), it is possible to aim for a term that is satisfac-

tory. By abandoning the prosecuting nature of a lawsuit or heterocomposition, the parties will be able to identify the needs, pains and options of the other, spending the necessary time to negotiate, without the uncertainty of the judiciary in which only at the end of the fight will it be possible to know the result.

Therefore, since Brazil does not have sufficient financial resources to increase the structure of the judiciary, as well as to demand greater speed from magistrates would cause losses to the population, the principle of access to justice tied only to jurisdiction is not effectively guaranteed. It is concluded as of essential importance the overlapping of the culture of litigation by the culture of self-composition. So that with the use of appropriate methods of conflict resolution, citizens will be guaranteed effective access to justice, in addition to the control of the decision of their conflicts aimed at agreements that bring benefits to all involved

Besides the benefits brought to the parties directly involved, they allow a reduction in the judicial collection, since with the reduction of the distribution of new achievements, the magistrates and servers will be able to take charge of existing cases and spend the necessary time for their solution.

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THE CONCURRENT LEGISLATIVE CONSTITUTIONAL COMPETENCE IN THE CRISIS CAUSED BY COVID-19 AND THE INTERPRETATION GIVEN BY THE STF IN THE JUDGMENT OF THE PRECAUTIONARY MEASURE AT ADI 6341

A COMPETÊNCIA CONSTITUCIONAL LEGISLATIVA CONCORRENTE EM MEIO ÀS CRISES CAUSADAS PELA COVID-19 E A INTERPRETAÇÃO DADA PELO STF NO JULGAMENTO DA MEDIDA CAUTELAR NA ADI 6341

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ABSTRACT

The paper analyzes the concurrent competence to legislate defined on the art. 24, XII, of the Brazilian Federal Constitution of 1988 (CF / 1988), comparing decisions of the Supreme Federal Court (STF) in times of normality and in times of crisis, as is the moment experienced, in the face of the COVID-19 pandemic. The

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judgments mentioned refer to the precautionary measure in Direct Unconstitutionality Action (ADI) 6341 and in the ADI 3937, both referring to the defense and protection of health. Methodologically, the study is qualitative, having as sources the bibliographic and documentary survey, especially the jurisprudential research. It is concluded that the court's position on the concurrent competence to legislate defined on the art. 24, XII, of the CF/1988, remained the same in the analyzed judgments.

KEYWORDS: Concurrent competence to legislate. ADI. Pandemic. Federalism. Health.

RESUMO

O artigo analisa a competência legislativa concorrente delimitada no art. 24, XII, da Constituição Federal de 1988 (CF/1988), comparando decisões do Supremo Tribunal Federal (STF) em tempos de normalidade e em tempos de crise, como é o momento vivenciado, diante da pandemia de COVID-19. Os julgamentos em foco são referentes à medida cautelar na Ação Direta de Inconstitucionalidade (ADI) 6341 e na ADI 3937, ambas referentes à defesa e proteção à saúde. Metodologicamente, o estudo é qualitativo, tendo como fontes o levantamento bibliográfico e documental, especialmente a pesquisa jurisprudencial. Conclui-se que o posicionamento da corte sobre a competência legislativa concorrente delimitada no art. 24, XII, da CF/1988, se manteve no caso nos julgamentos analisados.

PALAVRAS-CHAVE: *Competência legislativa concorrente. ADI. Pandemia. Federalismo. Saúde.*

1 INTRODUCTION

This article aims to analyze the concurrent legislative competence (*competência legislativa concorrente*) defined in art. 24, XII, of the Brazilian Federal Constitution of 1988 (*CF/1988*), comparing decisions of the Supreme Federal Court (*Supremo Tribunal Federal – STF*) in times of normality and in times of crisis, as is the moment experienced, in the face of the COVID-19 pandemic.

It's based on the interpretation given by this Court in the judgment of the precautionary measure in Direct Action of Unconstitutionality 6341(*medida cautelar na Ação Direta de Inconstitucionalidade – ADI*) (BRASIL, 2020d), reported by Minister Marco Aurélio Mello, seeking to verify whether there is, at least in terms of defense and health protection, a tendency to reinforce the division of vertical competence in the concurrent modality, taking into account the autonomy among the federated entities, the reaffirmation of the absence of hierarchy among them, as well as the notion of the prevalence of interest for the purpose of validating the idea of cooperative and solidary federalism that guides BC/1988 (BRASIL, 1988).

In ADI 6341 (BRASIL, 2020d) the Democratic Labor Party (*Partido Democrático Trabalhista – PDT*) called for the suspension of the effectiveness of several provisions of Provisional Measure 926/2020 (*Medida Provisória – MP 926/2020*) (BRASIL, 2020c) in dealing with the new coronavirus, in order to limit the taking of normative and administrative measures by the states, the Federal District and the municipalities.

The debate takes place at a time when it is necessary for Brazil to adopt measures to prevent and contain COVID-19, a disease caused by a new virus, SARS-CoV-2, also known as a new coronavirus. Initially registered in China, at the end of 2019, cases rapidly increased and gained worldwide proportion, with the World Health Organization (*Organização Mundial*

de Saúde – OMS), in late January, declaring an international public health emergency and, on March 11, 2020, evolved into the declaration of a pandemic.

In fact, the figures reveal a worrying picture, since the total number of confirmed cases in the world is already close to 6 million, with more than 350 thousand deaths, on May 28, 2020. The United States (USA), with almost 1,7 million cases, have far exceeded China (82.995), the initial epicenter of the pandemic. The same is true in Brazil (438.812), Russia (379.051) and the United Kingdom (269.127), Italy (231.732), among the examples of countries with more than 200 thousand cases, as shown by official data released by the respective governments and systematized by Stephanou (2020).

The situation caused a serious crisis and the need to adopt emergency measures in several dimensions, such as health, economic, behavioral and legal. It represents a brutal challenge for the State in terms of managing its health systems, which are strongly threatened with collapse in the face of the exponential number of people in need of care. There is still no scientifically approved drug to fight the new coronavirus, nor is there a vaccine, which, according to the most optimistic forecasts, will be available in a year.

It brings challenges in economic terms, as a result of a recession that perhaps surpasses that of the Great Depression of the beginning of the 20th century, when the fall in the countries' gross domestic product (GDP) and the increase in unemployment terrified the world. Between 1929 and 1932-1933, GDP fell 30% in the United States, 15% in Latin America, 9% in Europe, 5% in Italy (CIOCCA, 2009). According to the weekly Focus survey, carried out by the Central Bank, there will be a 3,45% drop in Brazilian GDP in 2020, after a 3,8% drop in the previous year. In addition to reducing product and income in two straight years, several other analysts already bring more negative forecasts to the country.

It is estimated that Brazil's unemployment rate will rise from the current 11,6% to 16,1% in the second quarter of 2020, worsening the labor market, which was already going through a bad phase in the country. In absolute numbers, it represents 5 million more unemployed people in just three months, increasing the number of people without work from 12,3 million to 17 million, according to the Brazilian Institute of Economics of the Getúlio Vargas Foundation (*Instituto Brasileiro de Economia da Fundação Getúlio Vargas – FGV IBRE*).

The challenges in social terms are enormous, such as the importance of structuring public policies to alleviate the cost of the dramatic situation of insufficient income of millions of brazilian, not least because there was already a situation of unemployment and reduction of social and labor rights that are quite complicated.

Behavioral disruptions, especially those stemming from social isolation (or, ultimately, lockdown), have profoundly altered the way people interact around the world. The high contagion of the virus requires changes in habits such as washing hands, wearing masks, canceling trips and social gatherings. In many cases, teleworking is necessary, this without mention changes such as the impediment of family members and friends to watch over the bodies and give a dignified burial to their loved ones, fatal victims of the disease.

Finally, the legal challenges stand out, since there are many uncertainties at the present time. Economy problems affect organizations as to the possibility of fulfilling (partial or total) the contracts already concluded. Although there are several legal mechanisms to mitigate risks and penalties that business organizations would be subject to, depending on the mag-

nitude of the impacts of the pandemic on their operations, the moment causes great concern. The impacts on health plan consumption relationships, for example, raise several questions in terms of the responsibilities of the parties.

The need for action by all the members of the Brazilian federation can, of course, raise potential conflicts of competence, insofar as, according to art. 24, XII, of BC/88, it is up to the Union, the States and the Federal District to legislate concurrently on social security, protection and defense of health.

In this article, as already explained, the concern is regarding the Supreme Federal Court (*Supremo Tribunal Federal – STF*) position on the issue of standards by States, the Federal District and Municipalities in facing the new coronavirus vis-à-vis other periods, which we will call normal.

To this end, a comparative analysis is carried out between the judgment of ADI 3937, in 2017 (BRASIL, 2017), filed by the National Confederation of Industrial Workers (*Confederação Nacional dos Trabalhadores na Indústria – CNTI*) against Law nº 12.687/2007 (SÃO PAULO, 2007), edited by State of São Paulo, prohibiting the use of products, materials or artifacts that contained any types of asbestos in the state territory and that adopted in 2020, in the judgment of ADI 6341 (BRASIL, 2020d).

As a research problem, it is asked: "does the constitutional division of concurrent legislative competence, in the interpretation of the STF on the subject of health protection and defense, maintain the idea of cooperative and solidary federalism determined by the BC/1988?".

Methodologically, the research has a qualitative approach, seeking to interpret the phenomenon and assign meanings to decisions. As for the objectives, the research is exploratory, having as a procedure, a bibliographic and documentary survey is adopted, notably the jurisprudential research regarding the position of the *STF* in both decisions under analysis.

The text is structured in three parts, in addition to this introduction. Section 2 discusses federalism and concurrent competence in brazilian constitutionalism in times of normality. In section 3, the concurrent competence to legislate in times of constitutional abnormality is addressed, analyzing the decision that endorsed the precautionary measure in ADI 6341 (*medida cautelar na ADI 6341*) (BRASIL, 2020). The study's conclusions are presented at the end.

2. FEDERALISM AND CONCURRENT COMPETENCE IN BRAZILIAN CONSTITUTIONALISM IN TIMES OF NORMALITY

Brazilian federalism, consolidated by the Brazilian Constitution of 1891 (BRASIL, 1891), was formed by segregation, that is, it was the result of a political decentralization of a unitary state as a result of a centrifugal movement established by Decree nº 1 of 15/11/1889, which

transformed the old provinces into united member states in an indissoluble way (HORBACH, 2013, p. 9).

In the following Constitutions, 1934 and 1937 (BRASIL, 1934 and 1937), a centralizing tendency prevailed, with the increase of the competences of the Union and the presence of the Federal Government in the solution of economic problems of the Member States, which was considered a setback because states and municipalities became less autonomous in this period than in the period of imperial centralism (SILVA, 2009).

This attempt to neutralize regional interests was changed in the Brazilian Constitution of 1946 (BRASIL, 1946), which inaugurated a period of cooperative federalism. One of the main characteristics of this cooperative federalism was the greater transfer of federal resources to Member States and municipalities, but the concentration, within the Union, of the great national decision-making powers and legislative discipline (ABRÚCIO; SAMUELS, 1997).

With the Brazilian Constitution of 1967 (BRASIL, 1967) and its amendments, the centralizing trend was resumed: increasing the reduction of the normative autonomy of the States, prevailing what Horta (1980/1982) called purely apparent federalism.

The democratic reopening and the promulgation of the Federal Constitution of 1988 (BRASIL, 1988) gave a new configuration to national federalism, which again had a cooperative profile, a model that can be inferred from the analysis of the provisions of its art. 24, which deals with concurrent/competitor competence (*competência concorrente*), having established institutional designs on a large scale to structure a State oriented to be democratic and of law (RANGEL, 2016, p. 218).

Discussing the notion of competence and its relationship with the power structures delimited by the constitutional rule, highlights Canotilho (1993, p. 175-176):

> Constitutional norms of competence are those in which certain attributions to certain constitutional bodies are recognized or spheres of competence are established between the various constitutional bodies. (...) It should be noted, according to the previous references on the "material contamination" of the organizational rules, that the rules of competence often contain a material content that concerns not only the duty to guarantee the constitutionally established competence, also to the very reason for the delimitation of competence. (*Normas constitucionais de competência são aquelas nas quais se reconhecem certas atribuições a determinados órgãos constitucionais ou são estabelecidas esferas de competência entre os vários órgãos constitucionais. (...) Saliente-se, de acordo com as referências anteriores sobre a «contaminação material» das normas organizatórias, que as normas de competência comportam muitas vezes, um conteúdo material respeitante não só ao dever de garantir a competência constitucionalmente fixada, mas também à própria razão de ser da delimitação de competência.*)

This new configuration of the delimitation of state powers was based on the principle of predominance of interest with regard to the division of powers among the federated entities, that is: the Union was responsible for what was of predominantly national interest, for States, regionally, and for Municipalities, local, as well as the idea of cooperative federalism which starts from the basic notion of the inability of federative entities to plan and implement, in an isolated way, public policies necessary to fulfill the competences attributed to them by the Constitution (SCHIER *et al,* 2018, p. 221).

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In turn, Horta (1991, p. 249-250), thus, points out the importance of the division of competence in the Brazilian Magna Carta for the maturation of federalism in search of balance between the entities:

> The division of powers is a requirement of the federal structure of the State, to ensure the coexistence of the systems that make up the Federal State. The federal form of State corresponds to the composite and plural State, founded on the association of several States, each one having its legal, political and constitutional order, according to the rules established in the Federal Constitution. (...) The division of competence, responsible for the constitutional definition of the specific field of each order, may accentuate centralization, concentrating the largest sum of powers in the Federation or Union, or lead to decentralization, reducing federal powers and expanding state powers, or even moving away from extreme solutions, measuring federal and state competences, in order to establish in the Federal Constitution the balance between the central ordering and partial ordering. In the first case, the centralization of powers configures centripetal federalism; in the second, decentralization leads to centrifugal federalism, and, in the third, the balance in the dosage of the attributions conferred to the orders will implant balanced federalism. (*A repartição de competências é exigência da estrutura federal de Estado, para assegurar o convívio dos ordenamentos que compõem o Estado Federal. A forma federal de Estado corresponde ao Estado composto e plural, fundado na associação de vários Estados, cada um possuindo o seu ordenamento jurídico, político e constitucional, conforme as normas estabelecidas na Constituição Federal. (...) A repartição de competências, responsável pela definição constitucional do campo próprio de cada ordenamento, poderá acentuar a centralização, concentrando na Federação ou União a maior soma de poderes, ou conduzir à descentralização, reduzindo os poderes federais e ampliando os poderes estaduais, ou ainda, afastando-se das soluções extremas, dosar as competências federais e estaduais, de modo a instaurar na Constituição Federal o equilíbrio entre o ordenamento central e os ordenamentos parciais. No primeiro caso, a centralização de poderes configura o federalismo centrípeto; no segundo, a descentralização conduz ao federalismo centrífugo, e, no terceiro, o equilíbrio na dosagem das atribuições conferidas aos ordenamentos implantará o federalismo de equilíbrio.*)

It's important to remember that, externally, only the federal State enjoys international legal personality, with the central government being responsible for conducting the federation's foreign affairs (BURDEAU, 1967). At the domestic level, however, federalism presupposes the division of powers among the different units of the federation.

This distribution can be horizontal or vertical. The first admits three different solutions: a) the exhaustive list of the tasks of the Union and the Member States; b) the enumeration of the Union's competence and the allocation to States of reserved or unlisted powers; and c) listing the competence of the Member States, so that unrelated matters are the responsibility of the central government.

In the vertical distribution, in turn, there is the distribution of identical legislative matter between the Union and the Member States, with federal legislation revealing the essential lines. It will be up to the local legislation "to fill in the clear that was affecting the matter revealed in the general rules legislation to the peculiarities and state requirements" (*"preencher o claro*

que lhe ficou afeiçoando a matéria revelada na legislação de normas gerais às peculiaridades e às exigências estaduais") (HORTA, 1964, p. 53).

This is one of the criteria for the vertical division of competences adopted by the BC/1988 (BRASIL, 1988), the so-called competitor competence that divides legislative political attributions among the federated entities under certain criteria, making it possible for all these entities to exercise the power to legislate , respecting their autonomies, on the same themes in the scope of the prevalence of their interests without hierarchy among the federated entities, demanding a political decentralization, as a way of reformulating the notion of division of competence (HORTA, 1985-1986, p. 21).

In this regard, Almeida (2000, p. 97) emphasizes that the respect for such autonomies of the federated entities in competitor/concurrent competence (*competência concorrente*) implies the absence of hierarchy between them, which reinforces the cooperative model of federation to which Brazil is submitted. It is through it that political power is expressed, at the heart of the autonomy of the federative units.

> In fact, it is in the ability to establish the laws that will govern their own activities, without hierarchical subordination and without the interference of the other spheres of power, that the autonomy of each of these spheres is fundamentally translated. Self-government means nothing other than dictating your own rules. (*De fato, é na capacidade de estabelecer as leis que vão reger as suas próprias atividades, sem subordinação hierárquica e sem a intromissão das demais esferas de poder, que se traduz fundamentalmente a autonomia de cada uma dessas esferas. Autogovernar-se não significa outra coisa senão ditar-se as próprias regras.*)

Accordingly, each autonomous power center in the Federation must be empowered to create the law applicable to its respective orbit. However, in this act of dictating its own rules, one must: keep subordination to sovereign power, in this case the constituent power, manifested in the Constitution:

> And because it is the Constitution that shares, it has the logical consequence that the invasion, no matter by which federated entity, of the field of legislative competence of another will always result in the unconstitutionality of the law issued by the incompetent authority. This is true both in the case of usurpation of private legislative competence, and in the case of non-compliance with the constitutional limits placed on the performance of each entity in the field of concurrent legislative competence. (*E porque é a Constituição que faz a partilha, tem-se como consequência lógica que a invasão não importa por qual das entidades federadas do campo da competência legislativa de outra resultará sempre na inconstitucionalidade da lei editada pela autoridade incompetente. Isto tanto no caso de usurpação de competência legislativa privativa, como no caso de inobservância dos limites constitucionais postos à atuação de cada entidade no campo da competência legislativa concorrente*) (ALMEIDA, 2000, p. 97).

Concerning this concurrent competence, BC/1988 (BRASIL, 1988) brings the limit to the Union to establish general norms, not excluding the supplementary competence of States, observing that in the absence of a federal law on general norms, States will exercise full legislative competence, in order to attend to its peculiarities, in all observed the provision of article 24, §§1 °, 2 ° and 3 °, of the BC/1988 (BRASIL, 1988). This concurrent competence is defined by Silva (2013, p. 485):

> Competence is the legally assigned capacity to an entity or to an organ or agent of the Public Power to issue decisions. (...) As for the extension, the competence is distinguished in (...) d) competitor, whose concept comprises two elements: d.1) possibility of disposition on the same subject; d.2) primacy of the Union regarding the establishment of general rules. (*Competência é a faculdade atribuída juridicamente a uma entidade ou a um órgão ou agente do Poder Público para emitir decisões. (...) Quanto à extensão, a competência se distingue em (...) d) concorrente, cujo conceito compreende dois elementos: d.1) possibilidade de disposição sobre o mesmo assunto; d.2) primazia da União no que tange à fixação de normas gerais.*)

Novelino (2018, p. 616) also describes concurrent legislative competence among federal entities as one that "can be exercised simultaneously by more than one federative entity. Within the scope of concurrent legislative competence (Brazilian Constitution, art. 24), and the Union being responsible for establishing general rules (Brazilian Constitution, art. 24, §1º)" (*"pode ser exercida, de modo simultâneo por mais de um ente federativo. No âmbito da competência legislativa concorrente (CF, art. 24), estando a União incumbida de estabelecer as normas gerais (CF, art. 24, §1º)"*).

The key to the proper distribution of concurrent legislative competence, as seen in Horbach (2013, p. 10) "is the concept of "general rule", contained in art. 24, § 1º, of the 1988 Constitution. Here again, the question arises in a simple way: The more comprehensive this concept of general rule, the less the state's autonomy" *("é o conceito de "norma geral", constante do art. 24, § 1º, da Constituição de 1988. Mais uma vez aqui a questão se põe de forma simples: quanto mais abrangente esse conceito de norma geral, menor a autonomia estadual"*).

One of the constitutional concurrent legislative powers concerns the protection and defense of health inserted in item XII of art. 24[4] of our 1988 Brazilian Constitution, which states that it is up to all federated entities (Union, States and Federal District) to legislate concurrently on topics such as social security, protection and defense of health.

This concurrent competence was already the subject of a manifestation by the Federal Supreme Court (*Supremo Tribunal Federal – STF*) in 2008 in the judgment of the Direct Action of Unconstitutionality 3937 (*Ação Direta de Inconstitucionalidade (ADI) 3937*) (BRASIL, 2008), filed by the National Confederation of Workers in Industry (*Confederação Nacional dos Trabalhadores na Indústria – CNTI*) against Law nº 12.687/2007 (SÃO PAULO, 2007), from the State of São Paulo, which prohibited the use of products, materials or artifacts that contain any types of asbestos in the state territory.

At that time, by majority, the STF Plenary (*Plenário do STF*) dismissed the request contained in ADI 3937 (BRASIL, 2008), defining that the autonomy of federative entities must be respected, especially in cases involving the protection and defense of health in times of normality, as it turns out:

> (...) federal law makes reference to the ILO Convention 162, art. 3rd, which, as it deals with a theme that in Brazil is considered a fundamental right (health), has the status of supralegal norm. It would, therefore, be above the federal law itself that provides for commercialization, production, transportation,

4 "Art. 24. It's incumbent upon the Union, the States and the Federal District to legislate concurrently on: [...] XII - social security, protection and defense of health; [...]". (*"Art. 24. Compete à União, aos Estados e ao Distrito Federal legislar concorrentemente sobre: [...] XII - previdência social, proteção e defesa da saúde; [...]."*)

> etc. of asbestos. (...) So that, resuming the speech of min. Joaquim Barbosa, the state standard, in this case, complies much more with the FC in terms of health protection or avoiding risks to human health, the health of the population in general, workers in particular and the environment**. State law is much closer to constitutional design, and therefore better accomplishes this supreme principle of maximum effectiveness of the Constitution in terms of fundamental rights, and much closer to the ILO, too, than the federal law. So, it seems to me a very interesting case of opposing the supplementary norm with the general norm, leading us to recognize the superiority of the supplementary norm over the general norm**) ([ADI 3,937 MC, Rapporteur Minister Marco Aurélio, vote by Minister Ayres Britto, j. 4-6-2008, P, DJE from 10-10-2008.] Emphasis added)
>
> ((...) *lei federal faz remissão à Convenção da OIT 162, art. 3º, que, por versar tema que no Brasil é tido como de direito fundamental (saúde), tem o status de norma supralegal. Estaria, portanto, acima da própria lei federal que dispõe sobre a comercialização, produção, transporte etc. do amianto. (...) De maneira que, retomando o discurso do min. Joaquim Barbosa, a norma estadual, no caso, cumpre muito mais a CF nesse plano da proteção à saúde ou de evitar riscos à saúde humana, à saúde da população em geral, dos trabalhadores em particular e do meio ambiente.* A legislação estadual está muito mais próxima dos desígnios constitucionais, e, portanto, realiza melhor esse sumo princípio da eficacidade máxima da Constituição em matéria de direitos fundamentais, e muito mais próxima da OIT, também, do que a legislação federal. Então, parece-me um caso muito interessante de contraposição de norma suplementar com a norma geral, levando-nos a reconhecer a superioridade da norma suplementar sobre a norma geral [ADI 3.937 MC, rel. min. Marco Aurélio, voto do min. Ayres Britto, j. 4-6-2008, P, DJE de 10-10-2008.] Grifo nosso).

In the above vote, the argument that state legislation is much closer to constitutional designs is observed, being pointed out as more effective in terms of fundamental rights and closer to the position defended by the International Labor Organization (ILO).

In addition to establishing the validity of the state rule, at the time, the Ministers also declared the unconstitutionality of article 2º of Federal Law nº 9.055/1995 (BRASIL, 1995), which allowed the extraction, industrialization, commercialization and distribution of the use of asbestos in the chrysotile variety in the country.

Therefore, it's noted that there is a tendency of the STF, at least in terms of defense and health protection, to reinforce the division of vertical competence in the concurrent modality based on the autonomy among the federated entities, in reaffirming the absence of hierarchy between them , as well as in the prevalence of interest for the purpose of validating the idea of cooperative federalism under the aegis of the Brazilian Constitution of 1988 (BRASIL, 1988), all this in times of constitutional normality.

Let us see, in the next section, whether in times of constitutional abnormality this understanding is maintained by the Brazilian Supreme Court (*STF*).

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3. CONCURRENT COMPETENCE TO LEGISLATE IN TIMES OF CONSTITUTIONAL ABNORMALITY: THE CASE OF PUBLIC HEALTH AND THE DECISION THAT REFERRED TO THE PRECAUTIONARY MEASURE AT ADI 6341 (MEDIDA CAUTELAR NA ADI 6341)

The idea of constitutional abnormality is intrinsically linked to the notions of a Democratic State of Law based on the governance/empire of law, on the division of state powers, on the legality of administration and on fundamental rights and guarantees. In this sense, the constitutional abnormality refers to situations of crisis or emergency, such as public calamity, for example, to the rules provided for in the constitution itself with provision of resources for the exceptional, necessary, adequate and proportional means, to obtain the restoration of normality constitutional.

This recourse to exceptional means, reminds us Canotilho (1993), can also be called "defense of the constitution", "suspension of constitutional guarantees", "defense of security and public order", "state of constitutional exception" or, still, "extraordinary State protection".

