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EDITORIAL

Meritum Magazine started the year 2020, with Volume 15, and some news: modernized graphic design, with new cover and inside format, page layout for easier reading of texts, English version of articles written in Portuguese. and the MP3 audio version, novelty and novelty among the journals published in Brazil, adhering to an extensive program of social inclusion in the Postgraduate Program Stricto Sensu in Law (PPGD) of the FUMEC University. It started to adopt the four-monthly periodicity (three issues per year), and a special commemorative number of the 10 (ten) years of PPGD FUMEC, with receipt of articles and evaluation in continuous flow for publication. In addition, emphasis on internationalization, through the aforementioned English version of the texts and, in particular, the DOI (Digital Object Identifier), that is, the respective article started to be identified individually with the code digital, allowing the publication to be detected in a unique and persistent way in the Web environment.

It is noteworthy that it is a traditional journal and a reference in law, being classified with extract B1 by the Coordination for the Improvement of Higher Education Personnel - CAPES, through the set of procedures called Qualis Periódicos.

The articles submitted to Revista Meritum vol. 15, n. 3, were evaluated by the Editorial Coordination, which examined the adequacy to the journal's editorial line, elementary and advanced formal and methodological aspects, among others. Subsequently, each text was sent to at least two referees, 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. 3, the issues of the legal universe related to the Democratic Rule of Law and the enforcement of fundamental constitutional rights were also honored, as well as the analysis and debates under perspectives that help to critically interpret the contemporary and the challenges that arise from it.

On the occasion, the Editors pay their tribute and thanks to everyone who contributed to this praiseworthy initiative from the FUMEC University and, in particular, to all the authors who participated in this publication, with emphasis on the commitment and seriousness shown in the researches carried out and in the elaboration of the excellence texts.

It is invited to read and / or enjoy listening to the articles presented, in a dynamic way and committed to the formation of critical thinking, to enable the construction of a Law aimed at the inclusion and concretization of precepts carved in the Constitutional Democratic State of Law.

Good reading everyone!

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

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ENFORCEMENT OF THE RIGHT TO FAMILY COEXISTENCE: PROCEDURAL AND NORMATIVE INSUFFICIENCY IN THE PROTECTION OF CHILDREN'S RIGHTS

CUMPRIMENTO DE SENTENÇA DO DIREITO À CONVIVÊNCIA FAMILIAR: A INSUFICIÊNCIA PROCEDIMENTAL E NORMATIVA NA TUTELA DO DOS DIREITOS INFANTOJUVENIS

Carlos Alexandre Moraes[1]
Diego Fernandes Vieira[2]

ABSTRACT

The purpose of this article is to analyze the procedural means for the fulfillment of the sentence of family coexistence duly regulated. Thus foster discussion about the civil procedural crisis that plagues the processes involving existential and family conflicts. For this purpose, the hypothetical-deductive method was used together with the procedural and comparative methods, and to support this research, the method of bibliographic and documentary investigation was used. It is concluded that the Civil Procedure aimed at the execution of family coexistence remains impaired and insufficient, lacking adequate coercive means for the treatment of existential demands, urgently needing a new jurisdictional stance and, Furthermore, there should be procedural legislation for the treatment and resolution of family conflicts.

KEY WORDS: Affectivity. Civil Process Code. Child and Adolescent. Personality Rights. Family.

RESUMO

O presente artigo tem por finalidade analisar os meios processuais voltados para o cumprimento de sentença da convivência familiar devidamente regulamentada.Assim fomentar a discussão sobre a crise processual civil que assola os processos envolvendo os conflitos existenciais e familiares. Empregou-se, para

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tanto, o método hipotético-dedutivoconjuntamente com o método de procedimentofuncionalista e o comparativo, e ainda, para sustentar referida pesquisa, utilizou-se do método de investigação bibliográfico e o documental. Concluindo-se que o Processo Civil voltado para a execução da convivência familiar resta prejudicado e insuficiente, inexistindo meios coercitivos adequados para o tratamento de demandas existenciais, necessitando-se urgentemente de uma nova postura jurisdicional e, ainda, de uma legislação processual própria para o tratamento e resolução dos conflitos familiares.