Whatever its denomination, it implies necessary measures for the defense of the constitutional order in the face of an abnormal situation that cannot be faced by the normal means provided for in the Constitution, aiming at restoring constitutional normality, according to Canotilho (1993, p. 1145):

> Consequently, it's a matter of submitting crisis and emergency situations (war, riots, public calamities) to the Constitution itself, constitutionalizing the recourse to exceptional means, which are necessary, adequate and proportional, in order to obtain the restoration constitutional normality. (*Trata-se, por consequência de submeter as situações de crise e de emergência (guerra, tumultos, calamidades públicas) à própria Constituição, constitucionalizando o recurso a meios excepcionais, necessários, adequados e proporcionais, para se obter o restabelecimento da normalidade constitucional.*)

Since the beginning of 2020, the world has been facing a crisis and emergency situation, due to the spread of a new virus, SARS-CoV-2, also known as the new coronavirus, which causes COVID-19. The first cases were recorded in December 2019 in China.

The World Health Organization (WHO) declared an international public health emergency on January 30, 2020 and, with the exponential increase in the number of cases, in people from different countries and continents, modified the previous emergency declaration on health for pandemic, on March 11, 2020.

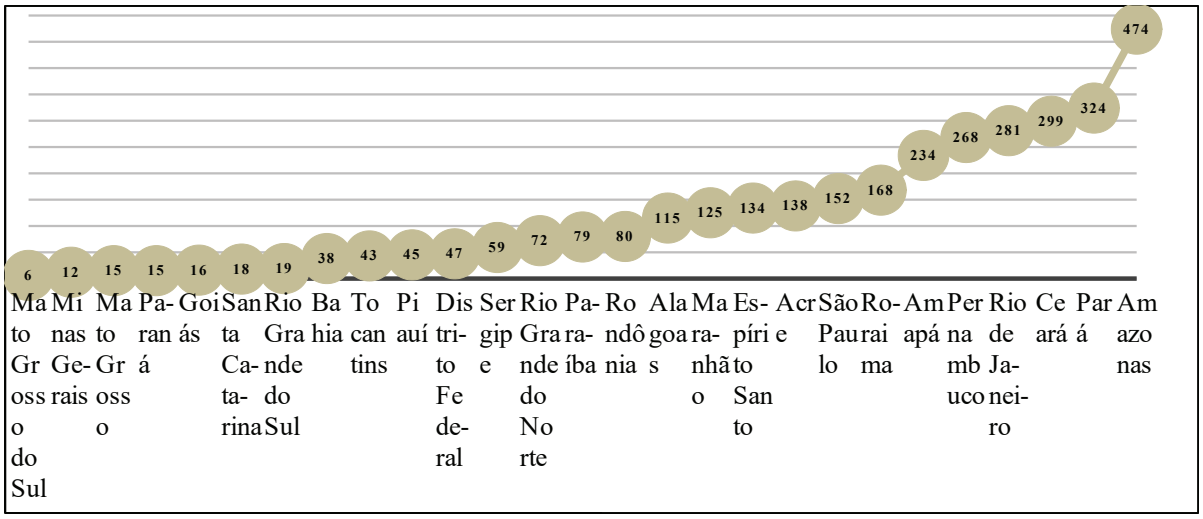
The total number of confirmed cases in the world of people with COVID-19 surpassed one million on April 2, 2020 and by April 15 that number was already over 2 million. As of April 7, more than 80,000 people had died of the disease on the planet, according to WHO.

On April 24, 2020, the total number of confirmed cases worldwide reached 2.716.146 with 190.876 deaths. The United States (USA) had the highest number of cases (879.697), followed by Spain (213.024), Italy (189.973), France (158.183) and Germany (153.129). In number of deaths, Germany (5.575) was well behind, being higher in the USA (49.776), Spain

(22.157), Italy (25.549), France (21.856) and the United Kingdom (18.738), according to official data released by the respective governments and systematized by Stephanou (2020).

In Brazil, which declared a state of public calamity by Legislative Decree nº 6, of March 18, 2020 (BRASIL, 2020), the first case dates from February 26, 2020 and, a month later, it already reached the total of 2.915 confirmed cases, with 20 deaths. As of March 24, the number had grown to 52.995, with 3.670 deaths. At the end of May, the data showed 438 thousand people, with almost 27 thousand deaths, with some states exceeding 30 thousand on March 29, 2019: São Paulo (89.483), Rio de Janeiro (42.398), Ceará (37.275), Amazonas (33.508) and Pará (31.033) (STEPHANOU, 2020; MS, 2020). When analyzing the number of deaths for each 1 million inhabitants, the high rate of Amazonas, Pará and Ceará is highlighted (Graph 1).

Graph 1- Number of deaths per 1 million inhabitants, according to brazilian states



Source: Own elaboration, based on Stephanou (2020).
Note: Position on 05/28/2020.

The graph shows that the evolution of COVID-19 didn't happen in the same way in the brazilian federated entities, which reinforces the need to respect their constitutional autonomies based on the allocation of concurrent legislative competence to effectively combat the pandemic.

Also in February and March 2020, the pandemic made the adoption of prevention and containment measures for COVID-19 by the various federated entities pressing. In the federal normative field, the following stand out: Ordinance nº 188, of February 3, 2020, of the Minister of State for Health (*Portaria nº 188, de 03 de fevereiro de 2020, do Ministro de Estado da Saúde*), which determined the declaration of Public Health Emergency of National Importance (*Emergência em Saúde Pública de Importância Nacional – ESPI*) and, mainly, Law nº 13.979/2020 (BRASIL, 2020b), published on February 6, 2020 and regulated by Decree nº 10.282, of March 20, 2020 (BRASIL, 2020a), which defined public services and essential activities, for the purpose of safeguarding the survival, health and safety of the population affected by the law's measures.

On March 20, 2020, the federal Executive Power published Provisional Measure nº 926 (*Medida Provisória nº 926*) (BRASIL, 2020c) establishing that the federal government, through

the President of the Republic, would be competent to decide on limitation of locomotion and definition of essential activities, changing part of the aforementioned law, including paragraphs 8 and 9 of art. 3º, as highlighted below:

> Art. 3º. To deal with the public health emergency of international importance resulting from the coronavirus, the authorities may adopt, within the scope of their competences, among others, the following measures: (Wording given by Provisional Measure nº 926, of 2020)
>
> § 8º The measures provided for in this article, when adopted, shall safeguard the exercise and functioning of public services and essential activities. (Included by Provisional Measure nº 926, of 2020)
>
> § 9º The President of the Republic will provide, by decree, on the public services and essential activities referred to in § 8º. (Included by Provisional Measure nº 926, of 2020)
>
> (*"Art. 3º. Para enfrentamento da emergência de saúde pública de importância internacional decorrente do coronavírus, as autoridades poderão adotar, no âmbito de suas competências, dentre outras, as seguintes medidas: (Redação dada pela Medida Provisória nº 926, de 2020)*
>
> *§ 8º. As medidas previstas neste artigo, quando adotadas, deverão resguardar o exercício e o funcionamento de serviços públicos e atividades essenciais. (Incluído pela Medida Provisória nº 926, de 2020)*
>
> *§ 9º. O Presidente da República disporá, mediante decreto, sobre os serviços públicos e atividades essenciais a que se referem o § 8º. (Incluído pela Medida Provisória nº 926, de 2020)"*)

Due to this amendment to Law nº 13.979/2020 by MP nº 926/2020, the Democratic Labor Party (Partido Democrático Trabalhista – PDT) proposed ADI 6341 (BRASIL, 2020e) with a request for a precautionary measure *ad referendum* from the Plenary, and the measure was granted by the rapporteur Minister Marco Aurélio Melo, who set the understanding that States and Municipalities have autonomy to face the pandemic and that the best interpretation of the law would be in the sense that all federated entities, within the limits of their attributions, could take measures to combat COVID-19. Let us see the content of the Minister's report:

> HEALTH; CRISIS; CORONAVIRUS; PROVISIONAL MEASURE; PROVIDENCES; COMPETITIVE LEGITIMATION. The following requirements are met the urgency and necessity, in what provisional measure provides for measures in the field of national public health, without prejudice to the concurrent legitimation of the States, the Federal District and the Municipalities. () 2. Although the request for an urgent measure is aimed at the immediate disallowance of the contested precepts, it's necessary, at the current stage, while the process isn't ready, to assess only the pertinence, or not, of suspending the effectiveness of the devices. The head of article 3º signals, most of all, the experienced court, when referring to the confrontation of the public health emergency, of international importance, resulting from the coronavirus. More than that, it reveals the endorsement of acts by authorities, within the scope of their respective competences, aiming at isolation, quarantine, exceptional and temporary restriction, according to technical and reasoned recommendation of the National Health Surveillance Agency, by roads, ports or airports of entry and exit from the country, as well as interstate and intercity transportation. The contested provisions follow. § 8º deals with the preservation of the exercise and functioning of public services and essential

activities. The § 9º attributes to the President of the Republic, by means of a decree, the definition of the services and activities that are eligible. § 10 provides that measures may only be adopted in a specific act, in conjunction with the regulatory body or the granting or authorizing power. Finally, § 11 prohibits restrictions on the movement of workers that may affect the functioning of public services and essential activities. It can be seen that the provisional measure, in view of the urgency and need for discipline, was issued with the purpose of mitigating the international crisis that reached Brazil, even though, according to some technicians, it's still embryonic. There must be a vision aimed at the collective, that is, public health, showing interest in all citizens. The article 3º, head, refers to the attributions, of the authorities, regarding the measures to be implemented. You cannot see a violation of the Federal Constitution. The measures do not exclude acts to be performed by the State, the Federal District and the Municipality considered the concurrent competence in the form of article 23, item II, of the Major Law. It also doesn't avenge the pleading regarding the reserve of complementary law. It is not up to the optics without a sense of the theme to be able to be the object of approach and discipline only by means of a larger law. Given the urgency and the need for general discipline of national scope, it must be concluded that, in due time and manner, the President of the Republic, Jair Bolsonaro, **acted in editing a Provisional Measure. What is contained therein, repeat to exhaustion, doesn't remove concurrent competence, in terms of health, from States and Municipalities. What is desired appears, under the cautionary angle, in item a.2 of the initial piece, based on the field, it must be recognized, simply formal, that the discipline resulting from Provisional Measure nº 926/2020, in what it printed new wording to article 3º of Federal Law nº 9.868/1999, doesn't preclude the taking of normative and administrative measures by States, the Federal District and Municipalities. 3. In part, I grant the cautionary measure to make the concurrent competence explicit, in the pedagogical field and in the diction of the Supreme Court.** 4. This cautionary measure is submitted, as soon as the existing critical phase is supplanted and designated Session, to the sieve of the face-to-face Plenary. (Our emphasis. Rapporteur Minister Marco Aurélio Melo [ADI 6341, Rapporteur Minister Marco Aurélio Melo]).

(*SAÚDE CRISE CORONAVÍRUS MEDIDA PROVISÓRIA PROVIDÊNCIAS LEGITIMAÇÃO CONCORRENTE. Surgem atendidos os requisitos de urgência e necessidade, no que medida provisória dispõe sobre providências no campo da saúde pública nacional, sem prejuízo da legitimação concorrente dos Estados, do Distrito Federal e dos Municípios. () 2. Embora o pedido de medida de urgência esteja direcionado à imediata glosa dos preceitos impugnados, cumpre, na fase atual, enquanto não aparelhado o processo, aferir tão somente a pertinência, ou não, de suspensão da eficácia dos dispositivos. A cabeça do artigo 3º sinaliza, a mais não poder, a quadra vivenciada, ao referir-se ao enfrentamento da emergência de saúde pública, de importância internacional, decorrente do coronavírus. Mais do que isso, revela o endosso a atos de autoridades, no âmbito das respectivas competências, visando o isolamento, a quarentena, a restrição excepcional e temporária, conforme recomendação técnica e fundamentada da Agência Nacional de Vigilância Sanitária, por rodovias, portos ou aeroportos de entrada e saída do País, bem como locomoção interestadual e intermunicipal. Seguem-se os dispositivos impugnados. O § 8º versa a preservação do exercício e funcionamento dos serviços públicos e atividades essenciais. O § 9º atribui ao Presidente da República, mediante decreto, a definição dos serviços e atividades*

> *enquadráveis. Já o § 10 prevê que somente poderão ser adotadas as medidas em ato específico, em articulação prévia com o órgão regulador ou o poder concedente ou autorizador. Por último, o § 11 veda restrição à circulação de trabalhadores que possa afetar o funcionamento de serviços púbicos e atividades essenciais. Vê-se que a medida provisória, ante quadro revelador de urgência e necessidade de disciplina, foi editada com a finalidade de mitigar-se a crise internacional que chegou ao Brasil, muito embora no território brasileiro ainda esteja, segundo alguns técnicos, embrionária. Há de ter-se a visão voltada ao coletivo, ou seja, à saúde pública, mostrando-se interessados todos os cidadãos. O artigo 3º, cabeça, remete às atribuições, das autoridades, quanto às medidas a serem implementadas. Não se pode ver transgressão a preceito da Constituição Federal. As providências não afastam atos a serem praticados por Estado, o Distrito Federal e Município considerada a competência concorrente na forma do artigo 23, inciso II, da Lei Maior. Também não vinga o articulado quanto à reserva de lei complementar. Descabe a óptica no sentido de o tema somente poder ser objeto de abordagem e disciplina mediante lei de envergadura maior. Presentes urgência e necessidade de ter-se disciplina geral de abrangência nacional, há de concluir-se que, a tempo e modo, atuou o Presidente da República Jair Bolsonaro* ***ao editar a Medida Provisória. O que nela se contém repita-se à exaustão não afasta a competência concorrente, em termos de saúde, dos Estados e Municípios. Surge acolhível o que pretendido, sob o ângulo acautelador, no item a.2 da peça inicial, assentando-se, no campo, há de ser reconhecido, simplesmente formal, que a disciplina decorrente da Medida Provisória nº 926/2020, no que imprimiu nova redação ao artigo 3º da Lei federal nº 9.868/1999, não afasta a tomada de providências normativas e administrativas pelos Estados, Distrito Federal e Municípios. 3. Defiro, em parte, a medida acauteladora, para tornar explícita, no campo pedagógico e na dicção do Supremo, a competência concorrente****. 4. Esta medida acauteladora fica submetida, tão logo seja suplantada a fase crítica ora existente e designada Sessão, ao crivo do Plenário presencial*. (Grifo nosso. Relator Ministro Marco Aurélio Melo [ADI 6341, Relator Ministro Marco Aurélio Melo]).

As noted, the minister deferred, preliminarily, in part the PDT's request for unconstitutionality of *MP 926/2020* (BRASIL, 2020c), which restricted the to federal government to determine what essential services are and to limit circulation interstate and intercity people and goods. In filing the lawsuit, the PDT pointed out the unconstitutionality in several sections, as it centralized in the Union the competence to take care of health, direct the Unified Health System (SUS) and carry out health and epidemiological surveillance actions, trying to empty the responsibility and the competence of states and municipalities.

The plenary session of the *STF* (*sessão plenária do STF*) to deal with ADI 6341 (BRASIL, 2020e) was held on April 15, 2020, and was marked by having been the first, entirely, by videoconference. In it, the ministers maintained the same basic idea of the precautionary decision of Minister Marco Aurélio Mello and gave an appropriate interpretation to determine that the President of the Republic, in the definition of essential services, safeguarded the regional interest of the state and locality of the municipality, under penalty of being emptied these autonomies, *in verbis*:

> The Court, by majority, endorsed the precautionary measure granted by Minister Marco Aurélio (Rapporteur), **plus interpretation according to the Constitution to § 9º of art. 3º of Law nº 13.979, in order to explain that, preserving the attribution of each sphere of government, under the terms of item I of**

> **art. 198 of the Constitution, the President of the Republic may dispose, by decree, on public services and essential activities**, expired, in this point, the Reporting Minister and the Minister Dias Toffoli (President), and, in part, as to the interpretation according to the letter b of item VI of art. 3º, Ministers Alexandre de Moraes and Luiz Fux. Minister Edson Fachin will write the judgment. Plenary, 15/04/2020 (Session held entirely by videoconference - Resolution 672/2020/STF). (Our emphasis)
>
> (*O Tribunal, por maioria, referendou a medida cautelar deferida pelo Ministro Marco Aurélio (Relator),* ***acrescida de interpretação conforme à Constituição ao § 9º do art. 3º da Lei nº 13.979, a fim de explicitar que, preservada a atribuição de cada esfera de governo, nos termos do inciso I do art. 198 da Constituição, o Presidente da República poderá dispor, mediante decreto, sobre os serviços públicos e atividades essenciais****, vencidos, neste ponto, o Ministro Relator e o Ministro Dias Toffoli (Presidente), e, em parte, quanto à interpretação conforme à letra b do inciso VI do art. 3º, os Ministros Alexandre de Moraes e Luiz Fux. Redigirá o acórdão o Ministro Edson Fachin. Plenário, 15.04.2020 (Sessão realizada inteiramente por videoconferência - Resolução 672/2020/STF). Grifo nosso*)

The unanimous decision endorsed the preliminary injunction, and its interpretation that there is no provision in the rule that in fact directs the exclusive competence to the Union to adopt measures on pandemic issues. It was understood that the measures adopted by the Federal Government don't prevent other entities of the federation from acting normatively and administratively within the scope of their common federative competence, in all observance of the fundamental social right to health, "whose access must be universal, equal and free, configuring the duty of the State and the right of all citizens, it causes the reconfiguration of public health in order to guarantee the provision of goods, utilities and services necessary for its enjoyment" (*"cujo acesso deve ser universal, igualitário e gratuito, configurando dever do Estado e direito de todos os cidadãos, ocasiona a reconfiguração da saúde pública de forma a garantir a prestação de bens, utilidades e serviços necessários à sua fruição"*) (COSTA. 2017, p. 850).

Some practical questions emerge from the decision endorsed by the plenary of the STF, reflections that will be pointed out here only to foster future debates, since the core of this article is to analyze the reflection of this decision for brazilian cooperative federalism. The first is about the limits of autonomy of states and municipalities so that arbitrariness isn't committed; what are these limits? Secondly, would restrictive orders from states and municipalities require a technical guarantee from the federal level, such as from the Ministry of Health (*Ministério da Saúde*) or the National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária – ANVISA*)? Or is the technical analysis of your health organs sufficient? Finally, in case of conflict between state and municipal decrees, which one should prevail?

Despite these questions, it's noted that the decision of the STF plenary that endorsed the precautionary measure of Minister Marco Aurélio, maintained the jurisprudence established by the court in ADI 3937 of 2008 (BRASIL, 2008), although in a generic way, and less in terms of defense and health protection. The decisions reinforced the division of vertical competence in the concurrent modality based on the autonomy among the federated entities, the reaffirmation of the absence of hierarchy between them and the prevalence of interest for the purpose of validating the idea of cooperative federalism, under the aegis of CF/1988 (BRASIL,

1988), and, above all, to ensure the proper functioning of the Democratic State of Law, which carries with it the duty to observe and implement fundamental rights, essential to protect human dignity (GERVASONI; GERVASONI, 2004).

4. FINAL CONSIDERATIONS

The analysis of the positioning of the Supreme Federal Court (*Supremo Tribunal Federal – STF*) in decisions on concurrent legislative competence, defined in art. 24, XII, of the *Brazilian Constitution of 1988* (BRASIL, 1988), showed that the jurisprudence is in the case of the trial of ADI 3937 (BRASIL, 2008), in 2017, and of ADI 6341 (BRASIL, 2020e), in 2020, the which were called periods of normality and periods of crisis, respectively, responding positively to the problem proposed in the present research regarding the Court's interpretation of health protection and defense.

It should be noted, however, that although the decision made by the STF in ADI 6341 (BRASIL, 2020) was generic, it remains clear that the autonomy of states and municipalities doesn't grant them the power to commit arbitrariness, especially when their actions may affect country's interests, such as, for example, in the case of road closures that may cause a crisis in national supply.

An issue that has not yet been decided or analyzed to obtain a dictum in this case by the *STF* is what should prevail in the event of disagreements between a state decree, which, for example, determines quarantine, and a municipal decree that relaxes it locally. However, by the interpretation given in the referendum of the precautionary measure it can be understood that, in these cases, the local interest of the municipalities will prevail.

Therefore, the *STF* reinforces in its decision the vertical division of competence, respecting the autonomy of states and municipalities and safeguarding the Union's competence to legislate only over general rules within the scope of concurrent competence, and it should also be understood that, within the scope of national interests of the Union, regional of the States and local of the municipalities, the notion of cooperative federalism is necessary for the effective confrontation with COVID-19 and other crises of this nature that may come to affect the structures of the brazilian federation.

In summary, the joint action of the federated entities, based on the balanced predominance of their interests, be it in times of normality but, mainly, in times of crisis such as that which occurred in the health system in all spheres of power resulting from the COVID pandemic of 2019, it's a necessary path, according to the *STF*, which reaffirmed its concurrent constitutional competences to legislate on the subject, so that this crisis is overcome with effectiveness and efficiency, maintaining the idea of cooperative and solidary federalism enshrined in the Federal Constitution of 1988.

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CONSUMER OVER-INDEBTENESS IN PANDEMIA: ANALYSIS OF THE DRAFT SENATE LAW ON THE LIMITATION OF INTEREST ON CREDIT CARDS AND OVERDRAFT IN PANDEMIA

SUPERENDIVIDAMENTO DO CONSUMIDOR NA PANDEMIA: ANÁLISE CRÍTICA DO PROJETO DE LEI DO SENADO SOBRE A LIMITAÇÃO DE JUROS DO CARTÃO DE CRÉDITO E CHEQUE ESPECIAL

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ABSTRACT

The purpose of this article is to analyze Bill nº 1,166/20, which provides for the limitation of interest on credit cards and overdraft to mitigate financial impacts during the pandemic, analyzing the material aspects of the proposal and the right compared. As a research problem, it is asked whether the referred bill has efficient mechanisms to face the highly complex situation, capable of mitigating over-indebtedness in Brazil, especially in the context of the economy of the most vulnerable families, considerably exposed in the context of the the COVID-19 pandemic. The research methodology adopted was documentary and bibliographic, through the analysis of specialized documents, consisting of books and scientific works. In the result, the importance of financial education combined with positive stimuli as an instrument for reducing consumer over-indebtedness in Brazil will be highlighted.

Keywords: Credit card. Overdraft. Pandemic. Over-indebtedness. Senate Bill.

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RESUMO

O presente artigo tem por objetivo analisar o Projeto de Lei n° 1.166/20, que prevê a limitação dos juros de cartões de crédito e cheque especial para atenuar os impactos financeiros durante a pandemia, analisados os aspectos materiais da proposta e o direito comparado. Como problema de pesquisa, indaga-se se o referido projeto dispõe de mecanismos eficientes para o enfrentamento do quadro de elevada complexidade, capazes de mitigar o superendividamento no Brasil, sobretudo no âmbito da economia das famílias mais vulneráveis, consideravelmente expostas no contexto da pandemia da COVID-19. A metodologia de pesquisa adotada foi documental e bibliográfica, mediante a análise de documentos especializados, constituída por livros e trabalhos científicos. No resultado, será destacada a importância da educação financeira aliada a estímulos positivos como instrumento para a redução do superendividamento do consumidor no Brasil.

Palavras-chave: *Cartão de Crédito. Cheque Especial. Pandemia. Projeto de Lei do Senado. Superendividamento.*

1. INTRODUCTION

With the access to easy credit brought by several payment alternatives and the control of information, it is noted that, regardless of the interest rates applied, it is usual to use credit in its exceptions, modalities for payment of expenses.

This easy access to credit brought benefits so that the quality of life could be improved. However, there was an increase in the interest rate to compensate the assignor for the value of the capital made available to the consumer.

When a contracted obligation fails to be honored in due time, a vicious circle of consumer debt is created. In Brazil, this is reinforced by the perception of the absence of guidance and financial education. This scenario, coupled with exacerbated consumerism, increasingly attentive to "having", represents one of the strongest reasons for there to be more than 67.4% of indebted families (ROUBICEK, 2020).

In view of this, the Executive Branch, on June 9, 2020, to implement the financial education policy, issued Decree No. 10,393, which instituted the new National Strategy for Financial Education - ENEF and the Brazilian Forum on Financial Education - FBEF, for promote financial, insurance, social security and tax education in the country (BRASIL, 2020).

The ease of obtaining credit, mainly through the credit card and the special check, made the debt curve to show an upward trend in the last few years (BRASIL, 2020). In the specific case of the credit card, the possibility of having a benefit without the immediate disbursement for payment in cash makes it possible for the consumer to take advantage of this modality, in many cases, without due planning and sustainability in the income, that is, an expense not designed, but realized.

According to the National Confederation of Trade in Goods, Services and Tourism (CNC), there were consecutive increases in indebtedness of Brazilian families in 2019, ended with the highest index since 2013 (NATIONAL CONFEDERATION OF TRADE IN GOODS, SERVICES AND TOURISM, 2020).

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It is believed that the high indebtedness scenario may worsen due to the measures to confront COVID-19 taken by the Government in Brazil (BRASIL, 2020). This is because the search for credit was the solution found in this new context, in an attempt to meet essential demands, such as rent, electricity, water, food, among others, a situation aggravated by the inadequate financial management of Brazilian families.

The default of credit obligations in terms of high interest rates raises the level of indebtedness and creates a worrying situation. The interest rates of overdraft and credit card in Brazil are one of the highest in the world, giving rise to necessary measures to mitigate, especially in such an exceptional period, such as that of a pandemic.

The purpose of this article is to analyze Law No. 1,166 of 2020 (BRAZIL, 2020), authored by Senator Álvaro Dias (Pode), from Paraná, which provides for the limitation of interest rates for credit cards and overdrafts, as a way to mitigate the negative impacts arising from the COVID-19 pandemic.

As a research problem, it is asked whether the referred Law has efficient mechanisms to face the highly complex situation, capable of mitigating over-indebtedness in Brazil, especially in the context of the economy of the most vulnerable families, considerably exposed in the context of the COVID-19 pandemic.

The research methodology adopted was documentary and bibliographic, through the analysis of specialized documents, consisting of books and scientific works.

2. FINANCIAL EDUCATION AND THE PANORAMA OF OVER INDEBTEDNESS IN BRAZIL IN THE LAST DECADE

Behavioral economics points out that, unlike the view of traditional economics, people decide based on habits, personal experiences and simplified rules of thumb. They accept only satisfactory solutions, seek speed, have difficulty balancing short and long-term interests and are heavily influenced by emotional factors, including the behavior of other individuals (ÁVILA; BIANCHI, 2020).

Financial education, as proposed by the government, through Decree nº 10.393, of 2020, combined with positive stimuli, as recommended by Richard H. Thaler and Cass Sunstein in the metaphorical figure of the "architect of choices" (THALER; SUNTEIN, 2020), can represent the reorientation and improvement of domestic choices and financial management, with the ability to mitigate the situation of over-indebtedness.

Thaler and Sunstein consider that individuals and institutions, through conscious and invisible stimuli and with a minimum of political and economic cost, can achieve great achievements in relation to finance, public health and equality. For them, business agents, governments, parents, teachers and doctors can become "architects of choices" (THALER; SUNSTEIN, 2020) [4].

4 Nudge it is a concept of behavioral science, political theory and economics, which proposes positive stimulus and indirect suggestions as a way to influence the behavior and decision making of groups or individuals. This incentive contrasts with other ways of achieving compliance, such as education, legislation or enforcement.

Advances in the various aspects of the field of economic-behavioral study occur at an accelerated rate and its wide use in several thematic areas, from academia to the public and private sector, reinforce the importance of incorporating and consolidating insights from behavioral economics in the face of the premises traditional economics (RIBEIRO; DOMINGUES, 2018).

Credit is an extra source of funds, coming from third parties, represented by banks, finance companies, credit unions, among others, which brings the opportunity to purchase goods or contract services in advance. This allows individuals or companies to supplement their income to buy something they want.

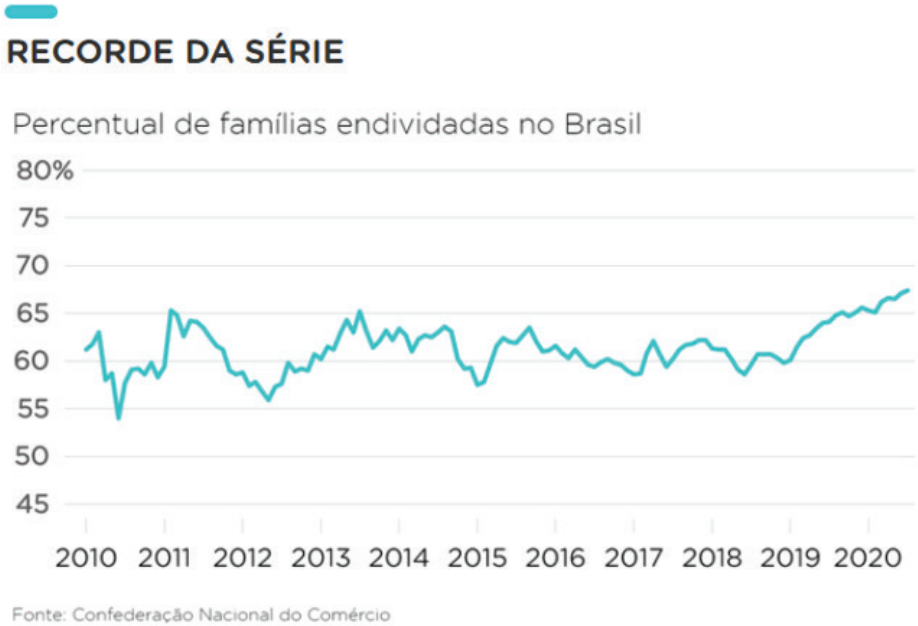
The spread of easy credit to the population, as well as the increase in other forms of payment, is making Brazilian society increasingly conducive to consumption. Another factor that increases the degree of indebtedness of the Brazilian family is the absence of a culture of financial education and the lack of monitoring of the application of financial resources in the long term.

The ease in obtaining credit in Brazil, reinforced by this lack of financial education, makes credit a problem instead of a solution, since interest, when not considered, ends up creating an overload in the fulfillment of the negotiated obligation. This often leads the consumer to look for a new credit as a form of payment for the previous one, thus creating the figure of over-indebtedness (FANECO, 2016).

This reality has generated a significant increase in household indebtedness, according to a survey carried out by the National Confederation of Trade in Goods, Services and Tourism (NATIONAL CONFEDERATION OF TRADE IN GOODS, SERVICES AND TOURISM, 2020).

According to a Consumer Debt and Default Survey (PEIC) conducted in July 2020, the number of Brazilian families with debts reached 67.4%, reaching the highest percentage index since 2010.

Gráfico 1



Fonte: Roubicek, 2020.

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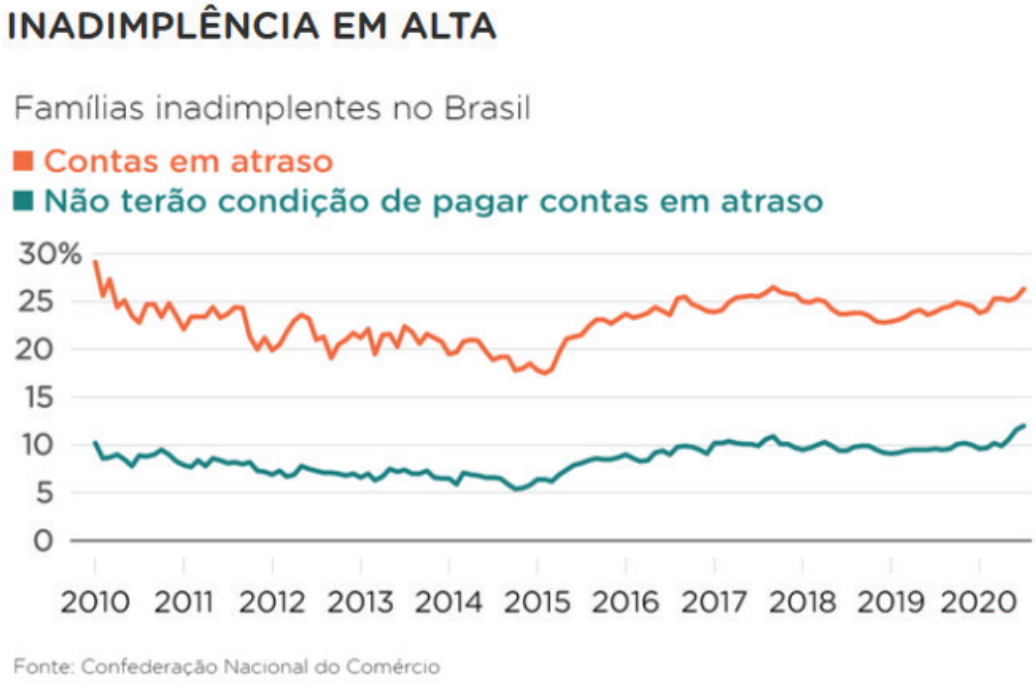
In February 2020, the same survey indicated a level of indebtedness of 65.1% (sixty-five point one percent) of households. It is believed that with the scenario that has been established since March 2020 in Brazil, due to the COVID-19 pandemic, this rate may increase even more in the coming months.

It is worth mentioning that debts have different origins, such as: credit card, overdraft, store booklets, housing installments, installments of movable assets, among others.

Another data of great significance and that the research of the CNC presents is the increase in defaults in 2020. Although it is not considered the highest index in history, since the research began, it shows an upward trend. At a given moment, the families' responses also indicate that 12% (twelve percent) of them have overdue accounts and will not be able to honor their commitments.

Gráfico 2

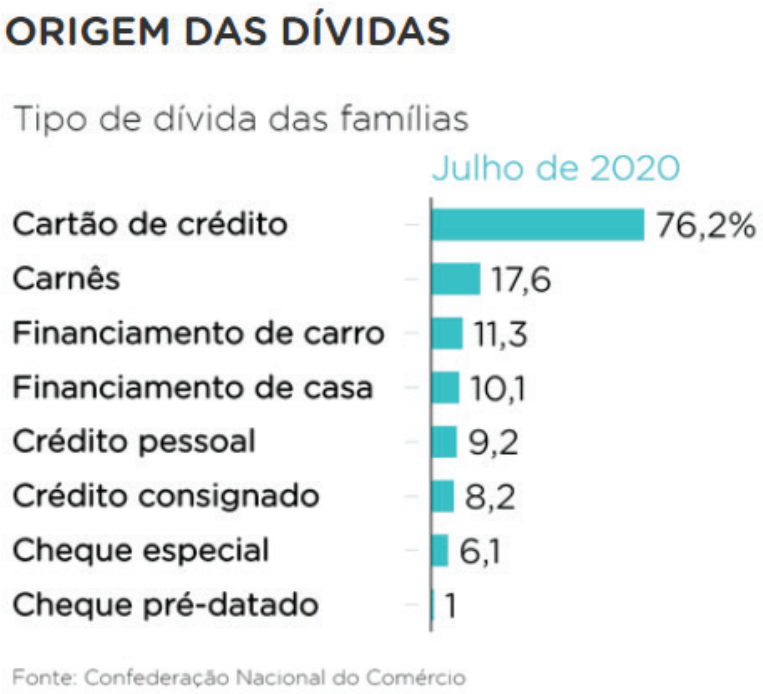


Fonte: Roubicek, 2020.

Among the various debt models, the most significant one raised in the survey was related to the credit card, which stood out with 76.2% (seventy-six point two percent). Followed by debts contracted in payment and car financing.

The modality of debt by credit card is a cause for concern, as interest rates are very high, reaching rates above 250% (two hundred and fifty percent) per year.

Gráfico 3

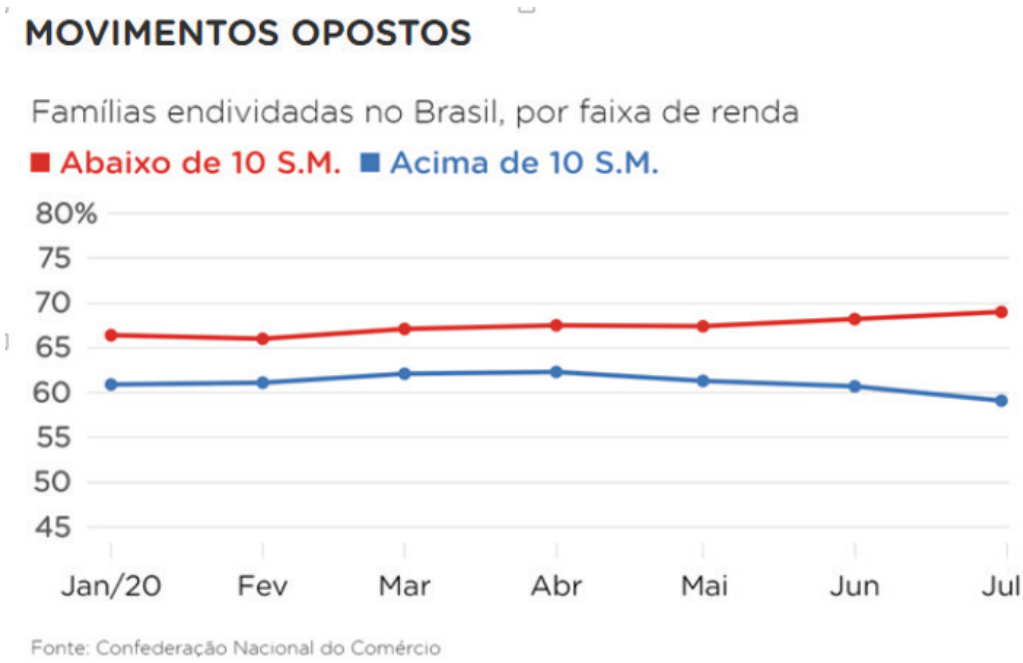


Fonte: Roubicek, 2020.

The research carried out by CNC also considered, in the data analysis, families with receipts of up to 10 (ten) minimum wages and those who perceived above this level.

In the analysis for the month of July 2020, a scenario of contrast was observed between the two ranges of families surveyed. The families that received above the ceiling of 10 (ten) minimum wages and still in the full situation of the pandemic, showed a tendency to fall in debt during the survey. However, there was an opposite movement in the range of families that received up to 10 (ten) minimum wages where an increase in indebtedness was noted.

Gráfico 4



Fonte: Roubicek, 2020.

This is corroborated by the indication that families with income below 10 (ten) minimum wages have credit cards as their main source of debt, which corresponds to 78.5% (seventy-eight point five percent) of the total. This high degree of indebtedness generates negative impacts on the economy of society, with negative repercussions on the dignity of these people.

3. THE PANDEMIC FOR COVID - 19

The human being is facing a different reality from the past centuries. Globalization is a phenomenon that has changed behavior, whether in society or in the economy. Distances have been shortened and technology, as well as development, has brought people from different countries together.

This shortening of distances is a source of benefits, but it is also a reality that brings concern, as diseases of fast spread such as diseases of viral origin, such as MERS (Middle East Respiratory Syndrome - Middle East Respiratory Syndrome and Severe Acute Respiratory Syndrome) and SARS brings a situation of difficult control in this globalized scenario (PAN AMERICAN HEALTH ORGANIZATION, 2020).

In 2019, one of these viral diseases appeared in China, whose characteristic was the ease of contagion, resistance of the virus in the environment and long incubation time (SANARMED, 2020). At the beginning of the year 2020, there were already reports of incidence of COVID-19 in practically all countries. This made the World Health Organization on January 30, 2020, COVID-19 was declared a state of emergency of international concern, and then, on March 11, 2020, it was designated as a pandemic (FUNDAÇÃO OSWALDO CRUZ, 2020).

The concept of pandemic is used when an epidemic, which is a disease that has its dissemination restricted to a limited space, ends up spreading over several continents reaching large proportions and its contagion is sustained from person to person (FUNDAÇÃO OSWALDO CRUZ, 2020) .

The Corona Virus (CoV) term is the name given to a viral family that has a crown-shaped structure. This group of viruses are zoonotic, as their transmission occurs from animals to people. Such viruses can cause mild and moderate respiratory diseases, with symptoms very similar to the common flu (SANAMED, 2020).

Some strains of Corona Virus can cause severe respiratory syndromes that are commonly called SARS (severe acute respiratory syndrome). With human reports made in China in 2002 (SANAMED, 2020). According to the Ministry of Health (2020), COVID-19 is a disease caused by the Corona Virus, called SARS-CoV-2, whose clinical range varies from asymptomatic infections to severe conditions.

The Legislative Branch, through the Legislative Decree of March 20, 2020, recognized the state of public calamity required by the Executive Branch and on February 6, Law No. 3,160 of 2020 was approved, providing for the amendment of Law No. 13,979 establishing the rules for

dealing with this confrontation, including measures such as isolation and quarantine (BRASIL, 2020).

4. THE SCENERY BROUGHT BY COVID 19 AND THE DRAFT LAW 1,166 OF 2020

The world is experiencing an exceptional moment since the COVID-19 pandemic. As previously analyzed, the level of indebtedness of Brazilian families was already increasing and consumers were at the mercy of seeking quick credit to honor their obligations. This type of credit has a positive aspect, which is the credit or financing made automatically and another negative aspect, which is high interest.

The Executive Branch at all levels of government has taken measures to deal with this calamity so that it has the least possible impact on the health and life conditions of Brazilians. In economic terms, the consequences of the pandemic were also significant.

It is expected that during the crisis and after that, most consumers will not be able to pay the entire credit card looking for revolving credit and overdraft for an option to honor their obligations (APPROVED ..., 2020).

The Brazilian legal system was contextualized in a different scenario before the pandemic crisis. This made the Legislative Power feel pressured in the search to update the country's legislation for this moment. Currently, there are laws passing both in the Senate and in the Chamber of Deputies, among which we can mention Law 1.166 / 2020, which deals with a variable of great impact on people's indebtedness.

This is a Bill designed by Senator Álvaro Dias, which proposes in its original wording an interest rate of 20% (twenty percent) per year for all types of credit offered through credit cards and overdraft between the months of March 2020 to July 2021, whose supervision will be the responsibility of the Central Bank and the breach of the ceiling, will constitute a crime of usury. (BRASIL, 2020).

The senator explained that his proposal is based on the fact that during the crisis the loss of income motivated, either by the change in the labor legislation or by unemployment, will cause a significant part of the population to search the credit card or overdraft for complement to finance essential expenses.

The author pointed out that a rate of 20% (twenty percent) per year is satisfactory and sufficient to remunerate credit institutions in this period of crisis. In order not to run the risk of an institution reducing the credit limit, exceptionally during this period, it will not be allowed to reduce the limit in the special verification and credit card modalities.

The text approved in August 2020, in the Senate, brought the limit of 30% (thirty percent) per year (in the case of fintechs[5], the limit was 35%), prohibiting the collection of fines and interest due to late payment. the provision of products and services and in bank credit opera-

5 The word fintech is an abbreviation for financial technology. It refers to startups or companies that develop fully digital financial products, in which the use of technology is the main differential in relation to traditional companies in the sector.

tions, even on credit cards. It was also predicted that the ban on charging interest will retroact to March 20, 2020.

According to article 2 of the substitute, the Law's objective is to prevent over-indebtedness. Thus, it will not be valid for those who assume debts using fraud or bad faith. It happens that there is a delay in its processing in the Chamber of Deputies associated with the signaling of the current president of the house, Deputy Rodrigo Maia, that he should not vote on a proposal, because he considers the Legislative's interference in the financial market (CHRISTIAN, 2020).

According to João Pedro Porto, interventionism is government interference in the market, be it in prices, interest rates and profits (PORTO, 2019). This occurred in the historical period of the military dictatorship, when interest rates were limited to all areas of the economy, causing disastrous effects, such as the decrease in credit granting and the increase in other financial products (ZANONI; IGNÁCIO; BARROS; LIMA; SOUTO; SILVA, 2018).

The law contradicts the understanding of directors and the president of the Central Bank, that the ideal, at this moment, would be to maintain bank contracts as they are, avoiding the limitation of existing rules and contractual breaches (GARCIA, 2020).

FEBRABAM (Brazilian Federation of Banks) supported the need to reduce the cost of credit, but in its understanding, the tabulation, instead of promoting financial relief, may aggravate the crisis, distorting the formation of prices, creating bottlenecks and creating legal insecurity .

If the law is approved, even if it is late, this may imply new issues, such as the judicialization of contracts and the fall in the supply of credit, with the double victimization of the most economically vulnerable strata in the country.

5. THE FOREIGN EXPERIENCE

Interest is the remuneration on the assigned capital, which is calculated according to the total loan amount, the time of the loan and a fee. It is the income that the owner of the capital obtains on the amount he lent (VASCONCELOS, 2019).

The fees charged by the assignor can be fixed or variable, in the first case referring to an unchanged amount, and in the second case, they are a combination of indexing with a margin or spread (VASCONCELOS, 2019).

The imposition of interest rate limits does not depend specifically on the countries' domestic legislation. Regarding maximum rates, they can be rigid or variable. In the maximum rigid rates, a percentage is determined, and in the case of the variables, a reference index is used, which is subject to variation.

The fixation of a limit rate for interest on consumer credit is made in approximately 76 (seventy-six) countries, as shown in a study by the World Bank and quoted by the Central Bank (LIMITE, 2019). Of these 76 (seventy-six) countries, 24 (twenty-four) adopt a single roof platform that is applied at all interest rates practiced in their markets. The rest, 32 (thirty-

two) countries, work with ceilings relative, where there are varied indices by types of credits, amounts borrowed, or maturity (LIMITE, 2019).

In most countries, the interest limit was introduced via legislation, where 28 (twenty-eight) establish the so-called "Usury Law", and in 24 (twenty-four) there are specific interest rate laws. Only in nine countries have these limits been introduced into the financial system by normative acts by the Executive Branch, such as the overdraft created by a resolution of the National Monetary Council (LIMITE, 2019).

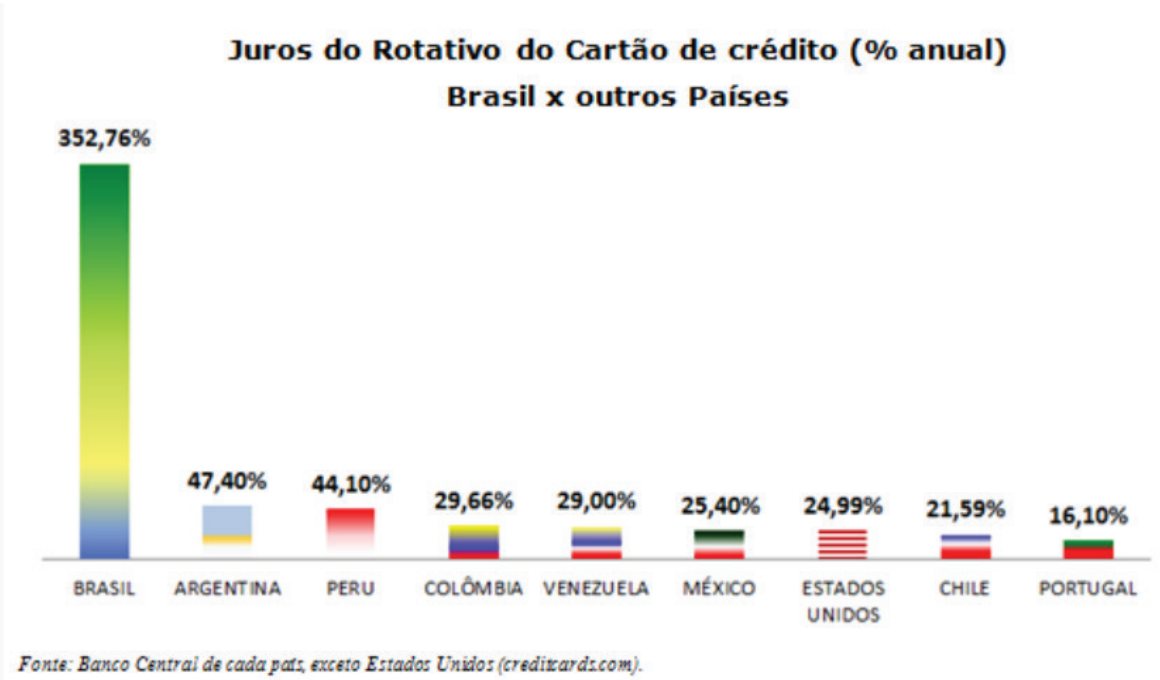
Through a comparison between the overdraft interest rate between Brazil and other countries, we can see the discrepancy in the cost between them, even if compared to the new measure adopted by the National Monetary Council on November 27, 2019 that limited to 8% (eight percent) per month the overdraft rate (GOMES, 2020).

In the case of Brazil, the annual interest rate on overdraft reached until 2019 at up to 305% (three hundred and five percent), and as of January 2020 it was limited to 151% (one hundred and fifty-one percent). In Canada, this rate ranges from 19% (nineteen percent) to 22% (twenty-two percent). Portugal 15.7% (fifteen point seven percent). France 13.81% (thirteen point eighty-one percent). Spain 7.5% (seven point five percent). Which demonstrates that the cost of obligations for Brazilian consumers is about 10 times the cost that the Portuguese have to bear in the same type of credit or when compared with the Spanish, 20 (twenty) times (GOMES, 2020).

In the most used form of credit by the Brazilian family, which is the credit card, the consumer pays very high interest rates. If there is a need to finance credit card obligations through a method called revolving, this interest could reach up to more than 350% (three hundred and fifty percent) in 2019 (O BRASILEIRO ..., 2017).

The interest on the revolving account is paid when the consumer chooses not to pay the total bill on the card, so he automatically acquires a credit with the financial institution.

Gráfico 5



Fonte: Roubicek, 2020.

When comparing the average rate applied to revolving credit in Brazil with other countries, it is possible to see the great difference between them. In the case of Portugal, which is one of the highest rates in Europe, it has a maximum interest of 16.1% (sixteen point one percent). In the United States, the rate of consumers who opt for revolving credit reaches a maximum of 24.99% (twenty-four point ninety-nine percent).

5 CONCLUSION

This article analyzed Law No. 1,166, by Senator Álvaro Dias, already approved in the first round by the Federal Senate (BRASIL, 2020). Through it, it was possible to analyze the severity of the effects of indebtedness on people's lives, especially during the pandemic.

COVID-19 emerged in a scenario of high indebtedness, when the government adopted measures to deal with the state of public calamity that was installed. Credit started to be used for basic demands, such as rent, electricity, water and food, essential needs of people's daily lives.

Although the project foresees mechanisms that, apparently, seem adequate to mitigate the situation of Brazilian over-indebtedness, the delay in its processing may imply new issues, such as the judicialization of contracts, the drop in the credit supply, with the double victimization of the economically most vulnerable, creating legal uncertainty.