PALAVRAS-CHAVE: *Afetividade. Código de Processo Civil. Criança e Adolescente. Direitos da Personalidade. Família.*

INTRODUCTION

The State, at the moment it legislates on existential issues involving the family and human development, places on itself the responsibility to deal and resolve the conflicts arising from this relational nucleus. In this socio-juridical perspective, the current and constitutionalized Family Law has turned to the protection and happiness of its members, especially the vulnerable, the person of the child. Note that the legal system has come to grant children and adolescents special rights and particular principles aimed at the protection of children and youth, one of these is the so-called right to family coexistence.

In this way, the right to family coexistence has become a right not only for parents, but also for children. This right is fundamental and indispensable for the development and protection of the rights of the personality. It is no longer conceived only as a moral duty, but a legal obligation to do, to provide assistance, beyond the material (food), but also emotional and psychological (coexistence).

However, changes in substantive law do not appear to have achieved procedural law, since there is still a resistance of cultural character in talking about forced execution of family coexistence when the guardian parent unjustifiably stops living with the child. Becoming visible the need to discuss and rethink the process of fulfilling the sentence involving the right to family coexistence.

This research was based on the hypothetical deductive method, using a qualitative analysis, as well as bibliographic and documentary research, aiming to demonstrate the civil procedural insufficiency regarding the protection of the right to family coexistence when the guardian parent remains silent in his duty to live together.

The research was organized in three parts, in the first it was given focus on the right to family coexistence and its reflexes for human growth and development. In the second part, the procedural issues regarding the enforced compliance of family life were addressed. And in the third and final part, hermeneutic possibilities for the protection of this right infantojuvenil have been demonstrated, in addition to the need for a proper procedural legislation for the solution of family conflicts.

The present study proposes a reflection on the importance of family coexistence, as well as the procedural need for this right to be effective when it is not done voluntarily. The focus of the article is not the imposition of "love" on the legal rules, but rather on the promotion of a

responsible parenting, of a conscious action and above all, an effective judicial guardianship, and not only declaratory rights.

1 THE FUNDAMENTAL RIGHT OF THE CHILD AND ADOLESCENT TO LIVE WITH BOTH PARENTS

The right to family life is provided for in the Federal Constitution of 1988 in art. 227, in the Statute of Children and Adolescents in art. 3, in the Civil Code in art. 1.589 and also in Law n. 12.318/2010 that deals with Parental Alienation. Parents have the duty of respect and enforcement of this right in the face of the person of the child, and this legal obligation arises from the principle of responsible parenting (art. 226, §7°, CF), in cases of loss of physical custody of the child, which generate the duty to have him in their company (art. 1.634, II, CC), as well as in the obligation of both parents to provide integral assistance (physical, psychic, moral and spiritual aspects) of the child (art. 229 CF, 22 ECA and 1.634, I, CC).

There is also talk of the existence of the constitutional principle of family coexistence applied to the Law of Families. "As a consequence of the principle of best interest is the principle of family coexistence, understood in the right of parents and children to live with each other" (ANGELINI NETA, 2016, p. 84). This principle aims precisely to preserve the parental relationship clearly of a useful nature, which imposes not only on the family, but also on the State the promotion and implementation of the right of the child and the adolescent. (AMARILLA, 2014).

The affective rupture between parents will not break the bonds arising from parenting, the latter remains unchanged, what actually occurs is an adaptation of the exercise of parental authority, which has a direct reflection on the form of coexistence between parents and children. Grisard Filho (2016, p. 110) states that: "The rupture, in itself, does not cause changes in the relations between the subjects of the guard, but it inevitably establishes a new way of linking". In this way, it remains clear that the cession of coexistence between parents will not cease their coexistence with their children, even residing in different houses. (LÔBO, 2008).