Furthermore, state interference, as suggested in the project, could set precedents for greater state intervention in the economy, as happened during the military dictatorship, with catastrophic results.

It is necessary to implement a culture of financial education in the country, combined with positive stimulation, that is, through conscious stimuli, invisible and with minimal political and economic cost. With this, great achievements can be made in relation to finance and, in particular, mitigating people's over-indebtedness.

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COMPLIANCE AS A TOOL TO FIGHT CARTRIDGE CREATION IN PUBLIC BIDDING AND CORRUPTION

O *COMPLIANCE* COMO FERRAMENTA DE COMBATE À CRIAÇÃO DE CARTÉIS EM LICITAÇÕES PÚBLICAS E CORRUPÇÃO

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ABSTRACT

The present article aims to weave a critical analysis about the performance of cartels in bids in Brazil, when associated with corruption and political-governmental collusions, under the prism of what was elucidated from the Police Operation called "Jaleco Branco"It happened in the State of Bahia, in 2007, which found the illicit, practiced by private companies, associated with public agents. Through the case study and literature review, using the deductive-inductive method, it is intended to analyze the formation of cartels in the scope of bids in the national field, as well as the negative consequences of such an institute and the country's panorama to combat anti-competitive practices, as well as corruption, pointing out Compliance as a prevention tool to be used, including by the *Public* Administration.

KEYWORDS: The cartel. Bidding. Competition. Corruption. *Compliance.*

RESUMO

O presente artigo tem por objetivo tecer uma análise crítica acerca da atuação de cartéis em licitações no Brasil, quando associada à corrupção e conluios de ordem político-governamental, sob o prisma do que elucidou-se a partir da Operação Policial denominada "Jaleco Branco", deflagrada no Estado da Bahia, no

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ano de 2007, que apurou ilícitos desta monta, praticados por empresas privadas, associadas a agentes públicos. Por intermédio do estudo de caso e revisão bibliográfica, utilizando-se o método dedutivo-indutivo, pretende-se analisar a formação dos cartéis no âmbito das licitações na seara nacional, bem como as consequências negativas de tal instituto e o panorama do país para combate às práticas anticoncorrenciais, bem como a corrupção, apontando o Compliance como uma ferramenta de prevenção a ser utilizada, inclusive, pela Administração Pública.

PALAVRAS-CHAVE: *Cartel. Licitação. Concorrência. Corrupção. Compliance.*

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INTRODUCTION

The defense of a system of fair competition, both for the benefit of a legal-republican system that is guided by the prism of free enterprise, and in the public interest, is of paramount importance for the socioeconomic development of a nation, and to this end, contemporary tools and mechanisms must be put in place, once and for all, to prevent competitive conduct that may clash with the loyalty that capitalism proclaims as an economic regime, as well as confronting State interests and resulting in negative impacts on society.

In this way, economic power, lato *sensu, in consonance* with the constitutional precepts pátrios, must always be used to ensure to all a dignified existence, according to the dictates of social justice, isonomy and dignity of the human person.

That said, it is of paramount importance to highlight that, as disclosed in the Transparency Portal (2020), the Federal Republic of Brazil, in the year 2019, had a budget of R $ 3,26 trillion reais to manage its core activities, and part of this resource was transferred to private agents, through public bidding, which, as a rule, is the procedure used by the Public Administration to perform their contracts and other legal business.

The simple analysis of the bidding data at national level is sufficient to draw the conclusion that discuss mechanisms that result in the best way to apply public resources, in order to ensure the constitutional foundations, Also fulfilling the republican objectives, foreseen in article 3 of the Major Charter, it is of salutary importance. Then there is the justification for this study.

In this sense, as will remain outlined in the course of this article, one of the greatest challenges for building a bidding system that reaches the constitutional and republican purposes, is basically respect for the fundamental principles of the economic order, in particular with regard to anti-competitive repression and prevention.

The formation of the notorious cartels is an example of anti-competitive conduct, par excellence, and this is even one of the most harmful - if not the most harmful - to the entire economic and capitalist system that governs a democratic rule of law.

Therefore, this article will analyze what was evidenced and determined from the outbreak of "Operation Jaleco Branco", which investigated, in addition to the formation of cartel in bidding processes, the collaboration, directly or indirectly, public officials to carry out the offence, through uncontested acts of corruption.

Initially, it is necessary to bring the data of Operation White Coat and the conduct practiced by those involved, who violated both constitutional precepts of economic order, as the free competition, as well as the fundamental principles of the Public Administration.

In the sequence, the cartel phenomenon is brought to light, so that it is evidenced, first, as an infringement of the constitutional economic order, for later specific cut as to its practice in bidding processes.

In the following chapter, it will be analyzed how *Brazil has acted to combat anti-competitive practices, such as the cartel, as* well as pointing out the compliance phenomenon, if applied to the Public Administration, as a potential mechanism for contributing to the prevention of corruption and, as a consequence, hampering the formation of cartels in public tenders, thereby contributing to better budgetary implementation, which ultimately comes from the population's own capital, from tax collection in general.

The method used for research was deductive-inductive, with the presence of constant doctrinal, conceptual and casuistic analysis, seeking to resolve the controversies presented through the elucidation of minutiae that involve the theme discussed, in order to reach an adequate and legally plausible conclusion on the issue addressed.

1. "OPERATION WHITE COAT" AND THE CARTEL PHENOMENON

The criminal investigation proposed as the object of central casuistic analysis for the purposes for which this work is intended, as cediço, is the so-called "Operation Jaleco Branco", held, in inquisitorial headquarters, in the State of Bahia, startingan initial investigation into a suspected fraudulent scheme involving servants of the National Institute of Social Security (INSS), which, by receiving fees, altered the computerized system of the Federal Municipality, for insertion purposes, modification or deletion of data that would allow the issuance of Negative Debit Certificates in favor of private companies participating in the collusion, which would use such documents to participate in bids, even if they had contracted debt to their detriment.

According to the investigation, the entrepreneurs involved used the Certificates provided by INSS, which are: Debit Negatives - CND; and Positive Debit Effect Negative (CPD-EN), obtained fraudulently, to participate in bids in the public services of that State.

The companies benefiting from the false certificates were debtors of large amounts to Social Security. As stated in accusatory piece (complaint) offered by the Federal Public Ministry (MPF), in the face of those involved, the fraud was subtle, but left visible traces and indicious, since all access to the computerized systems of the INSS were registered in the platform itself.

From the course of the investigation, however, the facts and elements brought to light realized that, in fact, the fraudulent collusion was practiced by a complex, sophisticated and well structured gang, composed of a web of entrepreneurs, employees, as well as lobbyists

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and civil servants, who dedicated themselves, as a team, to obtaining profit through fraud in bidding processes

Among other behaviors, the group was accused of defrauding the bidding processes to influence the hiring and agreement of legal business involving public services, to companies owned by it; prevent the carrying out of bidding processes, in order to keep the emergency contracts overpriced with their companies; and enter into new, overpriced emergency contracts.

As narrated the complaint, the organization was composed of almost 100 (one hundred) members, among them, a Attorney of the State of Bahia and the President of the Court of Auditors of the State of Bahia, at the time, thus revealing link between economic agents (private companies) and public officials (representatives of the Public Administration).

Some companies, inclusive, They had date of constitution and operation dating back to dates that translated more than 20 (twenty) years of operation, element from which it was extracted that the criminal organization acted in a stable and coordinated, for some time, with fraudulent purpose rooted in its purposes.

At a certain time, as stated in the complaint, in Criminal Action 510, before the Superior Court of Justice, mentioned group was defined as:

> Network of people, companies and institutions involved in directing service contracts in the state of Bahia. It is the structure on which the OC is based with its own rules, predefined behavior patterns, systems for the distribution of illicit profits and coordinated defense of its members.

The gang had about 20 (twenty) companies that worked in the area of cleaning, conservation, surveillance and ordinance, all linked to the entrepreneurs who were members of the criminal organization. The records before the Board of Commerce of the members of the corporate and administrative board of legal entities were also given in different names of the real administrators of the scheme.

According to police calculations, during the period of its activity, the criminal organisation had made extremely voluptuous profits, which, according to a report drawn up by the State Comptroller, based solely on the period 1997 to 2000, reached R$ 1,379,252,584.65 (one billion, three hundred and seventy-nine million, two hundred and fifty-two thousand, five hundred and eighty-four reais and sixty-five cents).

In view of the various criminal conduct carried out by the gang, which includes, in addition to the practice of the cartel (infringement of economic order), acts of corruption, CADE would not have legal competence to conduct the investigation, calling for the action of the control bodies and the Public Ministry, as it happened.

This is also available to the Administrative Council for Economic Defense (CADE), within the scope of its guidelines:

> However, it is important to differentiate the bidding cartel from other frauds to the competitive character of the bidding contests. There are several cases in which CADE does not have the legal competence to conduct the investigation, with the role of control bodies and the Public Prosecutor. For example, when several bidding companies are owned by the same owner, or when there are joint managing partners among bidding companies, we would not be faced with an agreement between competing companies, because in both

> cases such companies would be part of the same economic group in fact. There are also cases where a competitive bidding could be promoted, but the public administrator unlawfully included restrictive clauses of competition in the edict or even performed an illegal direct hiring. These practices are not, in the same way, the competence of CADE, but object of administrative control by the Public Ministry and Audit Courts. (CADE, 2018)

The practices imputed to the gang, as stated above, include the practice of cartel and corruption, such as:

> a) insertion of illegal clauses in the notices to justify the filing of lawsuits, more specifically warrants of security, for the purpose of preventing the execution of bids, invoking the nullity that they themselves have inserted;
>
> b) co-optation of potential competitors through payment of securities or delivery of goods, in general vehicles, in order to remove them from the competition and ensure the choice of their companies in bidding processes or in contracting for emergency services;
>
> c) corruption of public servants to obtain information relevant to the achievement of the criminal objective;
>
> d) forgery and use of false documents;
>
> e) the purchase of vehicles as a means of concealing the illicit origin of profits from criminal activity. (BRASIL, 2007, p. 6)

The bids, in the group's area of operation, They were always preceded by adjustment between them to decide who would figure as a competitor and who would win the event, affecting, so to extinguish the public event, the free competition.

The winner chosen by the gang, as consideration for having been contemplated with the hiring by the Government, made the payment in cash or the delivery of goods, usually vehicles, to competing entrepreneurs and dropouts of the event.

In this way, all those involved ended up being benefited from the public contract, in greater or lesser value, depending on the potential of their companies and the effective participation to complete the fraud.

The cartel practice in public procurement has been identified several times in recent years, which has resulted in a large number of police operations seeking to combat this illicit, including: Vampiro [2004], Sentinela [2004], Sanguessuga [2006], Carta Marcada [2006], Fox [2006], Alcaides [2006], Jaleco Branco [2007] and Castelo de Areia [2009].

In this perspective, Lira (2012, p. 24) adds that: "The damage caused to the Brazilian state by this practice can be estimated in the order of hundreds of millions of reais, considering that the purchases of goods, services and the construction of public works by the state represent an expressive share of its GDP".

The numbers brought by the Superior School of the Public Ministry of the Union demonstrate that, the year the operation was triggered in analysis, other 47, related to economic crime and corruption, They were also held:

> In 2007, 188 operations were carried out, resulting in 2,876 arrests, 310 public servants and fifteen federal police officers. Of this quantity, 48 related to economic crime and corruption, which resulted in 1,094 arrests: Passe Livre, Aliança, Rio Nilo, Antídoto, Testamento, Malha Sertão, Ouro Verde, Kaspar,

> Lacraia, 274, Cacique, Paraíso, Navalha, Contranicot, Hiena, Brussels, Checkmate, Zaqueu, Caipora, Russia, Slaughterhouse, Reluz, Columbus, Deep Water, Alliance, Seal, Zebu, Ratchet, Bet, Zebra, Faxina, Persona, White Gold, Metastasis, X-9, Alquila, Rodin, Kaspar II, South Wind, Metamorphosis, Carranca, Chess, Short Circuit, Jaleco White, Casa Nova, Eighth Plague, Prey and Al Capone. (ESMPU, 2016, p. 108)

Therefore, it is important to deepen the present study. Thus, in the following items, we begin to analyze the illicit phenomenon called by cartel, its incidence in bidding and how the country acts to combat such a practice that affronts the economic order and brings great harm, either to the particular, whether for the State, or for the public interest as a whole.

2. THE CARTEL AND ECONOMIC ORDER

Before going into the analysis of the cartel institute, it is necessary to highlight the context in which it is inserted, in consideration of the main constitutional principles that shape the national economic order, namely, free initiative and free competition.

At first, it is necessary to clarify that the Brazilian Economic Order, understood here as a "set of all norms (or rules of conduct), whatever their nature (juridical, religious, moral, etc.), which concern the regulation of the behavior of economic subjects" (MOREIRA, 1973, p. 67-71, apud GRAU, 2003*, p. 55/56)It is governed by* several basic principles, the central pillars of which are the principles of free initiative and free competition.

The first of them is even, stamped by the Federal Constitution as the foundation of the Democratic State of Law, in the wake of its article 1, item IV, which is, "the social values of work and free initiative", repeated principles, specifically, by the Article 170 Caput as the basis *of the* economic order. In addition, the same article still indicates "free competition" as one of its basic principles.

For Silva (2000, p. 767), "freedom of initiative involves freedom of industry and trade or freedom of enterprise and freedom of contract". Grinding the concept, Almeida (2004, p. 98) believes to be, the free initiative, a constitutional principle that exists to ward off state interference in economic activity, with the aim of avoiding monopolies and conferring on the individual the freedom to exercise any activity that is not prohibited by law.

Free competition, on the other hand, cannot be understood as synonymous, or as the equivalent of free enterprise, but rather as an aspect of this normative postulate. It is, therefore, a principle enshrined in the Federal Constitution of 1988, whose non-compliance characterizes infringement of the economic order, causing prejudice to the collectivity.

In this sense, for Grau (1991, p. 228), "free competition is by the 1988 Constitution erected to the condition of principle. As such contemplated in Article 170, IV, it is composed, along with others, in the group of what has been referred to as the 'principles of the economic order'".

Still, according to the reasoning aligned, Almeida (2004, p. 110) understands that free competition has, as purpose, "seek equal chances for fair and equal dispute in the exploitation of any activity".

It fits with this understanding:

> The economic order outlined by art. 170, IV, of the Federal Constitution, in addition to being founded on the valorization of work and on free initiative, aims to ensure to all a dignified existence, according to the dictates of social justice, provided that a number of principles are respected, including free competition, consumer and environmental protection, private property and the social function of property. (BONFIM, 2011, p. 171)

The principle in comment aims to guarantee to the economic agents, who act in the market, conditions of equality, more precisely isonomia regarding the opportunity to compete.

> Free competition, therefore, has the aim of guaranteeing to all those who wish to operate in the market a condition of entry, seeking to win the share of consumers, that is, the guarantee of performance, under equal conditions, among other economic agents. (BONFIM, 2011, p.177)

However, it should be emphasized that it is not only about protection of the subjective right of economic agents, but also of consumers and the collective, who end up becoming, in a contemporary definition of the fundamental principles of the economic order, the final recipients covered by the standard, who have achieved their practical purpose:

> The definition of the scope of the principle of free competition therefore requires the identification of the legal asset under supervision, taking into account that there is no more room in the juridical order for the principle of free competition to be understood only as a subjective right of economic agents, as once prevailed during economic liberalism.
>
> As stated by BERNARD DUTOIT, "in contemporary society, the protection of competition can no longer be dissociated from that dedicated to consumers and the collective in general".
>
> According to Law No. 884/94, the community is the owner of the legal assets protected by the law of the defence of competition, and it is imperative that the principle of free competition be recognised as an instrument for the realisation of a greater good, which is the preservation of an adjusted market that has the power to promote the achievement of the objectives of the economic order. (BONFIM, 2011, p.178)

To Bonfim (2011, p. 179), moreover, the principle of free competition should be seen as an instrument of reaching a free market that brings reflexes to society and the development of economic agents, since the economic order is created with the aim of assuring everyone a dignified existence, according to the dictates of social justice.

As long as there is no irregular exercise of the right of free enterprise, there may be the control of a given market by the economic agent, which, of course, must result from its efficiency (art. 36, §1º, Law 12,529/2011). See:

> The legal system allows the victory, so to speak, of a certain economic agent, provided that the rules of the game are followed. There may be overlap of a particular agent in a given relevant market. The search for larger market shares is stimulated by the ordering, since it manages improvement in the products or services offered and lower prices, all in function of the competi-

> tion between economic agents. Victory is rejected when achieved by means not approved by the system as, for example, the practice of predatory prices and the creation of cartels. (BONFIM, 2011, p.181)

It follows that the objective of the practical applicability of the principles of the economic order is, in effect, to ensure the real existence of competition, starting from a free initiative, which is ultimately beneficial to the market and to society as a whole. Any practice that confronts such principles, must be combated, as is the case of the cartel, which is regarded as the most serious of all infractions to the economic order.

By way of introduction, it is imperative that the classical definition of unfair competition is made explicit so that the study can then move to the focal point at which it is intended:

> It consists of unfair competition, in short, in the practice of acts of commerce and in a reprehensible procedure aimed at diverting the parish from the competitor; this is why the text stressed to the injured party the right to have losses and damages in compensation for damage caused by other acts of unfair competition not provided for in it, which harm reputation, the business of others, to create confusion between commercial or industrial establishments or between products and articles put into trade.
>
> These acts are not considered crimes and are not subject to penalty; but are criminal from the point of view of Commercial Law, unlawful acts that create the obligation to compensate for losses and damages. (FERREIRA, 1960, p. 354)

It is therefore extracted that, since the classical definition, the acts of unfair competition would not even be considered, but only from their specific analysis as crimes, since they deal with damages incurred between economic agents, which do not have the capacity to cause damage to the economy as a whole.

However, infractions to the economic order, due to the level potentially harmful to the entire capitalist economic-social system, are characterized as acts of qualified unfair competition, and may even be typified as crimes. In consonance, let's see:

> Economic dominion, like every domain, generates power for its holders. This economic power has to be used normally to assure everyone a dignified existence, according to the dictates of social justice (cf, art. 170). When the use unfolds in abuse, the Constitution itself imposes its repression (art. 173, §4) (MEIRELLES, 2014, p. 757).

The police operation mentioned in the previous item reveals a cartel scenario, which had, as a target of collusion, fraud in bidding processes that affected, directly, the Government and the Exchequer. The cartel, a serious violation of the economic order, has the power to extinguish competition, or makes it fanciful, to the point of being identified by many as pseudo-competition, before the prior agreement between the economic agents involved in order to dominate the market.

In this sense, the precise concept of cartel:

> Cartel - This is an agreement between companies that adopt common decisions or policies regarding all or a certain aspect of their activities. Because it is an agreement, the companies involved in it do not lose their autonomy or their individuality. They only submit to the terms of the agreement in its particular scope (NUSDEO, 2015, p 222).

The economic agents, who unite for the formation of the cartel, choose to cooperate among themselves, either by combining price, restricting the varieties of products or even dividing the market, resulting in an arbitrary increase in profitability to the detriment of the self-regulation of the economy itself as the essence of its development.

It is noted that the Antitrust Act does not distinguish between cartel species. In fact, the Law does not even use the expression "cartel", bringing, among the exemplifying list of conduct harmful to the economic order, the agreement between competitors for price fixing, reduction of quantities, division of markets or fraud in public bidding (art. 36º, § 3º, I).

As highlighted by Almeida (2012, p. 219), for faithful configuration of this violation, it is essential the agreement between the agents involved in the economic activity, in order to characterize the abuse.

For doctrinal classification purposes, cartels can be divided into two species, according to the sector in which collusion between economic agents is verified, whether private or public.

The former, market cartel, when identified in the private sector, characterised by the agreement, combination, manipulation or adjustment between competitors of the prices of goods or services offered individually (price fixing, buying or selling cartel)the limitation of the production or marketing of goods or services (quantity reduction cartel) and the division of median markets into customers, suppliers, regions, periods or other (market division cartel). Such hypotheses are provided, for example, in art. 36, § 3º, I, "a" to "c", of the Law of Defense of Competition.

the second, cartel in bids, provided for in paragraph "d" of the aforementioned provision and characterized from the agreement, combination, manipulation or adjustment of prices, conditions, advantages or abstention, within a bidding process, by bidders, with or without the participation of the Public Administration.

In the international context, it was agreed to call the cartel formed in bids Bid rigging, which according to the OECD (2009), "occurs when Businesses, that would otherwise be expected to compete, secretly conspire to raise prices or Lower the quality of Goods or services for purchasers who Wish to Acquire products or services through a bidding process".

This practice gains greater notoriety when identified in the private sector, having as a typical and common example the fuel sector. However, the public sector is also a target, as we saw in the course of the casuistic analysis made possible by this study, and its fight has been increasingly intense in recent years.

Thus, without disregarding the importance that market cartels assume in the judicial system (contemplated in the criminal, civil and administrative fields), integrates the specific object of this work the analysis of cartels in public tenders and how its formation can be mitigated by the phenomenon of compliance.

It then goes on to analyze the cartel in bidding and its harmful consequences.

2.1. CARTELS IN PUBLIC TENDERS AND ITS CONSEQUENCES

The need to contract works, services, purchases and disposals, carried out by the Public Administration, through a bidding process that ensures a level playing field to all competitors, comes from a constitutional guideline, included in item XXI, of Article 37 of the General Law.

According to Pestana (2013, p. 33), bidding is an administrative process, promoted by the Public Administration, prior to certain hires, in order to identify the suitable proposal to be hired.

The author also points out possible reasons for choosing the bidding process. See:

> The reasons that gave rise to its creation can be the most diverse: to curb offenses to the expensive principle of isonomy; to prevent the exercise of personality and preference, by the Public Administration, in the choice of certain suppliers and service providers; identify the proposal that is most advantageous for the Public Administration, etc. All these reasons, in some way, are aimed at preserving and protecting the public thing, an expression that we use to represent the acquis of the Public Administration integrated by assets, rights, assets and interests, as well as charges, liabilities and duties assumed to the detriment of the Public Administration (PESTANA, 2013, p. 1).

The constitutional directive in comment was regulated, in the infraconstitutional field, by Law 8.666, of June 21, 1993, which is intended to establish thoroughly all conditions, assumptions and procedures to be respected in the context of a bidding process.

As Carvalho e Carvalho (2014, pp. 7-8), the above-mentioned legislation emerged to standardize the bidding procedure and requirements of an administrative contract, requiring, in its terms, the observance of the normative provisions by all direct administrative bodies, special funds, municipalities, public foundations, public companies, mixed-economy companies and other entities controlled, directly or indirectly, by the Union, States and Municipalities.

In addition, the authors bring to light a synthetic and precise concept about the bidding process:

> The bidding aims to ensure compliance with the constitutional principle of isonomy, the selection of the most advantageous proposal for Administration and the promotion of sustainable national development, provided for in Article 3 of Law 8666/93 (BRAZIL: 2010). The provision of these objectives in the Bidding Law assists the doctrinators and jurists of Administrative Law to outline the concept of bidding. (CARVALHO; CARVALHO, 2014, p. 8).

What is expected is that the contracts made by the Public Administration are the most advantageous according to the public interest itself, having products and services at the lowest price and of better quality. The conduct of a fraudulent bidding process, as is the case of the cartel assessed by the work casuistically, causes serious damage to the Treasury and, consequently, to society as a whole (taxpayers and consumers as final recipients of the principles of free initiative and free competition).

According to Niebuhr (2011, p. 33), the bidding is an administrative procedure that has the conclusion of an administrative contract, by the Public Administration, as an intention, and from there, interested third parties offer proposals to be evaluated in the public interest.

Lira (2012) points out that "to achieve this goal, the institute is governed, in Brazil, by a normative plexus that leaves little freedom for the public manager to choose who he will hire".

As envisioned in the course of this item, the cartel in bids occurs when the companies participating in the event enter into agreement to define who will be the winner, or join efforts in trying to manipulate the outcome of the bidding process for any purpose.

To this end, such companies use various strategies, such as the joint definition of the value of bids, the reduction of the number of bidding companies in the contests, the submission of bids without the intention of winning the bid, among others, including with rotating schemes of predefined winners to simulate a non-existent competition.

The consequence is that the Public Administration ends up purchasing products and services at extremely disadvantageous conditions and the public resources derived from the taxes paid, which should be used for the benefit of society, are transferred to the companies that are members of the cartel, which derive illicit profits from the absence of effective competition.

In this sense, the "Guide to Combat Cartels in Bidding", prepared by CADE, states that:

Such conduct alters the normal and expected situation of effective competition of the event, allocating to the State less favourable conditions in the procurement of goods and services, such as higher prices, products and services of lower quality or acquisition of less than desired quantity. In other words, the bidding cartel undermines the efforts of the Public Administration to use its resources efficiently and effectively to provide the necessary goods and services to the population and promote the development of the country, is therefore detrimental to society as a whole. (2019, p.11)

The Federal Government's purchasing panel reveals that in 2019, 80,632 purchasing processes were carried out, totaling the expressive value of R$ 45,902,704,189.85, including several bidding, dispensing and unenforceability (PORTAL OF TRANSPARENCY, 2020).

having regard to the information provided by CADE (2019, p. 14), on the basis of data from the Organisation for Economic Cooperation and Development (OECD), cartels generate an estimated 10-20% excess of price in a competitive market, causing annual losses of hundreds of billions of reais to consumers.

There are many consequences of this practice, which undermines free competition. The damage reflects directly on the collective, owner of the legal well-being protected, strongly impacting the economic-social development of the country.

In addition, on the consequences of cartel practice in bidding:

> [...] the recent cases investigated in the context of Operation Lava Jato and also cleared in the Administrative Council of Economic Defense (CADE, 2017) make evident the potential economic damage, the shocks to the competition structure and, ultimately, the damage to public confidence, caused by the cartels in bidding (LACERDA, 2019, p. 112).

It is cediço that the acts of corruption and formation of cartel in the public tenders are distinct illicit. However, it is not uncommon that they occur together, in a complementary way and with the same purpose, exactly as calculated in Operation Jaleco Branco, a casuistry

evaluated by the present study, and it is recommended that the fight against such practices be done in an integrated way.

It goes on to analyze how the country has acted to combat, or at least reduce, harmful practices to the economic order and, consequently, to national development.

3. THE FIGHT AGAINST CARTELS IN BRAZIL IN BIDDING PROCESSES

In the face of globalized contemporaneity, with regard to modernized illicit, when public contracts are analyzed through bidding processes, more and more effective mechanisms should be sought to mitigate the damage caused to the Public Administration, against the favorable scenario of bidding for cartel practice and corruption conducts.

Brazilian legislation provides for three spheres of punishment for anti-competitive conduct, such as the cartel.

As an administrative offense, it is up to CADE to investigate and punish violations of the economic order, pursuant to Article 4 of the Law of Defense of Competition. In 2019, of the 707 cases judged by CADE, 74 had cartel practice as proven conduct (CADE, 2020).

In the civil sphere may also be filed action that has as a cause to claim compensation for losses and damages suffered arising from practices that constitute infringement of the economic order. Civil liability is supported by both the Civil Code and the Competition Defense Law.

In the criminal sphere, the classification results from Law 8,137/1990, which defines crimes against the tax order, economic and against consumer relations. The cartel, within the public administration, will also be subject to Law 8.666/1993.

In harmony with the other legal provisions, the most recent legislative creation was Law 12,846/2013, known as the Anti-corruption Law, which regulates the administrative and civil accountability of legal entities for the practice of acts against the public administration.

In this tuning fork, this is the purpose and instruments brought by the Anti-corruption Law:

> The Anti-corruption Law (Law 12,846 of 2013) comes to fill a legislative gap that remained in Brazilian law until its enactment, that is, to determine the objective responsibility of the legal entity. Although there were doctrinal positions on the subject, the law had not been edited until then. Inspired by the American Foreign Corrupt Practices Act and the Bribery Act, originating from the United Kingdom, and attending the Convention on the Fight against Corruption of Foreign Civil Servants in International Commercial Transactions, the novel diploma emerged.
>
> In other topics, the Anti-corruption Law brings the compliance institute, which can mitigate penalties under the law itself, the leniency agreement, punishments involving fine, extraordinary publication of the decision, forfeiture of property and compulsory dissolution of the legal entity (CEREN; CARMO, 2018, p. 38).

Yet:

> The core of the law is precisely the objective administrative and civil responsibility of legal entities if they engage in inappropriate acts (which contradict the systematic national and foreign public administration), that is, there will be administrative and civil penalties, regardless of intent or guilt; if the injury is found, the appropriate sanctions may be applied. It is interesting to note that when the legal personality is used to carry out illicit practices, its disregard will be allowed (art. 14 of LAC) (OLIVEIRA; CEREN, 2019, p. 188).

Before the National Congress, the Senate Bill n° 283, 2016, which aims to amend Law 12.529, of November 30, 2011, which structures the Brazilian System of Defense of Competition, in order to, among other measures, to institute double compensation for the competitive damage caused to the injured parties who take legal action, thus encouraging the bringing of redress proceedings. Below, transcription of the PLS menu:

> Amends Law No 12.529 of 30 November 2011, which structures the Brazilian System of Defense of Competition and provides for the prevention and repression of infringements against economic order, to make the fine to cartel practice by company or economic group, proportional to the duration of the infringement to the economic order; institute the indemnification in double to the injured who enter in court, except the defendants who sign leniency agreement or term of commitment of cessation of practice, in addition to other incentives to the leniency agreement, provided that this is done upon submission of documents that allow CADE to estimate the damage caused; determines the limitation of the term of limitation during the duration of the administrative process; and makes the decision of the Plenary of the CADE able to substantiate the granting of protection of evidence.

Note that the current legal framework is the result of many advances over time. In the meantime, it is necessary to recognise the need for continuous improvement, as they weigh the efforts of the competent bodies, often because of procedural legislation, which slows down the process, among other factors, the conviction of the guilty is not achieved and the law is impossible to attain the pedagogical and punitive character for which it was created.

Despite the above, there is also an increase in the efforts of the bodies responsible for combating the cartel, such as CADE (2020), which, in the period 2015-2019, for the practice of cartel conduct, shows a significant increase in the amount of fines imposed, as shown in the table analysis.

Ano	Conduta	Total de Multas Aplicadas (R$)
2015	Cartel	R$ 173.242.274,51
2016	Cartel	R$ 136.263.526,19
2017	Cartel	R$ 95.014.064,74
2018	Cartel	R$ 621.501.253,85
2019	Cartel	R$ 784.521.604,95
Total		**R$ 1.810.542.724,24**

TABLE 1 - Fines imposed by CADE - Cartel (CADE, 2020)

However, not always the repressive action, through the application of a fine, the criminalization of conduct and the legal provision of reparation of damages is sufficient for the economic agents and Public Administrators corruptible abstain from the practice of the illicit acts in question.

You see, one cannot deny the need for repressive control of infringements of the economic order and of corruption itself in its essence. However, more than punishing, it is imperative to change a pattern of conduct, to promote the change of negative culture on the practice of illicit acts that plagues Brazil.

The recurrent link of cartels in bidding, with cases of corruption from the aid of Public Administrators, is an example of that one can not think only of the punishment that, depending on the procedural rules, is often not even able to the end that should achieve - guarantee the protection of the public interest -, as well as there is reasonable reparation to the Exchequer.

It is necessary, therefore, to reflect on measures that awaken the commitment to change culture, so that the constitutional precepts are fulfilled and then we can think about social justice, as provided for in the Magna Carta.

In this perspective, one can think of compliance as a modern mechanism allied to the reach of an ethical and just society, as will be shown below.

3.1 CARTELS AND COMPLIANCE

It cannot be forgotten that the crimes committed against the Public Administration, in particular the practice of the cartel, often involve public officials, as seen at the beginning of this article, thus associating themselves with corruption.

Meirelles (2014, p. 123) states that "the act most affronted to the basic principles of administration and causing harm to society is corruption in the exercise of the civil service". Thus, it is necessary that a change of posture has as its objective not only the private sector, but also the Public Administration itself.

In this fork, as a concession, Law 12,846/2013 was responsible for taking a leap in the Brazilian anti-corruption policy by establishing the compliance mechanism (integrity program) and also include it as a mitigating measure of possible sanction in the determination of administrative and civil liability of legal entities for the practice of acts against the Public Administration, because, in a way, it encourages the company to join the program, thus initiating the desired change, towards a more ethical and unencumbered standard of conduct.

The terminology, of English origin, in the literal translation, means "to be in agreement with". Compliance for being understood as being in conformity. "In general, it is the duty of companies to promote a culture that stimulates, in all members of the organization, the ethics and the exercise of the social object in accordance with the law". (ASSI, 2018).

The compliance program does not mean only being in compliance with the legislation, respecting methods and procedures alone, a perspective that proves reductionist, "since mere compliance with regulations and codes of conduct does not correspond to their real proficiency" (GERCWOLF, 2019, p. 31). More than that: "In general, compliance involves one,

consists in the duty of companies to promote a culture that stimulates, in all members of the organization, the ethics and the exercise of the social object in accordance with the law". ASSI, 2018).

In fact, compliance can be understood as a set of mechanisms that promote the adoption of cultural standards in the organization - corporate or not - that adheres to it, which must conform to ethics, the integrity, legislation and internal rules that guide the expected conduct of all employees of the organization, without exception, so much so that one of its pillars is the so-called tone from the top, that is, the involvement from the highest management of the company:

> Compliance is about people, whether they are decision-makers, managers or collaborators, who must guide their actions in corporate responsibility, always choosing to do what is right until this behavior becomes naturalized - whether in the simplest behaviors (related to habits and clothing), or in those that directly impact the operation. [...] (ASSI, 2018).

In this sense, disserta Fernanda Santos Schramm (2018, p. 207):

> [...] more than legal compliance, the compliance program involves strategies that enable a change in the company's cultural patterns in relation to the ethics and guidelines that guide the regulatory environment, avoiding the risks inherent in the business activity and the penalties legally provided for, with the consequent damage to the image of the organization.

In short:

> One can distinguish the meaning of compliance from simple compliance with the law, suggesting that it is a dynamic state of legal observance and, therefore, a state of conformity added to a behavior orientation. [...]
>
> Such behavior guidelines become relevant to the extent that they are contractually established, usually through Codes of Ethics or Conduct, or set by law, as in the case of anti-wash compliance, may its failure to comply generate different legal consequences in the civil, administrative and criminal field.
>
> It is interesting to note that the national legal system has, in the context of criminal compliance, species with different formatting in the prevention of criminal offences, highlighting anti-washing compliance, anti-corruption compliance and antitrust compliance (CARDOSO NETO; CORDEIRO; PAES, 2019, p. 90-91)

Compliance is often seen in the private sector, since, on the one hand, the globalized economic context and technological advances impose transparency and security in commercial relations, mostly carried out at a distance and without personality (SCHRAMM, 2018, p. 196)On the other hand, the Anti-corruption Law brought some mitigating measures that encourage the adoption of the program, including the penalties applied.

The implementation of a compliance program by companies that operate in the private sector, but also relate to the Government in bidding processes, proves to be an important mechanism to prevent fraud in bidding, under various aspects.

It can be inferred, therefore, from the very notions previously outlined about compliance, in the sense that the formation of an ethical and integral cultural environment in companies leads, consequently, to less prone to the practice of corruption and fraud in bidding.

Fernanda Santos Charamm (2018, p. 102-114) points out that companies that adopt an effective compliance system contribute to prevent fraud in the bidding process, from the preparatory stage, through mechanisms that map and signal "prior to risk situations, alerting employees and employees to the possible consequences, individual and collective, of the practice of irregularities", during the external phase of hiring, It is up to the compliance program "prevent employees and representatives of companies from using subterfuges and illegal manoeuvres [...] to heal themselves winners at no cost'", until the course of the execution of the contract, avoiding "the involvement of the company in situations of disputed legality".

However, its applicability is not restricted to private companies. It must also be used by the Public Administration. So much so that, through Decree No 9,203/2017, there was the establishment of the integrity program within the Federal Public Administration.

After numerous scandals involving public officials, it is right to institute the integrity program also in the public initiative, so as to make it ethical and illiterate, or at least seek to achieve this goal. In this sense:

> The Public Compliance points to an innovative effectiveness to Brazil as an integrity mechanism, footwear in an accurate diagnosis, with risk assessment, monitoring, audits and denunciations that promote the promotion of a fair and lawful management in the hope that it may be the most correct and fast attitude to resume the country's policy, since Public Compliance is a program of public integrity (SOUZA; MACIEL-LIMA; LUPI, 2019, p. 17).

As in the business organizations, compliance is an important tool for changing the cultural patterns of public administration, direct or indirect, promoting the integrity of those who are in the exercise of public administration, so that their respective conduct may be manifested in accordance with ethics and, especially, constitutional dictates.

To the extent that the adoption of public compliance stimulates the culture of integrity, this proves to be an important instrument for the implementation of the constitutional principles that govern Public Administration, sculpted in art. 37 of the Magna Carta, being an important mechanism in the fight against corruption.

In addition, Susana Gercwolf (2019, p. 49-50) points out that the application of compliance in the public sector is able to "optimize public management in terms of improvement and speed in the quality and provision of services and economic and financial rationalization".

Compliance may not be the ultimate tool in the fight against corruption, but it is certainly a viable means of achieving cultural changes and a more dignified ethical standard, both in the private and public sectors.

4. CONCLUSION

Analyzing all the factors exposed, it is important to highlight the importance of studying the illicit phenomena of the cartel, having as allies the corrupt practices of assistance of Public Administrators, and, from a casuistic cut carried out on the "Operation Jaleco Branco"the

relevance and complexity of the actions of criminal organizations of this purpose, as well as the harmful potential of their conduct to the economic order, could be demonstrated.

Thus, it remains delineated that public purchases and bids generate a great economic impact and have high relevance in the budget and public spending; for this reason, the allocation of resources should be increasingly assertive and efficient.

Tracing the due conceptual and casuistic analyses, it remained explicit that the practices of cartels in public tenders are usually linked to institutionalized corruptive acts, which helps to maintain the longevity of the scheme and hinders the detection of fraud, like Operation White Coat.

In the face of the harmful potential of cartel conduct, allied to corruption, which end up injuring, even, constitutional precepts, basic of the Brazilian capitalist and republican system, legislative improvement and the creation of increasingly effective instruments, for both repression and prevention purposes, it has proved to be of paramount importance to eliminate or at least mitigate the vulnerabilities of Public Administration, thus protecting the interests of society at large.

Compliance thus appears as a beneficial mechanism of implementation in both private initiative and

Compliance thus appears as a beneficial mechanism of implementation both in the private sector, for the purpose of altering a corrupt and hidden culture of the Brazilian population, and for use in front of the Public Administration's own organs, so that the performance in favor of a standard of ethical and illiterate conduct is increasingly promoted, and the measures of repression are less necessary, so that the bidding processes reach their constitutional purpose, under the prism of equity, isonomy and social justice.

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THE CONSTRUCTION OF THE CRIMINAL WOMAN IN THE JURY COURT

A CONSTRUÇÃO DA MULHER CRIMINOSA NO TRIBUNAL DO JÚRI

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ABSTRACT

This article analyzes the Jury Court from an interdisciplinary perspective - which includes anthropology, sociology and discourse analysis readings – aiming to highlight its aspect of *performance*, a practice of a legally legitimized staging, which reveals its game-like, ritual and scenic characteristics. The purpose of this discussion is to understand the role of the Jury on the criminal and symbolic construction of women who commit intentional crimes against human life. Such essay is relevant to reinforce the multiple character of legal research, so often tending to be closed in its systematic technique, and also to show the legal and symbolic construction of "the criminal woman" in its historical aspects as well as in the Brazilian criminal law. The case study analyzed here allowed us to suppose that this public agency from Brazilian judiciary is guided by an intolerant and repulsive view on criminal women, whose punishment should always be as harsh as possible since their crimes correspond to their representation of the locus of evil that still prevails in contemporary society.

Key words: Criminal woman. Jury court. Narrative. Representation. *Performance*.

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RESUMO

Este artigo discute o Tribunal do Júri em perspectiva interdisciplinar – engloba leituras da antropologia, da sociologia e da análise do discurso – para destacar a sua dimensão de performance, entendida como práticas de uma encenação juridicamente legitimada, que revelam suas características de jogo, de ritual e cênicas. O objetivo desta discussão é entender o papel do Tribunal do Júri na construção penal e simbólica das mulheres praticantes de crimes dolosos contra a vida, o que se justifica por reforçar o caráter múltiplo da pesquisa jurídica, que tende muitas vezes a se fechar na sua sistemática técnica e evidenciar a construção jurídica e simbólica da mulher criminosa em sua vertente histórica e do direito penal brasileiro. O estudo de caso apresentado para análise permitiu supor que esse órgão do judiciário brasileiro se pauta por uma visão intolerante e de repulsa das mulheres criminosas, cuja punição deve se asseverar na medida em que seu crime corresponder à sua representação de lócus do mal que ainda vigora na sociedade contemporânea.

Palavras-Chave: *Mulher criminosa. Tribunal do Júri. Narrativa. Representação. Performance.*

INTRODUCTION

This article discusses the Jury Tribunal, the first level body of Brazilian justice, in its bases and in its performance. To demonstrate the performative perspective of this legal instance, we will take as a case to be studied its role in the criminal and symbolic construction of women who commit malicious crimes against life.

The proposed cut is justified since it approaches the object in question in an interdisciplinary perspective, intending to add to the most recurrent legal studies on the Jury Court a look based on the socio-anthropological reflections and the principles of discourse analysis. Furthermore, the case study chosen for this work contributes to the understanding of how the notion of criminal woman has been legally and symbolically constructed, both in its historical aspect and in criminal law in practice in contemporary Brazilian society. Such cut becomes more pertinent when we notice the increase in crimes committed by women in Brazilian society. Data from the NGO Conectas (www.conectas.org) point out that between 2000 and 2016 there was an increase of 455% of the crimes committed by women in Brazil, a fact that forces us to turn our attention to the recurring action of the Court of the Jury regarding this actor Social.

In this article, the anthropological study of Ana Lúcia Pastore Schritzmeyer (2012) on the Jury Tribunal was taken as a reference, corroborating the author's proposal to turn to aspects of the Court that resemble the game, ritual and theater. The case study complemented the methodology used in the research that gave rise to this article, as it is an investigation procedure that explores the characteristics and essentiality of a particular situation. However, this approach allows a broad understanding of the phenomenon that allows us to make generalizations about it, even if in a controlled manner

Article 5, item XXXVIII, of the Brazilian Constitution of 1988 (BRAZIL, 1988) recognizes the Jury Tribunal as an institution that judges intentional crimes against life, anchoring itself in the principles of full defense, secrecy in voting, sovereignty of verdicts and competence to judge tried or consummated crimes against life: intentional homicide; infanticide; participation in suicide and abortion. Based on these principles, the article will present, first of all, the legal basis of the Jury Tribunal in Brazil, to then address its ritualistic aspects - which we

call its performance - in order to describe a given system of persuasion that happens as a game of scenes around deaths, criminals and their judgments, but also around values, their traditions and changes. Based on the assumption that the Jury Tribunal is a space for legal verdicts, story reenactments and character construction, we will analyze specifically the trial of criminal women seeking to report, from this context, how the symbolic construction of the "criminal" occurs from a system of significant beliefs that give meaning to social life in the face of the rupture caused by willful crime against life.

It is, therefore, an interdisciplinary and interpretative theoretical path that seeks to put into dialogue different fields of analysis that interface with the legal field.

1. WOMEN WHO KILL

When discussing the culture that guides fear, Delumeau (1989) elects idolaters, Muslims, Jews, women and witches as the agents of the devil. In this selection, the woman stands out as the "favorite accomplice of Satan" (DELUMEAU, 1989, p.318) being the main source of the paradox of the life of men on earth. For men, the woman would oscillate between fascination and disgust, in a contradictory and unstable game, which at the same time that inspires respect and admiration, is worth being hostile and worthy subjugation.

This "eternal living contradiction" (DELUMEAU, 1989, p.311) appears, mainly, in the idea of creation and destruction that accompanies motherhood. The author observes that "the mother land is the nourishing womb, but also the kingdom of the dead under the ground or in deep water. [The woman] is a cup of life and death" (DELUMEAU, 1989, p.312). The feminine images of the classic Greco-Roman culture and of the Christians reveal moments of adoration of the man for the woman, letting the fascination for the mysterious flow, however, the paradox more fuels the fear and leaves space for images of destructive women to be forged. Delumeau (1989) observes this situation also in Hindu culture, as in the example of the goddess Kali,

> [The] mother of the world [...] at once destructive and creative. Beautiful and bloodthirsty, she is the "dangerous" goddess to whom thousands of animals must be sacrificed every year. It is the blind maternal principle that drives the renewal cycle. It causes the explosion of life. But at the same time it spreads pests, hunger, wars, dust and oppressive heat blindly (DELUMEAU, 1989, p.312-313).

This conception of the feminine seen in the ancient and archaic periods is repeated, according to the philosopher, also in legal discourse (Cf. KRAMER; SPRENGER, 1989), in medicine and in religious discourse. Literature is also a strong vehicle for this representation of the feminine, which still tends to deconstruct an evil character of men in the face of their crimes, dedicating this adjective to women. According to Nascimento (2015):

> If it was through the woman that evil has its place in the world, the man, from whom the woman is begotten, would therefore be, countless times, built as a victim of the female devices. In the case of narratives about crimes committed by men, there is a certain glamorization of the murderer. Most of the time, their masculinity is reaffirmed in crime, because violence heroizes, turning

> crime into value. It seems that the more brutal or fierce the crime, the more marked the masculinity is in the report.
>
> The woman would be predestined to evil, therefore, she was considered as a "domestic devil", often being portrayed in fiction and in the so-called real life of "infidel, vain, vicious and coquettish". Even the one that observes the most holy laws of modesty and modesty is dangerous, because "it adds to its natural charms the resources of its diabolical art". The woman's fear is thus combined with the fear of the devil. The woman is her instrument and, from the 13th century onwards, the Church tried to spread this postulate without rest, shaping mentalities, building the confusion between sexuality, sin, Eve and Satan (NASCIMENTO, 2015, p.156-157).

We noticed, in this comment, that the feminine in literature brings together what is incomplete and therefore dangerous. Stripped of the awareness of the rational universe and male intelligence, the woman acts in the service of her animality that is anti-heroic, artifice and deceitful, making the world a place for the satisfaction of her futile and clumsy desires. In this perspective, women are marginalized in comparison to the ideal type of male rational that points out that men, by acting, reconstructs ideas of honor and respect, and even when they commit a crime, they perform some form of objective rationality in the face of the facts of life.

The approximation of the literary field to the legal field, specifically targeting the analysis of the social role of the Jury Tribunal, broadens the understanding both of how the construction of a narrative about the women who kill - which starts to be socially shared - and of a given the performance dimension of the Jury Court, which cannot be known through studies limited to the rational and technical bases of this legal institution.

In the following section, this article summarizes the foundations of the Jury Tribunal in order to, next, combine the anthropological perspective with this interface.

2. THE COURT OF JURI AND ITS BASES

The Jury Tribunal, in charge of evaluating willful crimes against life, is a fundamental individual guarantee embodied in Art 5 XXXVIII of the Brazilian Constitution of 1988:

> Article 5, item XXXVIII, of the Brazilian Constitution of 1988 provides that intentional crimes against life are judged by the Jury Court, whose verdicts are sovereign: Article 5 (...) XXXVIII - the institution of the jury is recognized, with the organization that gives you the law, ensuring: a) full defense; b) the secrecy of voting; c) the sovereignty of verdicts; d) the competence to judge intentional crimes against life (BRASIL, 1988, Art.5).

Based on the fullness of defense; in the secrecy of the votes and in the sovereignty of the verdicts, the procedure of the Court gathers a body of peculiarities that fortify its base, detaching it from the other procedural ways available in the Brazilian legal system.

Its origin dates back to 1822, when it was first instituted in our country, in a law that dealt with the trial of press crimes - crimes against honor such as slander, defamation and injury

practiced by the press. At that time, the formation of the Jury staff was twenty-four citizens, nominated by the figure of the corregidor and the criminal hearers (BISINOTTO, 2015).

These subjects were designated by subjective criteria such as kindness, honesty, patriotism and intelligence, requirements that already refer the Court of Jury, since its origin, to a certain level of performance. By the term performance, we want to refer here to a type of performance and representation common to the theatrical universe, which is postulated to be recognizable in the action model at the Jury Court, being an analogy capable of making the performance of that organ more understandable.

In the scenario of the Jury Court, full defense is a principle that must always be ensured and read with the greatest possible care. When we distance ourselves from this constitutional notion, we put the accused at risk and consequently his freedom. Nucci (2012) says that the defenses made in the Court must overcome the mere regular work in the process. Appropriate arguments, care with the use of words, intrusions and corrections must be marked and constant, if necessary. In the common process, the judge bases the decision, and thus fulfills the duty of motivation, but the same does not happen in the Jury procedure:

> In the common criminal process [...] the defender does not need to act perfectly, knowing how to speak, articulate, construct the most solid arguments, in short, he can fulfill his role in a satisfactory way. Broad defense remains with such an impact.
>
> In the process pending in the plenary of the Jury, just regular performance seriously jeopardizes the defendant's freedom. It is essential that the presiding judge, with perspicacity, control the efficiency of the defendant's defense, if the defender does not express himself well, he does not make himself understood - not even by the magistrate, sometimes -, fails to make appropriate interventions, correcting any excess of the prosecution, does not participate in the examination of witnesses, when it would be necessary, in short, acts pro forma, there was certainly no full defense, that is to say irreproachable, absolute, thorough.
>
> In another aspect, it is necessary to consider that the magistrate, in the common process, bases his decisions, explaining, therefore, the reasons that led him to condemn the defendant. Such a system does not occur in the Popular Court (NUCCI, 2012, p.29).

In this procedure, the jurors, those subjects that make up a body of lay judges, express their reading of the Jury simply by absolving or condemning the defendant, without the need for a justified justification. These civilians vote using that knowledge presented to them in Court, plus their notions of the world, their individual biographical paths, which correspond to the intimacy of each one, exercising their role in the criminal process using their intimate conviction. It is useful to use the words of Pontes de Miranda (1947, p.307), who says that "in the fullness of defense, it includes the fact that jurors are drawn from all social classes and not just one or some".

This work by the jurors refers to the constitutional principles of the secrecy of votes and the sovereignty of verdicts. The juror's job consists, roughly, in observing the case and opting for the conviction or acquittal of the accused, responding to a list of objective criteria with general content already provided for in the criminal procedure code (art. 483, CPP). These questions given to the jurors question the materiality of that fact, the authorship of that action and whether the jury understands that the accused should be acquitted.