The law under analysis becomes the words of Madaleno (2007, p. 119) as being "a right conferred to all persons united by ties of affection, to maintain coexistence and spiritual exchange when these paths of interaction have been broken by the physical separation of the characters".

The objective of this right is basically to safeguard family relations, whether they come from consanguinity or socioaffectivity, including beyond the parental figures. The family coexistence also covers the right of correspondence between parents and children (STRANGER, 1991), speaking today even of a virtual coexistence and communion with the physical to encourage and foster the greater interaction of the non-guardian parent with their offspring.

Currently the family is seen as a privileged locus, where the personality development of all members actually occurs (GAMA, 2008). Being exactly in this place of interaction that the family will overcome its eudemonist conception, to become mainly solidarist, since in the family its members are co-responsible for each other. And even if existential freedom is one

of the pillars of the Democratic State of Law, this autonomy focused on the Law of Families, has as its object "conjugated options", which impose a certain limit on this freedom, to the exact extent that individual choices will reflect directly to other members of this affective and relational core. (TEIXEIRA; TEPEDINO, 2020).

This co-responsibility is based on the right of family coexistence, which in its new and constitutionalized conception presents a legal obligation to parents and a fundamental right for children. In fact it is no longer maintained that the coexistence (visit) is a choice of the parent, nor an exclusive right of the latter, because it is much more related to the well-being of the child than of the parent. "Family life with parents is much more tied to an obligation to do a positive act in the child's face than to a right [...]" (MORAES; VIEIRA, 2020, p. 738-739).

Hence the importance of the realization of family coexistence, because it will be through this relationship, this exchange of affection, in short this family experience with both parents, that the child and the adolescent can create and develop the idea of belonging and security. Living together will provide a healthy environment for growth and integral development, still in the consolidation of his personality. (TEIXEIRA; TEPEDINO, 2020).

From this perspective, from the fundamentality of the right to family coexistence, it is understood that fundamental rights will, in fact, affect private law, regardless of its branch, and "not only in patrimonial juridical relations, but also in existential relations" (EHRHARDT JÚNIOR; TORRES, 2018, p. 350). At the moment when family coexistence is established as a fundamental right of constitutional order, means must also be established for its protection and effectiveness in order to preserve and protect them through judicial, administrative and legislative actions.

On the family and its essentiality in the formation of the person, Hironaka (2018, p. 326), clarifies that:

> It is undeniable that the bosom of the family forms those who participate in it. It is in it that one prepares or is unprepared for gregarious life, depoluing or receiving obstacles on the way between his private space and public space. More than just people, the aim of the family is to form citizens, not only from their cities and their countries, but from the world, so that they respect the dignity of others and have respect for themselves. This is the family's responsibility: to serve, to provide and to educate.

For this fact is that, it is up to parents to structure and shape the personality of their children, through the sharing of parental duties, and in the effective exercise of their roles in the human development of their offspring (BOSCHI, 2005). At a time when one recognizes the differences and complementarity of parental functions and relations, it is then possible for the family to reach its goal of being time/space in the development of the children's personality, and also in a reflexive way of adults, and these functions and actions must be supported by affection, responsibility and solidarity. (GROENINGA, 2009).

While the right to free family planning is guaranteed to all persons, they are not exempt from the obligations involved in caring and caring for the child, and it is up to parents regardless of their will to provide moral assistance, material, affective, intellectual and spiritual to the children since its conception (CARDIN; SANTOS; GUERRA, 2015). Thus, the right to family coexistence "is not structured as an object of personal pleasure of parents, predisposing

itself, as a duty, to the protection of needs proper to the proper development of the personality of children [...]" (STRANGER, 1991, p. 58).

In the words of Amarilla (2014, p. 90):

> [...] the right to family coexistence should be seen as a means and not as an end in itself, constituting an instrument aimed at the development of the personality of its members and meeting the special demands of those who, Because of their little age, insufficient maturity, they call for more attention and care.