Although it is not the purpose of this article to describe in detail this procedure of the Jury, it is worth mentioning that, if the case is one of conviction, jurors are still required to opt for causes of decreased sentence, qualifiers and causes for increased sentence and finally , for possible disqualifying theses of the offense. The secrecy of voting takes place exactly at the moment of voting. The jurors are taken to the special room, accompanied by the prosecuting body, the prosecution assistant, the defender, the judiciary officials and the judge himself, to verify the completion of the ballots. Art. 5th, LX, and art. 93, XI of the constitutional text (BRASIL, 1988), when it says about the principle of advertising, it takes into account a limitation of its applicability when the defense of intimacy and social interest or public interest are at stake. Nucci (2012), however, disagrees that the principle of publicity of the acts of the judiciary would be impaired at this point in the Jury procedure.

It is necessary to highlight that the Jury procedure is not a secret trial and there is no secrecy in the votes that are produced there. What we want to protect, with the special room, is to avoid unnecessary wear, loud interference from third parties who are in plenary session or invasions of the intimate conviction that makes up the work of the jurors and just that (NUCCI, 2011).

The sovereignty of the verdicts, another guiding concept of the procedure, is noted for the strength given the last popular word, for its power to decide and compromise on the case, and, when it comes to the facts, it cannot be challenged by any specific court, that is to say , formed by judges of law. As Nucci explains, this guarantee can under no circumstances be overturned: "It is not possible that, under any pretext, cut cuts will invade the

merit of the verdict, replacing it. When - and if - there is a judicial error, it is enough to refer the case to a new trial by the Popular Court "(NUCCI, 2012, p.34).

However, as Pacelli (2013) observes, there is the case of the criminal review action contained in article 621 of the Code of Criminal Procedure, which should not be understood as an affront to the principle of the sovereignty of verdicts, since it is restricted to a limited number situations and corresponds to the fallibility of any human judgment.

Since the intimate conviction, briefly discussed above, is directly linked to the juror's conscience and it is not necessary to demand from this subject an exact knowledge of the text of the law, nor the repertoire of previous judgments produced by the judges of law, nor this possibility of exceptions it creates total instability for the organ and what it wants. What is apprehended by the juror's senses is enough for him to produce his reading of the case and take his vows, but it is by no means the possible end to the trial of willful crimes against life (NUCCI, 2011).

2.1 DO PROCEDIMENTO DO TRIBUNAL DO JÚRI

The Jury Tribunal at the same time is composed, in the judge and mediator center, by the President-Judge and the Sentencing Council. The latter consists of seven lay judges, represented by the jurors. These people, as already mentioned, are everyday subjects, people of the people, who must not correspond to a predetermined profile. What is required is a general capacity for the jury, covering some minimum requirements (PACELLI, 2011).

Still according to Pacelli (2013), the Brazilian nationality is included among the requirements to act as a juror in the procedure of the Jury Court, which includes native Brazilians and naturalized ones; citizenship, fully realized in the exercise of political rights provided for in article 436, caput, of the code of criminal procedure; being over eighteen years old, which represents the maturity of that person, who can already be held criminally responsible; the requirement of notorious suitability, which circumscribes the average morale of the subject, excluding those who have an objectionable social conduct, who have a criminal record, habitual drunks and those who use illegal drugs; we also have the requirement of literacy and, finally, the enjoyment of their mental faculties and their senses. These civilians are chosen by lot with a procedure defined by law (art. 462, CPP).

With a view to the complexity that the presence of the jurors implies, when we think of a possible impartiality, we see that the Jury Tribunal follows a biphasic procedure with a division very well delineated and outlined by the text of the law. Pacelli (2013) points out that the two procedural phases can be governed by different judges, without any prejudice to the procedure.

The first phase that the procedure follows, according to Pacelli (2013), is the preliminary one, aimed at the formation of guilt, a kind of preliminary judgment, of admissibility, that wants to resolve whether the described practice corresponds to the competence for the judgment of the Jury court. In this stage of the process, the hypothesis of summary acquittal is worked (art. 415 of the CPP); declassification (art. 419, CPP); impronunciation (art. 414, CPP) and the pronunciation (art. 413 CPP).

It is with the decision of pronouncement, which has as one of its effects the submission to trial by the Jury Court, that the process should proceed to the second phase of the Court's procedure, understood as the trial phase (PACELLI, 2013). The second phase, therefore, takes place with the judgment of the case itself, in which the prosecution and defense will present the witnesses who will testify.

The pronunciation received is the decision that leads to the constitution of the second phase. It outlines what will be discussed in a court case. It is not our purpose in this article to describe or analyze the procedures of the Criminal Procedure Code - CPP, but it is worth mentioning that the document is a basic and reference text in the Court that follows the Jury procedure (PACELLI, 2013). Also part of the second phase of the procedure is the analysis of the jury, anticipating the refusal of some of its members, since they are in the exercise of a judicial activity (PACELLI, 2013).

It is important to note that the function of juror is mandatory and cannot be rejected without reason, except in cases at the discretion of the presiding judge. For the exclusion of a juror, it is possible to eliminate it by reasonless refusal, treated in terms of article 468 (BRASIL, CPP). As Pacelli (2011) observes, it is possible that each party excludes, without necessary motivated reason, up to three jurors, with a minimum of seven remaining, when considering the possibility of multiple defendants in a court case. With the jury draw, in a selection that starts with twenty-five and ends with the seven drawn, we have the beginning of the period of incommunicability between the members of the Jury.

The question, assertions that will reflect the judgment of the sentence body, corresponds to a question that, necessarily, has as possible answers yes or no. Pacelli (2013, p.741) com-

ments that "in fact, in the procedures of the Jury Tribunal, the presentation of a question corresponds to the formulation of a question. What's worse: a question whose answer will necessarily be yes or no." This difficulty is due to the requirement of exact correspondence to the demands of Law nº 11.689 / 08, which gives the strict guidance for the preparation of questions that are valid as items. The items must contain, in the following order:

> Art. 483. The questions will be formulated in the following order, asking about:
>
> I - the materiality of the fact;
>
> II - authorship or participation;
>
> III - whether the accused should be acquitted;
>
> IV - if there is a cause for the reduction of the penalty alleged by the defense;
>
> V - if there is a qualifying circumstance or cause for an increase in the penalty recognized in the pronunciation or in subsequent decisions that deemed the accusation admissible.
>
> § 1 The negative response, of more than 3 (three) jurors, to any of the items referred to in items I and II of the caput of this article ends the vote and implies the acquittal of the accused.
>
> § 2 Responded affirmatively by more than 3 (three) jurors the items related to items I and II of the caput of this article will be formulated item with the following wording:
>
> Does the jury acquit the accused?
>
> § 3 When the jurors decide on the conviction, the judgment continues, and questions must be asked about:
>
> I - cause of decrease in the penalty alleged by the defense;
>
> II - qualifying circumstance or cause for increased sentence, recognized in the pronunciation or in subsequent decisions that deemed the accusation admissible.
>
> § 4. With the disqualification of the infraction under the jurisdiction of the individual judge sustained, a question will be formulated about it, to be answered after the 2nd (second) or 3rd (third) question, as the case may be.
>
> § 5. The thesis of the occurrence of the crime in its attempted form or if there is disagreement about the classification of the crime, being supported by the Jury Court, the judge will formulate a question about these questions, to be answered after the second question.
>
> § 6. If there is more than one crime or more than one accused, the questions will be formulated in different series.' (BRASIL, 2012, pp.452-453).

First, the materiality of the fact described in the indictment is questioned; the authorship and participation of that subject in the conduct to which the case refers; whether that accused should be acquitted; if that cause of diminished sentence, alleged by the defendant, exists; "If there are qualifying circumstances or cause of increased penalty recognized in the pronunciation or in decisions subsequent to it" (PACELLI, 2013, p. 744). Thus, after the request, the votes of the jurors are counted.

With the presentation of these elements that make up the procedure of the Jury Tribunal, we can understand the course of the trial with its pre-set procedures. Article 473 of the code of criminal procedure establishes that the order of inquiry begins with the presiding judge,

passing to the prosecutor, the assistant, the plaintiff and finally the defender of the accused. Pacelli (2013) advises that questions should be asked directly to the witnesses, only in the case of questions coming from the jury, the question should be mediated by the presiding judge.

Upon interrogation, the investigation must be initiated by the Public Prosecutor's Office, in accordance with article 474 of the criminal procedural law. Then, the assistant, the plaintiff and the defender should come, asking the defendant questions directly.

When the second phase of the Jury Tribunal procedure is finalized, an appeal against the sentence handed down is applicable, in accordance with Article 593, III of the Criminal Procedure Code.

With the presentation of the legal and procedural bases of the Jury Tribunal, the Jury must operate to fulfill its function of promoting justice in cases of willful crimes against life. In the next session, using a theoretical study of areas related to law, we will treat the Jury Court as a space for performance, with emphasis on aspects of its performance that contribute to the social construction of the notion of evil and criminal women.

3. THE LEGAL COURT AS PERFORMANCE

Understanding the Jury Court as a center, where dramas of everyday life are staged, corresponds to a particular focus, focused on the narrative constructions that are exercised in this Court. By highlighting the role of narratives, the way is cleared to extract the experience that comes with these successive versions of events. From the understanding of this body of choices, we realize how the experiences are organized and are sometimes amplified, sometimes erased. This approach suggests the possible ways in which this institution operates, freeing or condemning the defendant from the penalty for committing a willful crime against life.

Anthropologist Ana Lúcia Pastore Schritzmeyer (2012) researched the Jury Courts in the city of São Paulo, between 1997 and 2001, and proposes that this legal instance presents us with a narrative of our society.

Anthropology makes a rich contribution to a consistent interpretation of the scope of the Jury Tribunal, with regard to its realization in the social fabric. Such scope, however, is not limited to instrumentalizing justice, but it has a relevant relevance in the relationship established between the legal and social spheres. From the methodological resource of ethnography, it becomes possible to understand, in an interpretive back and forth between law and anthropology, a notion of justice that appears inside the Jury Court, which thinks about "investigating Jury narratives about the society" (SCHRITZMEYER, 2012, p.31).

In his research, Schritzmeyer (2012) questioned the blocks of values that are explored in the Jury and how, during the sessions, these meanings will imply in the judges' decisions, in this context, the jurors. Texts, verbal and written, technical / scientific and informal, combine in this scenario and produce diverse readings. The author wants to understand what are the speeches that are repeated, wanting to know if the difference and inequality is reinforced

there or not, or if this is a scenario in which impartiality guides the conventions, within that event / ceremony. Schritzmeyer (2012), explores the existence of an internal grammar to the Jury, which organizes its practices and links those heterogeneous texts, overcoming the ideal perspectives that are described in the body of Brazilian criminal procedural law.

Thinking of the Jury, "as a perpetuator of inequalities and differences in the midst of legal and theoretical attempts to found consensus" (SCHRITZMEYER, 2012, p.28) and in its playful, ritual and scenic character, is the assumption that Schritzmeyer gives to the multiple character of the institution, which leaves, even with systematic legal guidelines and predispositions, cracks and erasures, which respond to other scenarios and imaginary, other than those strictly connected to a notion of exercising justice. The focus will then be on the discussion that takes place inside the Jury plenary sessions.

3.1 THE JURY COURT AS A GAME

The notion of game is developed by Schritzmeyer (2012) as an analytical instrument of what happens in the plenary of the Jury Tribunal. Within a time limit that implies a break with an external reality of the session, which is an end in itself and that makes it clear that its participants are aware that that activity is different from the tensioned reality of everyday life, we face a game situation.

The game is a productive cultural factor in societies, since it articulates images and transforms them, which establishes a link between imagination and reality. It is proposed, therefore, that the Jury Court, by gathering the same characteristics described for the game, be understood as such, that is, it can be considered as a game when it simulates and works with the images of an individual who kills another (SCHRITZMEYER, 2012). The proposed approach offers a perspective that can go beyond a mere exercise of state power over subjects,

The author interprets the court "as [an institution] capable of transcending polarizations, allowing the construction of multiple subjectivities and redefining social experiences, hence the judgment sessions can be understood as rituals of a playful and agonistic character" (SCHRITZMEYER, 2012, p.48). In its analysis proposal, the Court is perceived "as games based on the manipulation of images related to the regulation of the power of one individual to kill another" (SCHRITZMEYER, 2012, p.49).

There is, therefore, a process of legitimizing these images, in which the one who imagines and appropriates the death images more cunningly, is the one who understands what are the fundamental values that constitute and are conveyed by the Court and by social morality.

Those subjects that make up the Jury scenario, as speech producers and in the use of their expression and gesture, speak of our world of culture, of our moral and socioeconomic conventions. The Jury actors have the role of transforming crimes that end in murders into a metaphor for the dramas of everyday life. Thinking about the narratives that make up this institutionalized game of the Jury Tribunal, corresponds to a reading of the imaginary of that social body that manages it. Still, and apparently, the participant in this game represents a group of expectations that are already internalized by living in society itself. These suppos-

edly created images are, in fact, restatements of social rules already fixed and predisposed. (SCHRITZMEYER, 2012)

Schritzmeyer (2012) lists a set of general rules for the development of a game and relates them to the formation principles of the Jury Court. The author notes that the games can be voluntary or mandatory. In the Court, actions are developed that resemble the mandatory rules of a game, in which there is a must-do involving its members. We know that the trial sessions cannot be postponed or suspended without reason and that, only in occasional circumstances, the Jury can be rescheduled, which reinforces the mandatory nature of this game and its difficult interruption.

Another relevant feature that is common to Courts and games is the ability to create a break in everyday life. Schritzmeyer (2012) points to the extraordinary character of a judgment session and, approaching the context of games to that of rituals, ponders that there is a spatiality and a temporality that suspends the subject's contact with the reality of everyday life, giving a tone artificiality to these categories. In the court scenario, we would move from real life to narrated life. The author highlights the importance of the body of implicit and explicit rules that must be admitted and exercised by the members of the Jury. Breaking the rules means a break with this extraordinary spectrum of the institution:

> This artificial isolation delimits not only the place of play, but commonly characterizes almost all ritual circles of consecration and initiation, so they are quite similar to spatial boundaries for playful and sacred purposes. Such delimitations are very clear in the plenary of the Jury. There are forbidden, isolated, closed, secret places, as well as others where those who are not part of the game pass through. The world of sessions is temporary, regulated, and whoever observes it will notice this (SCHRITZMEYER, 2012, p.61).

Court sessions can be understood as a magic circle, a restricted space, an area where the game develops and that its participants undergo a reconfiguration in which their characteristics, seen in the reality of everyday life, are temporarily re-examined and partly abolished, to serve the predetermined rules of the game. The delimitation of roles in the Jury scenario is essential for its development. The architecture, the clothes and the bodies themselves, are already sources of information about the dynamics that develops there. When dealing with the Jury Tribunal, it is advisable to look beyond the mere judicial procedure instrumentalized by the law, but rather as a ritual of a sacralized character that lets us see the roles that each subject plays. The role of each subject in the plenary and their activity in that context are questioned. For Schritzmeyer,

> The sacred and rigorous character of judicial rituals does not exclude their playful qualities, just as the competitive and playful character of procedural practices does not exclude serious attitudes and rapture by practitioners. In these two hypotheses, sides of the same coin are revealed, the game is subjected to a system of restrictive rules that place its participants within an ordered and antithetical domain. (2012, p.73).

There is a grammar of performance in the plenary sessions of the Jury Tribunal that makes it possible for its participants to decode the rules of the game and analyze their resourcefulness during their performance. If we mix notions of material law with the mere description contained in a complaint, we notice a set of choices that reflect and characterize the Brazilian judicial bodies.

Schritzmeyer (2012) suggests the existence of two axes that organize plenary sessions, one horizontal, composed of jurors, defendant and defense attorney, and the other, vertical composed of judge, prosecutor and his assistants. This entire imaginary division can be identified by the speeches, the arrangement of the bodies and the architecture of the room where the Jury is developed. The horizontal axis concentrates a persuasive argument, in which the words, the gestures and the most varied signs of language try to convince the jurors. The other axis, interested in guarding and representing social interests, brings together the subjects who can move in this division, with special action from the prosecutor, producing the discourse and narrative of the maximum representatives and inspectors of the law.

Still according to Schritzmeyer (2012, p.67) "in the case of the plenary sessions, the law and the interpretations of procedural pieces allow the metaphor of moral codes always at play in the narratives of crimes". These two axes articulate, diverging or waking up, a narrative that reviews the case by reorganizing imagery and reinforcing its hypotheses that represent images already predetermined by life and average social morality. However, even reiterating these pre-established views, the Court is a place of rapture, tension, competition, futility and ecstasy.

When considering the characteristics of the games present in the Jury Court, Schritzmeyer (2012) also argues that there individuals are led to believe in a temporary and limited perfection of the world. Unlike the reality of life that constrains us and happens without asking for passage, this institution builds an image of precision and continuity, generating a specific and apparently predetermined scenario. In the Court's panorama, the representations that build the world are structured in the narratives and arguments developed by the characters who accuse and defend the defendant.

The aforementioned author notes that there is also a community behavior that arises from the feeling of belonging of the players to that doing, the result of the belief that those who are involved in the game and dominate its rules can find other common characteristics in other participating subjects, forming nuclei of affinity. As she suggests, since the formal greetings and presentations at the trial session, the papers are already distributed and reaffirmed. Right in the first acts of the Court, the roles that must be developed by each character that make up the Jury are marked and reiterated, belonging and affinities are guided, thus, by the systematic reaffirmation of the role of each one in the plenary sessions.

Linked to the notion of belonging related to both the game and the Jury Court, is the idea of a party. Ana Lúcia Schritzmeyer (2012) observes that in these events there is a representation party, in which power relations are staged and displayed wanting to legitimize those statements:

> Representation, by making subjects consensually assign power to the sovereign, constitutes their legitimacy. And as power is only legitimated when it is granted, [...] it is in the festive representation process that its effective legitimation takes place (SCHRITZMEYER, 2012, p.91).

What will be highlighted in the Jury, as argued by Schritzmeyer (2012) is the strength of the State, the legal imperative embodied in its representatives.

These subjects still reflect the reasoning of a criminal system as a system of values, manners and beliefs, which even though it seems fictitious in its ideal model, corresponds to the legitimate demands of society in dealing with willful crimes against life. The author

argues the importance of this system of legitimation for the functioning of this popular institution, saying that understanding the reality demands understanding the system of beliefs that are placed in this group.

For this reason, more than knowing whether the defendant committed the crime of which he is accused or not, it matters how he, through the versions [...], allows the group to articulate a detailed reflection on crime and the values that make certain acts socially legitimate or illegitimate (SCHRITZMEYER, 2012, p.95).

The components of the Jury, due to the nature and dynamics of their functions, contribute to the construction, legitimation and circulation of a system of beliefs linked to the notions and narratives of criminality in the society in which they operate.

3.2 RITUAL ASPECTS

Narrative constructions about killing can also be interpreted based on their ritual character. In the context of the Jury Tribunal, those who argue exhibit their power of legitimation and persuasion from a complex system of representations and practices that provides for the formation and exchange of systematic meanings in such a way that brings us closer to the notion of ritual.

Returning to the anthropological perspective of the Court of Jury presented by Schritzmeyer (2012), the ritual can be seen as a phenomenon that highlights the stories of social life, functioning as a mirror of the worldview of individuals and providing a moment when society speaks of you. The ritual performs in the symbolic arenas of the Court the materiality of that social context, since those who compose it are producers of significant material that aims, in addition to a justification and a reason to condemn or absolve, to ponder the "meaning of a whole value system that qualifies lives, deaths, order and disorder" (SCHRITZMEYER, 2012, p.136). In the Court, where the future of a subject's freedom is discussed, elections of preponderant and fundamental values of social life are set, with society exercising its discourse on itself.

Considering the Jury as a ceremony implies thinking about the physical and symbolic manipulation of the objects and bodies that circulate there. The hierarchical order that appears in the greetings, the disposition of the bodies on the scene and the attire of their participants already signals this predetermined modeling, for example. Aiding this is avoidance. During judgment sessions, argues Schritzmeyer (2012), subjects leave certain behaviors aside, in order to give visibility to that space and reproduce the feeling that that occasion is special and singular, compared to the others of everyday life.

It is also worth mentioning the very figure of the presiding judge who articulates himself in the Court as an image close to that of the priest, a common presence in rituals. This supposed guide, which mediates discussions and ponders on the smooth running of the session, is at the center of it and represents what is fundamental in relation to the technical knowledge of the judiciary. Based on the law, which is seen almost as a constitutive and supernatural element of the Courts, the judges invoke it by dealing with an abstract and universal element, which will soon gain materiality by interfering in the reality of the life of a defendant or defendant. Schritzmeyer says that,

> [...] we can consider that, taken as a ceremony, judgments by the Jury perform certain functions not only for its participants, but also for those who, in some way, are affected by its logic and its effects. These judgments express, transmit and perpetuate elements that make up the system of values and feelings considered legally hegemonic, preserving them from insoluble doubt and opposition, since, however controversial a case is, a sentence is always reached and intensifies solidarity among the people who participate in the ceremony (2012, pp. 147-148).

The ceremony that the Jury Tribunal is preparing is dominated by ordination and a sense of respect that legitimize it as an institution of relevance in the Brazilian judiciary. The predetermination of their acts and their forms shapes the behavior of the bodies and discourses produced within them. The Court is characterized by Schritzmeyer (2012) as an extraordinary event predicted in the order of time, which brings together versions of an event that tells of the social world where it was produced. The ritual aspect of the Court promotes approximations with the social world, allowing it to appear and develop in the voice of the Jury's characters. A given energy that gives form to rituals is the same energy that moves everyday life. However, the rites are different because they are organized and planned.

When the figures of the defender and accuser produce versions addressed to the public and the jurors, and when the latter exercise their choices by asking yes or no, opting for the conviction or acquittal of the defendant or defendant, we have a ritual.

It is important to note that, if the ritual intends to bring its participants into their own contact with the sacred, with the divine, the Jury Tribunal, in its plenary sessions, wants to take its participants to a direct exercise in the jurisdictional game proposed by the State right. Assessing the production and construction of motives - exercised mainly by the roles of accusation and defense - of the legitimacy or illegitimacy of a subject who is accused of killing and ending the life of another, he exercises his function of approaching the radiating nucleus of power, in this case, carried out in the image of the State.

3.3 JURY AND THEATER

In his analysis of the Jury Court as a performance Schritzmeyer (2012) promotes the approximation of the notions of staging, drama and play. This close conceptual link leads the author to think that these versions produced in the Jury Courts are essentially composed of narratives, which are based on a dramatic-sociological discourse, systematically and analytically articulating the gears that move social life. According to the author, these texts are dramatized because they articulate and expose the feelings and emotions of those who speak them in plenary sessions.

The dramatic style that develops in the Jury's rituals is shown in its likelihood mechanisms. Far from the classic notion of the tragic, as a succession in which the characters are already predestined in their history, the drama provokes discovery and incites the search for what is hidden:

> When presenting itself through its various characters, the Jury acts in unison, although creating the illusion that the set is fragmented. In a single session, hatreds, compassions, hopes and hopelessness are raised, dispersed and balanced, without major threats to the institution.

> The Jury remains because one of the theatrical "illusions" that it creates is that its representatives are spokespersons for universal values. When judging apparently inter-individual dramas according to apparently collective values, judges, prosecutors, defenders and jurors disguise, for themselves and for others, the social character of the dramas and the elitist and hierarchical bias of the values on which the system is based to judge them. In this mechanism lies the creation of likelihoods (SCHRITZMEYER, 2012, p. 176).

The theatrical illusion, in this context of the Court, is the mechanism that allows the legitimation of the actions by its public in the face of the case. Even with unequal relations and perspectives, which bring together various notions of good and evil, acceptable or not acceptable, the presence of predetermined notions is constant. The other opinions may, according to Schritzmeyer (2012), fall into a spiral of silence.

With the focus on the victim of the willful crime against life, the Jury, faced with the created illusions, decides whether she, the victim, deserves to be socially preserved or not. He decides whether in the face of that specific case, other lives and values were illegitimately cut. At the end of these sessions, then, we would have the evident realization of universal values, with reference to an ideal society, which appears with the point of view and departure of all those subjects that make up the jury, with the exception, of course, of the defendant or defendant, who will pay for that reading of the world with his freedom.

When approaching the Jury sessions as a game, ritual and theater, we try to gather a point of view that contributes to thinking about how this legal instance participates in the construction of the criminal subject and the notions of good and evil in societies governed by the democratic rule of law. We realized that, in this center that discusses the legitimacy of one subject killing another, the elements considered fundamental in social life will predominate. With society exercising its discourse on itself, we have access to what these fundamental elements are, which often refer to traditional models of intolerance and exclusion.

4. THE COURT OF THE JURY AND THE SOCIAL CONSTRUCTION OF REALITY

The analysis of the Jury Tribunal that we propose turns to narratives that are based on a "dramatic-sociological" discourse (SCHRITZMEYER, 2012, p. 166), which moves the gears of social life. In the dynamics of the Court, we can see that the debate about the legitimacy of one subject killing the other highlights elements that are considered fundamental in social life and that should reflect the reality of everyday life, which is not always stripped of preconceived and discriminatory notions. .

Berger and Luckmann (2001) postulate that reality is not given to us a priori, but is, rather, a continuous social construction. The authors say that what we call reality is a social construct and that, from a sociological perspective, it is necessary to understand that reality is an attribute, a quality of events that are perceived, regardless of our will and our choices. Knowledge, in turn, is affirmed by the authors as the confirmation and certainty that we have

before the characteristics of these real events, apprehended by our senses. Thus, we understand the general ways in which realities are accepted and validated by human societies.