It will be the effective coexistence that will establish the affection necessary for the life worthy of children and adolescents, hence the importance of respecting this right, always in view of the Personality Rights of both children and parents (GROENINGA, 2009). In this line of thinking Moraes and Vieira (2020, p. 752) maintain that: "[...] healthy and long-lasting family life enables the child to exercise his or her right to psychophysical integrity, honor, respect and the free development of his or her personality". Thus, it will be in the family and in this relationship and interaction that the development of the personality and potentiality of its members will be promoted, thus guaranteeing them respect for the dignity of the human person in this social aspect. (GAMA, 2008).

Moreover, the right to family coexistence is a fundamental right that aims to guarantee the protection of other rights, more specifically those of the personality, rights that are "inherent to the person and his dignity" (TARTUCE, 2017, p. 153). It is through coexistence that the physical and psychic integrity of the child will be established, it is through coexistence that one will have respect and care for their existential rights of the child and the adolescent.

This physical and emotional interaction between the child and both parents is essential to implement the numerous fundamental rights and personality of the child, serving coexistence as an instrument that benefits the full biopsychosocial development of children and adolescents (BOSCHI, 2005). Thus it is not enough to provide only support and education, "but it is necessary to ensure the coexistence of children with parents, understanding this coexistence as fundamental to the formation of personality in the individual" (ANGELINI NETA, 2016, p. 85).

The family environment as already listed, has a great influence on the development of children and children, and parents should guarantee them at least the minimum conditions for the development of the children's personality (TOMASZEWSKI, 2004), because when this does not occur, rights will be violated, damage will be done and dignity will be tainted. When there is a lack of zeal, care and affection in paternal-maternal-filial relations, it can be said that they will trigger "uncontrollable personal and social harm" (JABUR, 2019, p. 1115).

The omission with regard to physical and emotional contact with the child is a direct violation of this fundamental right, but, moreover, it is a reflex violation of the numerous rights of the personality provided for both in the Federal Constitution of 1988, as in the 2002 Civil Code. "By way of illustration, this act violates the rights of the personality in the physical sphere (right to life, physical integrity), psychic (right to freedom, psychic integrity) and moral (right to identity, respect)" (MORAES; VIEIRA, 2020, p. 750).

If there is no family life, the child will be able to carry with him the feeling of abandonment, trauma of rejection, difficulties to relate and many other damages that will vary his

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intensity from person to person[3]. When absent the necessary stimuli the developing human person, "a whole capital aspect of the personality of the child, of his humanity', we could say that already more has been constituted" (TOMASZEWSKI, 2004, p. 86).

Soon, when the parent refuses to live with their child, being silent in their duties, comes to cause damage of extrapatrimonial order. Accordingly, Basset (1993, p. 27-28) clarifies that:

> *When the parent does not cohabit unjustifiably refuses to contribute to the paternal or maternal figure, in a visible, legitimized and positive manner, his or her conduct violates the child's substantive right, for whose wholesome and integral formation he or she is responsible, incurs an unlawful act or omission which may cause extra-marital and material damage, which an imperative of justice requires reparation.*

In this way, it is possible to say that the realization of the fundamental rights and the personality in the first place is the responsibility of the Judiciary, since often public policies organized by the State, fail to achieve their preventive and promotional end (FERIATO; MARCH, 2019). This fact is understood that regardless of the will of the parent who does not live daily with the offspring, must comply with their legal duties, even if at its core do not want to exercise it, for reasons that the right cannot encompass.

Finally, the right to family coexistence is a fundamental right of the child who has an instrumental function in the realization of other fundamental rights and personality, as well as imposing legal obligations on parents involving living together and caring. When there is a parental omission regarding coexistence, whether total or partial, then there is talk of an existential damage immeasurable by the Law, and then the Judiciary is responsible for implementing it in order to guarantee the best interest of the child and his full protection.

2 ENFORCEMENT ORDER AND ENFORCEMENT OF THE RIGHT TO FAMILY LIFE

One experiences in the present day a wave of relationships, and many of these end up causing the birth of another human being. Regardless of the marital status of these people, son will always be a son, and it is up to the parents, whether they are together or not, to provide for all the needs of this offspring[4]. "The separation of spouses (separation of bodies, legal separation or divorce) cannot mean separation between parents and children. In other words, parents are separated, but not from their children under the age of 18" (LÔBO, 2008, p. 168).