The legitimation of the reality of everyday life is an important theme of social theory and, according to Berger and Luckmann (2001), it has the role of "explaining" the institutional order, granting cognitive validity to its intended meanings, as well as "justifying" The institutional order giving normative dignity to its practical imperatives (BERGE; LUCKMANN, 2001). We can understand with this that, in the reality of everyday life, knowledge is a compound that emerges from both objective and subjective actions of the institutions, always keeping within it a knowable and a normative element.

When observing the Jury Court, as a judicial body that contributes to the construction of a socially shared reality, we understand that this body is a role in the legal world of mirroring legitimate knowledge and transferring it to the analysis that it makes of supposedly criminal facts. At its center, in that arena where the trial sessions are held, questions about the legitimation of notions of morality and justice, what is right and what is wrong, what is accepted as good and what is evil effervesc and let themselves be noticed. In this sense, the Court contributes to the construction and legitimization of the legal and symbolic dimensions of crime and the criminal, specifically the criminal woman, doing this through its theatrical and mimetic dimension, in short, its underlying dimension that is performative.

From the universe of versions that appear in the Jury Tribunal, we can consider what teaches discourse analysis. In this approach, it is assumed that every person who takes the floor to express himself, creates an image of himself. When expressing himself, the speaker uses artifice so that his image corresponds to what he believes to be the image that will reach his audience in a positive way. There are different ways of presenting yourself and this presentation is usually the result of a group of choices. According to Helcira Lima, the speaker "shows a good image of himself, an image of honesty and common sense, even if this is not consistent with the truth" (2009, p.580).

We can cite as constituent elements of this speech the choice of tone of voice, posture and friendliness of the speaker. The way the interlocutor says what he says and, mainly, why he says what he says corresponds to the effects he intends to achieve in his audience (AMOSSY, 2005). These elements are also essential to the Jury, since they basically use the performativity of their characters to build legitimate images of themselves.

The notion of ethos arose in Greece with Aristotle and in Rome with Quintilian and Cicero. The Greek line uses Aristotelian thought, in which it is stated that the speaker creates and shows, at the moment of enunciation, an image so that he can convince his audience. However, this created image does not need to match your identity. The speaker seeks at the moment of the speech to make his self-portrait, either explicitly or implicitly, leading those who observe him to believe that what he says corresponds to who he is. Regarding this construction of a self-image, Amossy states that:

> Every act of taking the word implies the construction of an image of oneself. Therefore, it is not necessary for the speaker to make his self-portrait, detail his qualities or even to speak explicitly about himself. His style, his linguistic and encyclopedic skills, his implicit beliefs are sufficient to build a representation of his person. [...] That the way of saying induces an image that facilitates, or even conditions the good accomplishment of the project,

> is something that no one can ignore without bearing the consequences. [...] The presentation of oneself is not limited to a learned technique, to an artifice: it takes place, often by default, in the most common and most personal verbal exchanges (2005, p. 9).

Goffman (1975) is also an important reference in this discussion, for his contribution on the construction of social subjects. For him, the "I" is a constructed "I", almost always represented by a set of elements selected by the social subject himself. The author says that this "me" has a dramatic effect on his observers and the real interest in this "me" is concentrated on whether he is believed or not by the actor and his observers. Goffman makes use of the theatrical language, when saying that the individual behaves like an actor. He ponders that the social actor may, in fact, be truly convinced of the mask he has built for himself, participating in a game of disbelief and belief in his social role.

For Goffman (1975) there is a discrepancy between appearance and total reality, proper to any social activity. The actor, he observes, does not expose points of his personal life in certain environments, due to the quality of his observers; hides errors; it covers the process and only the result is presented; it does not mention bad points as constitutive of the process. The audience's relationship with the actor is due to the way in which the observers perceive the representations that are projected to them. The actor makes use of what the author calls "audience segregation" to guarantee "that those in front of whom he plays one of his roles will not be the same people for whom he will play another role in a different environment" (GOFFMAN, 1975, p. .52).

The reference to these theorists is fundamental to understand the role of the Jury Tribunal in the social construction of an idea of a criminal woman. In this conception in circulation in our society, what we bring about social construction ends much more than it is actually technically defined from legal data. This does not mean that the legal construction does not have an effective validity for the Court's analysis, but that it is not restricted to the environment of justice and experts in criminal matters. The symbolic construction runs through an entire lay world that knows or will know about a constellation of versions about crimes and criminal women.

5. A CASE STUDY

The case study that follows aims to demonstrate a given social process of imaginary or symbolic construction of the criminal woman from an objective case. It will be interesting in this analysis, not the criminal's own judgment, but the speech and the textual performance, with a view to our clipping, which highlighted the text of the complaint and the final allegations offered by the Public Ministry of Minas Gerais, in the first phase of the procedure of the Jury Court.

The Public Ministry of the State of Minas Gerais, in the exercise of its powers, filed a complaint against Belo Horizonte (A)[3], which, on April 16, 2005, would have committed a

3 Wanting to preserve the identity of the parties to the case under analysis: "(A)" represents the defendant in the case; "(V)" represents the victim, husband of the accused; "(AV1)" and "(AV2)" indistinctly represent the two daughters who came from the union of the accused and the victim.

willful crime against life. This woman allegedly set fire to the house where she lived with her partner and their two daughters, satisfying the desire to end the lives of these three people. Bottled alcohol was the combustible substance that would have started the fire and served to fuel the flames on these people, with the exception of the accused.

The daughter (A1) was the fatal victim who did not resist the burns, dying at the scene. The children's daughter (A2) and father (V) (AV1 and AV2) ended up not resisting the injuries resulting from the fire days later, in a hospital in the mining capital. In this short report, more in the report of final allegations that precede the decision to pronounce (A),the Public Ministry of the State of Minas Gerais, represented in the writing of one of its attorneys, mixes notions of material law with the mere description, but we immediately notice in the reading of these texts, that the connection of the crime that (A) is the accused is linked to evil instances and images of evil, as our historical perspective has characterized. It is not too much to point out that there are doubts as to whether the defendant emerged unscathed or not from this fire, the text of the case states both.

The incursion of (A) into the criminal types of art. 121, §2º, I, III and IV, in relation to the victim (V), and art. 121, §2º, I, III and IV, and §4º, final part, of the same article, combined with art. 61, in the form of art. 70 final part of the penal code, with respect to (AV1) and (AV2).

The prosecuting court, which produced the complaint, seems to combine in this text portraits that show two isolated personalities in one woman. A first that sees the hysterical woman, corroded by jealousy and stimulated by alcohol, who physically and morally attacks her partner, without worrying about the curious look of the neighborhood; and another who sees a viperine woman, who decides to end the life of her family and simply provides for the extinction of the three, out of jealousy of her partner.

In the text of the complaint that "the accused and the victim (V) lived at odds, the couple's discussions and fights being constant, occasions when (A), usually, physically assaulted his amásio through joints and slaps, also threatening the offended by death, all because of jealousy "(PROCESS OBJECT OF ANALYSIS, page 2) and although" as determined, on the date of the facts, the accused had another heated discussion with (V) and, calmly, kill him, as well as the two daughters "(PROCESS OBJECT OF ANALYSIS, pages 2).

The text that serves as final allegations, which still makes up the first phase of the Jury Tribunal procedure, preceding the decision of pronouncement, which is also promoted by the Public Prosecutor of the State of Minas Gerais, seeking the conviction of (A), text a succession of issues that are of great interest to the approach proposed in this article. After a brief description of what happened, following what has already been seen in the complaint, there were the following questions from the Public Prosecutor's Office about the conduct of (A), in order to reinforce the need for pronunciation:

One wonders:

> What mother would leave her daughters to the flames, selfishly worrying about saving herself at the expense of her offspring?
>
> If it was (V) the author of the fire, what is the explanation for why he left the event seriously burned and the defendant, his main target, unharmed?
>
> Why, once out of the shed, safe, the accused did not return to the interior of the property to save the daughter who remained there (there is news that (V) left the shed with one of the children in her arms), preferring to let third

> parties venturing into the burning house to save the girl (AV1) - charred? (OBJECT OF ANALYSIS PROCESS, pages 229).

And he ends by saying that in the course of the first phase of the procedure,

> The jurisdictional testimonial evidence also brings to light evidence that the defendant's marital relationship with the victim (V) was in very bad shape, with constant aggressions between both. There is then evidence of the motivation of the crime, the feeling of petty revenge, the clumsiness that guided (A) to kill the consort, a feeling that extended to innocent child victims (PROCESS OBJECT OF ANALYSIS, pages 229).

The prosecutor's text constructs a question that addresses the transgressive behavior of (A) in the face of motherhood. It seems that in the eyes of the prosecutor, (A) is deprived of, or has given up, awareness of his fixed and delimited role in the world. We see a woman who conceived and failed to correspond with her first and maximum feminine vocation, motherhood, following selfish, sordid and safe from the flames of the fire. Letting her life prevail over that of her children (AV1) and (AV2), the accused shows the classic image of the woman's cold body (Cf. FERREIRA and HAMLIN, 2010).

In this last description, the paradoxical character of the feminine, as explained by Delumeau (1989), prevails. The woman who is not a hero is a criminal. Being the main source of the paradox of the life of men on earth, the woman keeps, apparently in this question, the source of life and death. The enigma of motherhood remained in many civilizations, linked to nature, while reason was a male characteristic.

FINAL CONSIDERATIONS

The theoretical and analytical path proposed in this article allows us to answer the question that moved us, which was to understand and describe the role of the Jury Tribunal in the historical construction of an imaginary of criminal women that is socially shared, beyond legal boundaries. To this end, we present a discussion of the Jury Tribunal, a first-level body of Brazilian justice, in its bases and in its performance, with the aim of understanding how its dynamics contributes to having a relevant role in the penal and symbolic construction of women perpetrators of willful crimes against life.

The concern that led to this study was the result of access to the text of the process that we use here as a case study and that led to both theoretical reflections on the Jury Tribunal as an instance subject to anthropological analysis, as well as readings on the re-presentation of women and the feminine in the history of humanity. It should be noted that the theoretical basis of this article was limited to a western perspective of discussions about the history of criminal women and the conception coming from a "legal technical" text. The approximation between legal texts and literature, as suggested by Schritzmeyer (2012), allowed to articulate the case in question with a preliminary judgment of the Jury Court.

As we have seen, the case under analysis reflects a grammar of performance in the plenary sessions of the Jury Tribunal. In such a way, it is possible to believe that its participants will decode the rules of the game and analyze the characters of the Jury during their

performance. In the versions extracted from the complaint and the final allegations in this case, we can see a mixture of notions of married law with the description. The set of choices expressed there, however, reflects and characterizes the Brazilian judicial body. The technical/ legal texts showed that, in view of the transgressive behavior that denies the social, moral and Christian function of motherhood, the woman must have her guilt increased.

It is worth reiterating that the documents that make up the file of a case can be requested at any time by the body of subjects that assembles the sentence board, excluding the decision of pronunciation, which cannot be read in the plenary, but can be consulted by the board, which also marks an imprecise intention by the Jury Tribunal. The text of the pronouncement is a decision that came from a togo judge, however it cannot be read in the session, but can be consulted by the jurors and other participants. What is the reason for this ban that does not limit? It is possible that this procedure is an indication that the decision of the first trial phase, which must be motivated, may interfere with what will occur in the Court, which will probably maintain its decision based on the notions of criminal woman and expression of evil already built socially. In this sense, we must consider the interference that the accusing organ can exert in this group of lay people, which will determine the legitimacy or not of the accusation.

The blocks of values that are explored in the Jury, and that are made known mainly during its sessions, come from the world, from the social construction that is made of what we conventionally call reality. In that restricted context, the texts, verbal and written, technical / scientific and informal combine, which can produce different readings, but as we intend to show, they also produce discourses that are repeated, expressing the difference and inequality of the representations of evil, crime, of the criminal in circulation in society.

The Jury ethnography presented by Schritzmeyer (2012) leads us to think of this organ in what is inherent and that allows it to perpetuate such inequalities and differences that are legitimized by legal and theoretical attempts to found consensus and carried out through a staging equally legitimate through which its game, ritual and scenic character are revealed. Even with the systematic legal guidelines and predispositions, it is possible to perceive cracks and erasures that respond to other scenarios and imaginary than those strictly related to the exercise of justice.

With these conceptions in mind, we intend to articulate an interdisciplinary vision of the founding pieces of the Court's procedure, the Jury. We hope that combining the texts of the law with the voices of anthropology, sociology, history, literature and discourse analysis will serve us, mainly, to reinforce the multiple character of legal research, which often tends to close in its purely technical system. This body of the Brazilian judiciary, reflected in our object of analysis, allowed to read through its text, a taste for intolerance, creating a view of repulsion of the feminine and of the criminal women that must be punished with more severity, since traditionally their crime represents the greatest sin of corresponding to its representation of the locus of evil that still prevails in contemporary society.

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PPGD/FUMEC DISSERTATIONS

LINE OF RESEARCH: PRIVATE AUTONOMY, REGULATION AND STRATEGY

The growing need to promote sustainable economic development, contrasted with the significant regulation of economic activity, with the increasing intervention of the State in business and with the excessive judicialization of legal phenomena, are relevant, contemporary issues and are part of the basis of several scientific and technological problems. practical approaches involving tensions between private autonomy, regulation and strategy.

This situation requires that the Law be recognized not only as a science and a legitimate instrument for resolving conflicts, but as a fundamental element of structuring the objectives of people (natural and legal) and organizations (private and public), so that these can carry out their tasks. strategic objectives with the lowest cost and with the greatest possible efficiency, respecting the normative, philosophical and ethical limits resulting from the Democratic Rule of Law.

In this context, it is essential to develop innovative ideas within the scope of the science of law, as well as the analysis, reflection and propositional criticism of structuring issues, such as, among others: the limits of state intervention in economic activity and private autonomy ; contemporary normativity and the licit structuring of globalized businesses and markets; the freedom to contract; the finalistic and contemporary interpretation of the classic private law institutes; the confrontation between private autonomy and the public interest; the dichotomy between private property and the company's social function; the relations between companies, the State and third sector organizations; the composition of private and public interests in the markets; the inefficiency of the instruments for controlling economic activity; public--private partnerships; the relationships between business models, business planning, the strategic management of organizations and the efficiency of legal planning (tax, corporate, contractual, labor, etc.); the use of typically private legal structures to organize state activity; market domination and free competition; business combinations, mergers and acquisitions; the freedom to act, to think, to inform and to be informed, to undertake.

Start date: 01/09/2014

http://ppg.fumec.br/direito/linhas-de-pesquisa/

ANALYSIS OF THE OVERLAY OF INTELLECTUAL PROPERTY RIGHTS IN DESIGN

MARINA VELOSO MOURÃO

MOURÃO, Marina Veloso. **Analysis of the overlapping of intellectual property rights in design.** 97f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on July 10, 2020.
Virtual room on the digital platform "zoom"
Advisor: Prof. Dr. Frederico de Andrade Gabrich

ABSTRACT

Law and art are part of the human universe, one as a way of preserving social balance and the other as a way of emotional experiences. The appreciation of design works and applied art is increasingly present in the life of the population, who are looking for an experience or an object that is different and pleasant. In this sense, the present master's thesis proposes, as a research problem, the analysis of the feasibility of the double protection of design objects recognized as works of art in Brazil, as in France. The general objective is to demonstrate the need to establish which intellectual property rules protect design and applied arts, considering that the Copyright Law and the part reserved for the industrial design of the Industrial Property Law present gaps regarding the appropriate form of protection of these legal assets in the Brazilian system. To achieve the general objective, the hypothetical deductive method is used predominantly, critically analyzing the Copyright Law (Law nº 9.610 / 98) and the Industrial Property Law (Law nº 9.279 / 96), both Brazilian, national and European doctrine and jurisprudence related to the topics covered, an analysis of the overlapping protection in the comparative Law between Brazil and France was carried out. In addition, a suggestion to change the Brazilian Copyright Law is presented, in order to fill the existing gap regarding the protection of design and applied works of art, in order to provide greater legal certainty to the recipients of the law.

Keywords: Intellectual property. Copyright. Applied work of art. Design. Industrial draw. Overlapping rights.

MEDIATION AND CONCILIATION AND THE STRATEGIC ROLE OF NOTARY AND REGISTRATION SERVICES: AN ANALYSIS OF THE MODEL ADOPTED BY THE NATIONAL COUNCIL OF JUSTICE AND THE IMPACTS ON DEJUDICIALIZATION

CAROLINA FINGER MARTINEZ MORALES

MORALES, Carolina Finger Martinez. **Mediation and conciliation and the strategic role of notary and registry services: an analysis of the model adopted by the National Council of Justice and the impacts on judicialization**. (266 sheets) f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on August 5, 2020.
Virtual room on the digital "zoom" platform.
Advisor: Profa. Dra. Danúbia Patrícia de Paiva

ABSTRACT

In the current Democratic State of Law, taking into account organized civil society, the decisions imposed by the Judiciary, in a coercive way, are no longer seen as the only means of satisfaction of rights. Thus, the extrajudicial mediation and conciliation carried out by notaries and registrars now represent significant milestones. However, it proves to be essential to verify if the model conceived by the Brazilian National Council of Justice for the exercise of mediation and conciliation by extrajudicial services can ensure the composition of disputes by consensus. Thus, it is asked, as a research problem, whether the objective of consolidating public policies to encourage and improve the consensual mechanisms for resolving conflicts, sought by the Brazilian National Council of Justice, with the principles and guidelines currently existing, notably by the established precepts in Provision nº 67/2018, which established a standard for the institutes of conciliation and mediation in notary and registry services, it proves to be efficient and sufficient to settle disputes, with the ability to generate relevant impacts on judicialization, promoting the realization of the right of access the Justice. As a hypothesis, it is stated that the model adopted by the Brazilian National Council of Justice, especially in Provision nº 67/2018, contains gaps and setbacks when dealing with extrajudicial conflict resolution institutes, both between provisions of this council's regulatory provision, as well as between general and special legislation on the subject, not proving to be, in isolation, truly efficient and sufficient in the solution of controversies, which may cause damage to the right of access to justice and negative impacts on judicialization. The research adopts, as converging theoretical frameworks, the concept of Strategic Analysis of Law by Frederico de Andrade Gabrich, which supports the need for a new hermeneutics, applying rules and legal principles to prevent and resolve conflicts, relativizing a legalistic, conflicting and procedural approach, for the benefit of extrajudicial prevention and resolution, as well as the concept,

by Aflaton Castanheira Maluf, for whom extrajudicial mediation and conciliation comprise effective conflict resolution institutes, and that notaries and registrars can and should be mediators and conciliators. The general objective of the research is to elaborate a critical analysis of the institutes of extrajudicial mediation and conciliation, with the participation of notaries and registrars, in addition to identifying if the means of conflict resolution are currently able to produce the effects of prevention and composition of disputes, how they were conceived. As for the other methodological aspects, the research is inserted in a juridical-sociological perspective, adopting the hypothetical-deductive reasoning as the predominant reasoning. As for the knowledge sectors, the research is interdisciplinary, combining concepts of Procedural Law, Constitutional Law, Jurisprudence, Civil Law, and Strategic Analysis of Law. As for the type of research, it is bibliographic and documentary; concerning the nature of the research data, they are primary, raised from research to laws, resolutions, and other norms, worked directly by the researcher, and secondary to specialized literature and doctrine related to the theme.

Keywords: Mediation. Conciliation. Notaries. Extrajudicial services. Alternative dispute resolution. Brazilian National Council of Justice. Access to justice.

THE MARIANA DISASTER AND THE PREVENTION OF THE SOCIAL RISK OF ENVIRONMENTAL DAMAGE

KATHIA FRANÇA E SILVA

SILVA, Kathia França e. **Mariana's disaster and the prevention of the social risk of environmental damage**. 117f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on August 10, 2020.
Virtual room on the digital "zoom" platform.
Ad hoc advisor: Profa. Dr. Luciana Diniz Durães Pereira

ABSTRACT

The expansion of capitalism from the Industrial Revolution, responsible for the world's economic growth, came at the expense of predatory exploitation of the environment. The disordered advance of predatory extractive activities culminated, in the twentieth century, with the imminent threat of the depletion of natural resources, awakening the need to rethink the whole form of production. In this context, perception of law and economics, as two independent systems, enables the correct observation of the intersection of systems that mutually reflect and influence each other, what is called Economic Analysis of Law, a sector of knowledge that has in Ronald Coase one of its main exponents. The analysis of the cost of resource allocation, as well as the fixing of property rights, pillars of Coase's theory, is relevant to avoid environmental disasters. Thus, the research problem is asked how the guidelines pointed out in Coase's theorem, the theoretical framework of the research, applied to the process of creation of environmental law regulatory norms, would reduce the risk of socio-environmental damage, such as those that occurred with the rupture of the Fundão dam, in Mariana/MG, inducing the behavior of the mining sector to privilege the preservation of natural resources. As a hypothesis, it is stated that the application of the guidelines pointed out by Ronald Coase, as a means of giving more efficiency to laws, regulations and public policies – discouraging the market that optimizes profit, without accounting for socio-environmental losses – would ensure the prevention of social risk of environmental damage, as occurred in the city of Mariana/MG, by the rupture of the Fundão ore tailings dam. The general objective of the research is to investigate the possibility of anticipating the behavior of economic actors in the environmental field, from the vectors pointed out by the Coase Theorem, identifying whether they will discourage the performance in the market. Also, it seeks to highlight how the incorporation of the theoretical framework provided by Coase's theorem, by legislation, regulation and environmental public policies, is together with advances in the area of environmental protection, may present alternative solutions to prevent the indiscriminate use of natural resources. As for the other methodological aspects, the research is inserted in a juridical-sociological perspective, adopting as predominant reasoning the hypothetical-deductive. It is from an interdisciplinary and transdisciplinary perspective, since it proposes to approach the interface between Law and Economics in its positive and normative dimensions, in addition to the Economic Analysis of Law.

Keywords: Economic Analysis of Law. Economy. Law. Environmental Law. Coase's theorem. Ronald Coase. Mariana disaster. Fundão Dam. Mining. Samarco. Vale

LEGAL SECURITY IN THE BRAZILIAN REAL ESTATE REGISTRATION SYSTEM IN THE LIGHT OF COMPARED LAW: OVERCOMING PRECEDENT 84 OF THE SUPERIOR COURT OF JUSTICE BY LAW NO. 13,097 / 2015

CLÁUDIA MARIA RESENDE NEVES GUIMARÃES

GUIMARÃES, Cláudia Maria Resende Neves. **Legal security in the Brazilian real estate registration system in the light of compared law**: Overcoming Precedent 84 of the Superior Court of Justice by Law No. 13,097 / 2015. 285 f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on August 21, 2020.
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Advisor: Prof. Dr. Daniel Firmato Almeida Glória

ABSTRACT

The problem to be investigated in this paper is: after the enactment of Law n° 13.097/2015, is the precedent n° 84 of the Superior Court of Justice still valid? The hypothesis is that, if before the enactment of Law n° 13.097/2015, the precedent n° 84 was already considered by the best doctrine to be mistaken, as it disregarded that real estate registration advertising is the only way of the promise of buying and selling to radiate erga omnes effects, after the enactment of Law n° 13.097/2015 there is no longer any space for clandestine real estate in the national legal system. The research begins with the panorama of the transmission of real estate in comparative law, from which the analysis of the classification of real estate registration systems in force in comparative law is made, giving emphasis to France, the United States of America, Germany, England, Spain and Austria. Afterwards, the transmission of real estate in Brazil is explored, analyzing the historical evolution of its territorial occupation and pertinent legislation until 2015, to then address its efficiency regarding the legal security desired in real estate transactions. As a methodology, brazilian and foreign specialized doctrine on the subject is used, as well as nacional jurisprudence. It appears that the instrumentality of the real estate registry, both in the social and economic sense, having the real estate registry principles as a fertile ground for legal security in real estate transactions, allows us to conclude that, from Law n° 13.097/2015, with the obligation to concentrate all the information on the legal status of the property in its registration – and the respective sanction for its non-compliance –, the ordinary legislator left behind the static legal security model, adopting, from then on, dynamic legal security, greatly raising the level of security in real estate relations. It is concluded, therefore, that Law n° 13.097/2015, in the part that deals with real estate records, is an insurmountable barrier to real estate hiding, which until then was not only tolerated, but also encouraged by precedent n° 84 of the Superior Court of Justice.

Keywords: Legal Security. Real Estate Registry. Law n° 13.097/2015. Precedent n° 84 STJ.

LINE OF RESEARCH: PUBLIC SPHERE, LEGITIMACY AND CONTROL

The identity between the public sphere and the state cannot be conceived at the same time. The public sphere "is composed of movements, organizations and associations, which capture the echoes of social problems that resonate in the private spheres, condense them and transmit them, then, to the public political sphere. Its institutional nucleus is made up of free, non-state and non-economic associations and organizations, which anchor the communication structures of the public sphere in the social components of the world of life ". (HABERMAS, Jürgen. Law and democracy: between fatality and validity. Rio de Janeiro: Tempo Brasileiro, 1999. v. 2, p. 99 et seq.).

The center of the public political sphere, in turn, is also composed of other functional "subsystems", each representing its role within the political system, such as the administrative system, the parliamentary complex, the judicial system and the democratic opinion formed by elections and political parties. In the contemporary moment, spaces in the public sphere gain more breadth and dynamism in the search for collective means of building plural identities. It is no longer between state powers or because of belonging to historically situated communities, but between different sources of social integration, that a new balance must be sought.

The object of study in this line aims to reconstruct the classic academic approaches to public law, centered on the perspective of the State and Public Administration, based on two instruments of the social integration process: legitimacy and control.

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http://ppg.fumec.br/direito/linhas-de-pesquisa/

THE ILLEGIBILITY OF TERRITORIAL LIMITATION OF THE EFFECTS OF SENTENCES IN COLLECTIVE ACTIONS IN THE LIGHT OF ISONOMY

GUILHERME ABRAS GUIMARÃES DE ABREU

ABREU, Guilherme Abras Guimarães de. **The illegibility of the territorial limitation of the effects of sentences in collective actions in the light of isonomy**. 94f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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Advisor: Prof. Dr. Luís Carlos Balbino Gambogi

ABSTRACT

Contemporary society is marked by collective disputes and the protection of collective rights in a broad sense, involving a group of people or even the entire society. In this context, Collective Procedural Law is inserted, destined to solve, by means of a single judicial response, conflicts of greater amplitude, avoiding the dispersion of individual demands. Collective procedural law is governed both by the general principles of the process - such as isonomy - and by specific principles, which contribute to giving autonomy to the discipline. In Brazil, the defense of collective interests is systematized, mainly, by Law No. 7,347 / 1985 and by the Consumer Protection Code, which, integrated, form the collective protection microsystem. In Collective Procedural Law, it is common for jurisdictional provisions to reach determined groups or not, to the extent that the interest in discussion radiates. The Federal Executive Branch of Brazil, seeing itself limited in its performance by the decisions rendered in collective actions, instituted a new system, changing, by means of Provisional Measure No. 1,570-5 / 1997, later converted into Law No. 9,494 / 1997, the wording originating in art. 16 of the Public Civil Action Law, with the objective of restricting the effectiveness of sentences handed down in public civil actions to the territorial area within the jurisdiction of the prolacting judge. Thus, it is asked, as a research problem, whether, in the light of isonomy, it would be legitimate to limit the effects of sentences in collective actions, under the terms of art. 16 of the Public Civil Action Law, considering the changes promoted. As a hypothesis, it is stated that the territorial limitation of the effects of sentences in collective actions is not legitimate, since it allows for the multiplication of demands and increases the chances that individuals in identical situations will receive different jurisdictional treatments, denaturing the essence of collective actions. and disintegrating the protection of collective rights. The general objective of the work is to verify, in the light of the principle of isonomy, the legitimacy of the territorial limitation of the effects of sentences in collective actions, under the terms of the new wording of art. 16 of the Public Civil Action Law. The concept of Ada Pellegrini Grinover and others, for which the principle of isonomy implies the fulfillment of the vectors of formal and substantial equality, will be adopted as convergent theoretical land-

marks of the research, importing, in practice, the treatment of unequal to the extent of its inequalities, as well as the conceptions of Sérgio Henriques Zandona Freitas, who affirms that the due legal process cannot be dissociated from the due constitutional process, and that state provisions will only be considered legitimate when built on isonomic participation. As for the other methodological aspects, the research is located in the legal-dogmatic aspect, predominantly adopting deductive reasoning. As for the knowledge sectors, the research is of an interdisciplinary type, as it combines aspects of Collective Procedural Law, Constitutional Law, Philosophy and Theory of Law. It is of the bibliographic type, having as primary data the legislation and the jurisprudence related to the theme and, as secondary data, the doctrines directly related to the interrelated branches of knowledge.

Keywords: Collective Procedural Law. Public civil action. Territorial limitation of the effects of the collective sentence. Isonomy. Provisional Measure No. 1,570-5 / 1997. Law No. 9,494 / 1997.

THE CONSTITUTIONAL RIGHT TO RESOURCE AND GROUNDS FOR DECISIONS: CRITICAL STUDY OF JUDGING IN A SINGLE INSTANCE AT HEADQUARTERS

LAÍS ALVES CAMARGOS

CAMARGOS, Laís Alves. **The constitutional right to appeal and the reasoning of decisions: a critical study of the judgment in a single instance in an appeal court**. 89f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020. Available at: https://repositorio.fumec.br/xmlui/handle/123456789/585.

Defense on June 10, 2020.
Virtual room on the digital platform "zoom"
Advisor: Prof. Dr. Sérgio Henriques Zandona Freitas

ABSTRACT

The 2015 Code of Civil Procedure, in his §3rd of article 1.013, determines that the court will immediately decide the merits when it finds an omission in the examination of one of the requests or when the sentence is null due to lack of reasoning. In other words, this rule allows single judgment in appeal, by the 2nd degree courts, in order to favor speed rather than fundamental rights such as the right to adversary, the reasoning of decisions and the constitutional right to appeal. This research aims to study in detail referred fundamental rights in order to demonstrate that the disrespect to them goes against the Rule of Law, current paradigm since the 1988 Constitution of the Republic, and the due constitutional process, which ensure the supremacy of the Constitution over the law, being of fundamental importance the observance of the people's participation and unceasing inspection rights for the application of the law. This is an original problem issue, of great value in the scientific field, as a new and more comprehensive rule is being analyzed than that existing in the Code of Civil Procedure from 1973 - which provided for the hypothesis of the court to judge immediately the demand only in the case of a final sentence in which there was only a matter of law to be analyzed. There is also relevance for directly compromising the solution of the proceedings, in view of the limitation of the matters that can be appealed to the Superior Court of Justice and the Supreme Federal Court. The present research aims, therefore, to confirm the hypothesis that Paragraph 3 of article 1.013 of the Code of Civil Procedure is not consistent with the Rule of Law. The deductive method will be used to carry out a bibliographic search in books, theses, dissertations, articles in Qualis Capes journals and jurisprudence from the Court of Justice of Minas Gerais, focusing on the constitutional process theory as a theoretical framework, with great contributions from neoinstitutionalist theory whose legal framework is in the fullness of Democracy.

Keywords: Rule of Law. Due constitutional process. Substantiated decisions principle. Right to appeal. Right to adversary proceedings. Fetishism of celerity. 3rd paragraph of article 1.013 of the 2015 Brazilian Code of Civil Procedure

DEJUDICIALIZATION AND ACCESS TO JUSTICE: MEDIATION AND CONCILIATION IN EXTRAJUDICIAL SERVICES

MICHELLY PEREIRA MELO

MELO, Michelly Pereira. **Judicialization and access to justice**: mediation and conciliation in extrajudicial services. 111f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on July 3, 2020.
Virtual room on the digital "zoom" platform.
Advisor: Prof. Dr. Luís Carlos Balbino Gambogi

ABSTRACT

The present study aims to investigate the possibility, taking as a parameter the criteria of admissibility and adequacy, of the use of extrajudicial techniques of conciliation and mediation for the resolution of conflicts in the registry offices. To this end, it opposes jurisdiction and alternative means of conflict composition, seeking to identify the means that best serve access to justice and the realization of the right to citizenship; explains the notary and registration activity in Brazil, presenting its origin, historical evolution, constitutional forecast, main characteristics and guiding principles; and it discusses the social and political grounds for judicialization and its application to notaries as well as the difficulties related to lawyers and plaintiffs and defendants. The methodology used for the development of this dissertation was deductive, dialectical and empirical through a bibliographic and documentary research carried out from previously published sources, such as books, articles, academic works and legislation that refer to the problem theme in analysis allowing to conclude that the conciliation and the mediation as well as the instruments of litigious and social prevention, are procedural mechanisms of pacification of the demands since the parties themselves give solution to their conflicts without the intervention of the judge State. At first, the analysis of jurisdiction and alternative means of conflict is made, as well as the concept of access to justice based on the studies of Cappelletti and Garth. Subsequently, the institution of the Notary is analyzed from its origin, historical evolution, species and regulations in Brazil. In the end, it is understood, from the social and political basis, how the extrajudicial services through mediation and conciliation, collaborate for the realization of access to rights.

Keywords: Conflicts. Mediation. Conciliation. Judicialization. Notary Functions.

EXTRAJUDICIAL USUCAPIÃO: FROM THE STANDARDIZATION TO ITS EXECUTION

SARAH LARA ALVES MARTINS

MARTINS, Sarah Lara Alves. **Extrajudicial adverse possession**: from standardization to execution. 137f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on July 8, 2020.
Virtual room on the digital platform "zoom"
Advisor: Prof. Dr. Antônio Carlos Diniz Murta

ABSTRACT

The present study aims to verify the viability of extrajudicial usucaption as a form of access to formalized property. To this end, the socioeconomic impacts of land informality in Brazil, as well as the institute of usucaption, will be analyzed. Subsequently, the context that justified the attribution of extrajudicial usucaption processing to Real Estate Registry Offices will be studied, which involves the overload of the judiciary and the possibility of access to the law in a fast and safe manner. All stages of the processing of the extrajudicial usucaption that occurs exclusively before the Real Estate Registry will also be described, in addition to clarifying the required evidential documentation, emphasizing the minutes of justification of possession drawn up by the notary. Finally, the main controversies about the institute will be analyzed, such as the financial cost, the need for the consent of the interested parties and specific cases in which the institute is viable. As for the methodological aspects, the work is developed in the theoretical-dogmatic aspect, which will be carried out through a detailed bibliographic and documentary search on the subject, adopting the hypothetical-deductive reasoning as the predominant reasoning.

Keywords: Non-judicial Usucapion. Impediments. Property. Notary office. Land registry.

PROVISIONAL IMPLEMENTATION OF THE PENALTY: COLLISION BETWEEN THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE AND THE EFFECTIVENESS OF THE CRIMINAL LAW

BRUNO PINHEIRO CAPUTO

CAPUTO, Bruno Pinheiro. **Provisional execution of the sentence**: collision between the principle of the presumption of innocence and that of the effectiveness of criminal law. 96f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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ABSTRACT

The present work has as its theme the provisional execution of the sentence in the Constitution of the Republic of 1988. Therefore, the work faces as a research problem the question of whether it is the provisional execution of the constitutional or unconstitutional penalty. In this sense, the hypothesis presented is that of constitutional the provisional execution of the sentence, insofar as the presumption of innocence is not to be confused with the prohibition of imprisonment, since this is linked to the written order and substantiated by the competent authority. The work is justified by the fact that the constitutionality or unconstitutionality of the provisional execution of the sentence generates a great impact on the freedom of the accused, since, with the admission of the provisional execution of the sentence, the defendant, if convicted, can start serving his sentence soon after the judgment by the Court of Justice or the Regional Federal Court. The general objective of the work is to analyze the institute of the provisional execution of the penalty in the Constitution of the Republic to present a satisfactory answer on its constitutionality or unconstitutionality. As specific objectives, the need to analyze the fundamental rights and guarantees in the Constitution of the Republic is presented; the International Human Rights Treaties; the principles of the presumption of innocence and the effectiveness of criminal law; the position of the Supreme Federal Court in relation to the provisional execution of the sentence; and, finally, the debate on the constitutionality or unconstitutionality of the provisional execution of the sentence. As a theoretical framework, the work draws on the teachings of Robert Alexy, in his book Theory of Fundamental Rights. With regard to the methodological aspects, the work is developed by the dogmatic legal aspect. In addition to this aspect, the work also develops from foreign and national bibliography, scientific articles, decisions of the Supreme Federal Court, Constitutional Law, Procedural Law and Human Rights. Finally, the work found to be the provisional execution of the constitutional penalty, insofar as the prison and the guilt are not confused, since, for the arrest, it is necessary the written order and reasoned by the competent authority, being the grounds of the provisional execution of the penalty, basically, in the fact that the factual and probative analysis in the ordinary instance is exhausted.

Keywords: Provisional Execution of Penalty. Fundamental rights. Presumption of Innocence. Effectiveness of criminal law. Proportionality.

CORPORATE GOVERNANCE AS A LEGAL STRATEGY FOR STARTUPS: CREATING ENVIRONMENTS FAVORABLE TO REDUCE THE CIVIL RESPONSIBILITY OF ANGEL INVESTORS IN BRAZIL

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COUTINHO, Karina Mourão. **CORPORATE GOVERNANCE AS A LEGAL STRATEGY OF STARTUPS**: creating favorable environments for the reduction of civil liability of angel investors in Brazil. 105f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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ABSTRACT

The so-called Industrial Revolution allowed fundamental changes in people's working conditions and lifestyles. However, the technology currently used to produce products and services is completely different from those of the past. In this context of technological innovations, startups are identified, business models characterized by innovation, technology, and environment of uncertainty, in addition to repeatability and scalability. These are businesses that have the capacity to grow exponentially, differentiating themselves from traditional models. The angel investor is an important development figure for the initial stage of startups. He believes in the entrepreneur's idea and invests significant value in starting the business. Without it, many startups would not be able to get out of the product and service ideation phase. As it is still an embryonic business model, many of these startups do not have internal processes and the organization of large companies and are therefore managed outside the corporate governance concepts – compliance –, which is so expensive for foreign investments. Thus, it is asked, as a research problem, in the light of the strategic analysis of law, how corporate governance directly impacts the reduction of civil liability risks for angel investors, a central figure in the technical and financial development of the startup environment in the initial stage. As a hypothesis, it is stated that corporate governance contributes to the legal model of startups, as it increases the possibilities for investments and to establish integral relations with investors, through the adoption of compliance programs, which define internal regulations, observing the legislation applicable to the business, expressing and clarifying the means of compliance with these rules, providing predictability and legal certainty for the contribution of resources, with direct consequences on the civil liability of angel investors. The general objective of this research is to propose ways to minimize the risks of civil liability of angel investors in small and medium technology-based companies – the so-called startups – through the adoption of a corporate governance program (compliance). The research adopts, as a theoretical framework, the concept of Strategic Analysis of Law by Frederico de Andrade Gabrich, for whom the Law must allow the imposition of strategic legal thinking, which allows finding legal and lawful solutions for the achievement of the objectives outlined by people, also considering the importance of interpretation and its dialectical character. As for the other methodological aspects, the research is inserted in a juridical-sociological perspective and is of an interdisciplinary character, since it seeks to coordinate contents concerning the field of Civil Law, Business Law and Strategic Analysis of Law, in order to analyze the object of study in all its plural characteristics.

Keywords: Startups. Angel Investors. Corporate Governance Compliance. Strategic Analysis of Law.

THE TAXATION OF REVENUE OBTAINED BY THE PRACTICE OF ILLEGAL ACTS AND APPLICATION OF THE 'PECUNIA NON OLET' PRINCIPLE IN THE BRAZILIAN LEGAL SYSTEM

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TRINDADE NETO, Pedro Alcântara. **The taxation of revenues obtained by the practice of illegal acts and application of the 'Pecunia Non Olet' principle in the Brazilian legal system**.72f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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ABSTRACT

This paper aims to discuss a recurrently debated matter, both on media and academic environments: the taxation of illicit income and the intricacies of either encouraging or abhorring such practice from the Brazilian government. On the present paper, under the guidance of the researched problem, we dissertate about the possibility of the State profiting from the taxation of goods and values acquired from various criminal activities, and the possible conflict between criminal and tributary law standards. In order to properly address the many possible perspectives on the law it is mandatory the understanding the concepts of legal-tax rule and tribute along with the constitutional principles that rule the National Tributary Code. Furthermore it is critical to analyze the pecunia non olet principle and its implications on current Government decisions; developing a critical analysis based on doctrinaire studies. The general objective of the present dissertation is to demonstrate that the pecunia non olet principle should not be applied based solely on the moralist common idea of justice, requiring instead a deeper analysis of each case under the interpretation of the law. The ideas presented on this paper rely on the work of Amilcar de Araújo Falcão who advocates in favor of unrestrictive taxation of illicit income, and Ricardo Lobo Torres who, in opposition, postulates that the Government should not profit from practices frowned upon by the State itself. In addition, Alfredo Augusto Becker and Daniel Lin Santos are quoted as advocates of a more prudent analysis of each context aiming for equilibrium between the seemingly antagonistic criminal and tributary law. The conclusion that it is viable to charge tribute over illicit income, except for some caveats widely discussed throughout the text.

Keywords: Pecunia non olet principle. Taxation. Ilicit practices.

THE DIALETICS OF LEGAL SYSTEMS IN BRAZILIAN LAW WITH THE RECEPTION OF THE CULTURE OF PRECEDENTS: PERCEPTION, ILLUSION AND RESULT

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SOSI, Ana Paula Soares da Costa. **The dialectic of legal systems in Brazilian law with the acceptance of the culture of precedents: Perception, illusion and result**. 102f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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ABSTRACT

The insertions currently occurring in the Brazilian constitutional process, especially those that occurred in the civil process with the insertion of the preceding figure, are not new in the internal procedural plan. Even though it was not something new, these insertions led us to ask again the role of the jurisprudentialization of law in Brazil. First, the study sought historical elements of the process in Brazil, expanding sequentially to a detailed plan from which the elements of the main legal systems are extracted to understand the functioning of the interpretative figure and the formation of precedent in distinct traditions from its structural genesis. In this context, evidently and necessarily followed by the theoretical-philosophical elements that support it, it was possible to complement a research by analyzing the functional elements practiced by the courts (for mere descriptive functionality), since the procedural insertions mainly based on the preceding figure are among us an element of judicial policy for managing repetitive litigation, together with other mechanisms of containment and prevention by binding and restrictive jurisprudence. The research retrieves the history of jurisprudentialization of law based mainly on the reasons that led the courts to adopt precedents and precedents as a way of controlling mass demands. What can be seen - a repetition of demand growth control - from this perspective it can be seen that no application used by the courts since Brazil was sufficient in the management of the number of claims. Contrarily, the result obtained by the state and higher courts is still the exponential growth in the number of cases. Would repetitive litigation management then be the appropriate means to understand or stop the slowness of the courts? Are precedents demanding for the administration of justice and in that sense would there be similarities with the precedents of other system (s)? The present research then seeks to answer how these mechanisms of containment of demands may or may not contribute to the democratic judicial process in Brazil and whether the mechanism of the precedent is adequate or of possible use in a legal universe different from the one that gave rise to it.

Keywords: Jurisprudence. Overviews. Precedents. Repetitive litigation microsystem. Higher courts.

ANALYSIS OF THE IMPUNITY OF POLITICAL AGENTS WITH JURISDICTION BY POSITION OF FUNCTION, IN THE CRIMINAL SPHERE, BEFORE THE SUPREME FEDERAL COURT

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SOUZA, Ranieri Jésus de. **Analysis of the impunity of political agents with jurisdiction due to the prerogative of function, in the criminal sphere, before the Federal Supreme Court**. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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Advisor: Prof. Dr. Lucas Moraes Martins

ABSTRACT

Brazil and other countries in the world adopt the forum as a function of prerogative, with the aim of protecting relevant public functions. Certain authorities, depending on the positions they hold, have the prerogative to be tried by a collegiate body and not by a judge of first instance. The Brazilian Constitution of 1988 established several cases of authority with jurisdiction by function of prerogative, defining in which Court these authorities are judged. This study analyzed whether the forum for the prerogative of function in the Supreme Federal Court generates impunity for political agents in the criminal sphere. The present research was developed in the scope of the sociological-legal aspect, with the analysis of the forum by prerogative of function in the legal and factual scope and had as theoretical framework the concepts proposed for the institute in the Constitution of the Republic and in the work "The forum privileged"of Lúcio Ney de Souza (2014). Work carried out with analysis of the comparative law and of the Brazilian Constitutions. Barriers of the system were pointed out, such as the excessive number of authorities with jurisdiction and the question of whether the forum covers crimes that occurred before the moment when the authority took office or, still, crimes that do not have connection with the function performed. Finally, the results obtained in the Supreme Federal Court were analyzed in relation to the judgment of investigations and criminal proceedings that are pending before the Court due to the jurisdiction of the court, from 2001 to 2016. It was identified that less than 1% of the court cases on the prerogative of function result in condemnation in criminal proceedings within the jurisdiction of the Supreme Federal Court. It was concluded that the forum by prerogative of function generates impunity for political agents in the criminal sphere.

Keywords: Forum by function prerogative. administrative authorities. Federal Court of Justice. impunity. penal sanction.

THE PERFORMANCE OF THE SUPREME FEDERAL COURT AND THE CONSTITUTIONAL PROTECTION OF MINORITIES, UNDER TWO HYPOTHESES: COUNTERMAJORITY OR MAJORITY FUNCTION?

FABRÍCIO DE ALMEIDA SILVA REIS

Reis, Fabrício de Almeida Silva. **The performance of the Supreme Federal Court and the constitutional protection of minorities, under two hypotheses**: countermajority or majority function? 112 f. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020. Available at: https://repositorio.fumec.br/xmlui/handle/123456789/584.

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Advisor: Carlos Victor Muzzi Filho
Co-supervisor: Prof. Dr. Luis Carlos B. Gambogi

ABSTRACT

Within the scope of constitutional jurisdiction, critical notes stand out, extracted from questioning about the countermajoritarian function of the Constitutional Courts. As a research problem and in light of Jeremy Waldron's theory of the opposition to the Judicial Review and the theory of decision-making in a democracy by Robert Alan Dahl, theoretical frameworks of research, the work asks whether the action of the Supreme Court (STF), in the protection of minority rights, would be a majority. As a research hypothesis, given the study of the countermajoritarian function of the Supreme Court, we will try to demonstrate whether, in the examples collected by Luís Roberto Barroso, this performance is proven. The legitimacy of jurisdictional control of laws is faced with the difficulty of combining the principle of separation of functions with the democratic principle, an objection to the North American model of judicial review, known as "countermajoritarian difficulty". It is up to the Judiciary to be the interpreter and guardian of the Constitution, whose decisions have repercussions in other spheres. However, it lacks democratic credentials in the face of moral dissent. As a general objective, it seeks to establish a historical line of constitutional jurisdiction in Brazil, and to conclude, based on case studies, whether the role of the Supreme Federal Court in the protection of minorities is, properly speaking, countermajoritarian. The specific objectives of the work are to analyze constitutional jurisdiction based on idiosyncrasies in the systems of North American common law and civil law; to analyze the main constitutionality control systems and their implementation by the Judiciary; examining criticisms of constitutional jurisdiction, in light of Jeremy Waldron's theory of opposition to Judicial Review and Robert Alan Dahl's decision-making in a democracy; investigate the action of the Supreme Federal Court on the protection of minority rights, with case studies for comparison purposes; and to identify

which are the two hypotheses that rule out the argument that the action of the Supreme Federal Court in protecting the rights of minorities, is a general and routine rule. The research is developed in a juridical-sociological methodological perspective, with na interdisciplinary perspective, based on concepts of political and philosophical theories of Law, encompassing the areas of Constitutional Law, Human Rights and Civil Law. Deductive reasoning, descriptive method and bibliographic, jurisprudential and legislative research were preeminently adopted.

Keywords: Constitutional jurisdiction. Judicial review of constitutionality. Federal Court of Justice. Countermajoritarian function. Minorities.

OBSTETRIC VIOLENCE IN BRAZIL: AN ANALYSIS OF THE FUNDAMENTAL RIGHTS PERSPECTIVE

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GONÇALVES, Regiane Priscilla Monteiro. **OBSTETRIC VIOLENCE IN BRAZIL**: An analysis of the fundamental rights perspective. 2020. Dissertation (Master in Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

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ABSTRACT

The term obstetric violence was recently instituted, attributed to institutionalized gender violence and practiced against pregnant women. Socially rooted and naturalized in favor of the power relationship in the doctor-patient relationship, it occurs through a mechanization / commercialization of the delivery process. In this process, the woman goes through a kind of appropriation of her body, which is extended to all health professionals involved in the action and which materializes in a dehumanized treatment, abusive of techniques proven useless and conscious pathologization of the natural processes of childbirth. Currently, Brazil does not have any federal legislation that positively or even conceptualizes the practices of obstetric violence. While Bill 7,633 / 14 remains in progress in the National Congress, the Judiciary responds to several demands put on trial on the subject. Contextualizing the reality arising from obstetric violence, the present study sought to answer the following questions: is obstetric violence capable of harming women's fundamental rights? And given the legislative omission, how has the Brazilian Judiciary handled the issue? To answer these questions, the present research analyzed what would be the impacts of legislative omissions, in the confrontation by the Judiciary in the protection of the fundamental rights of women and also the debasement of constitutional principles such as the dignity of the human person. As a theoretical framework, the theory of Robert Alexy was adopted, in the concept of human dignity, and, finally, as a form of judicial analysis of the legislative omission Ronald Dworkin. In view of the multidisciplinary nature of the theme, the research material was concentrated in the areas of law, but with important contributions from specific themes in the biological sciences to explain topics in the exclusive domain of the health areas, such as episiotomy, kristeler maneuver, among others. other medical procedures that, if misused, are capable of generating obstetric violence. The predominant type of reasoning for the analysis of the material was, therefore, inductive-deductive and, for the analysis of the data collected from the STJ and STF judgments, the qualitative. To carry out the research, several complementary methodological procedures were used, namely, bibliographic research and documentary analysis of judicial judgments. To carry out the research, several complementary methodological procedures were used, namely, bibliographic research and documentary analysis of judicial judgments. The conclusions obtained by the present research were sufficient to affirm that obstetric violence culminates in a true violation of fundamental rights and also the debasement of constitutional principles such as the dignity of the human person, establishing a true state of exception when it comes to childbirth, which does not happen , for example, in other areas of the medical sciences,

whose free and informed consent is an essential requirement for any and all procedures. He concluded that the Judiciary, even in the absence of its own law, has been able to punish conduct through a fundamental and fundamental analysis of women's rights. Finally, he concluded that the humanization of childbirth, so defended by the Rehuna movement, can contribute to the minimization of obstetric violence and the protection of women's fundamental rights.

Keywords: Obstetric Violence. Violation. Dignity of human person. Fundamental rights. Humanization of childbirth.