Therefore, because there is no undoing of parental duties and responsibilities, these regardless of their marital status, or loving relationship, will have the duty to support their children, especially in their immaterial aspect. And it is through family coexistence that these

3 In this sense, it is stated that: "These parents who fail to visit their child end up causingirreparable moral and psychological order. The coexistence that the father stole from the son, the emotions that were not shared, the affective bond that was not formed or not maintained can not be recovered, by total time-feedback impossibility" (BOSCHI, 2005, p. 213).

4 about such a social fact, Grisard Filho (2010, p. 196) maintains that: "It is a fact known to all that day by day the number of family ruptures increases and the formation of new nuclei, in which live or circulate and socialize children of different unions, constituting a material and emotional support network that is not free of antagonisms and conflicts".

duties will be materialized. Thus, the realization of parental duties in what restricts family coexistence goes beyond being physically together with the child, but is noted in the materialization of a set of actions that are intended in the protection, zeal and care of the child and adolescent, thus composing a bundle of conduits that have as its primacy the best interest of the vulnerable.

The right to family coexistence brings with it a bilateral perspective, where both parents and children are holders of it. And because this right contributes to the satisfaction of the needs of the offspring, it is necessary to have mechanisms that can ensure their satisfaction, which has as the biggest beneficiary the child and adolescent. (TARTUCE, 2019).

The parent who does not habitually reside with their offspring will have special responsibility for the realization of family coexistence. It is up to him to find ways to better accomplish this time of relationship, adapting the times, days, and activities that will be performed, seeking to strengthen this bond and thus ensure the full development of the child's personality. (BOSCHI, 2005).

It is only through the understanding that family coexistence is an infantojuvenil right, linked to the vulnerable person, and no longer simply a moral obligation of the parents, that it will be possible to open spaces for debate and discussion on a legal guardianship aimed at this institute, and ways to rescue and promote a responsible parenting (MORAES; VIEIRA, 2020). "Therefore, the visitor, as long as the visit is fixed, cannot neglect the duty to perform it, failing to fulfill it in the agreed form, under pain of its omission characterize attack on the fundamental right of the visited (art. 5º of the ECA)" (BOSCHI, 2005, p. 209).

The family relations of contemporaneity are often formed without there being a real sense of affection, solidarity and awareness of a responsible parenting and respect for human dignity (CARDIN; SANTOS; GUERRA, 2015). What often ends up causing in the breach of the terms listed in the judicial executive title, in particular the points related to coexistence, since for subjective reasons the guardian parent ends up defaulting on their parental duties.

As explained, it is the right of the child and the adolescent to be able to develop in all its aspects (moral, spiritual, psychic, physical, among others), being the adequate and continuous family coexistence that provides this to develop. In this sense, "it will not be enough for the winner, however, to issue the order. It must be fulfilled in the real world" (ASSIS, 2013, p. 174). Thus, "[...] it is not totally unreasonable to demand of those who share the right of visits, especially parents, compliance in favor of the minor; after all, the latter also holds the right to coexistence" (TARTUCE, 2019, p. 434).

In these terms, Dias (2017, p. 565) understands that: "It is much more a right of the child to live with the parent who does not have custody. Thus, there is an obligation - and not a simple right - of parents to meet visitation fees". Once the form of family coexistence is regulated, the guardian parent, the one who does not reside with the child in the usual way, has a legal duty, which has its genesis an agreement approved in court or even a judicial decision, therefore, family coexistence "becomes a law between the parties of an individual standard" (BOSCHI, 2005, p. 210).

Thus, in the event of a failure to comply with a sentence, or agreement, this parent "may be held liable for the moral and property damage resulting from the visit" (BOSCHI, 2005, p. 210). But beyond these penalties, one must also guarantee means of compliance, even if

forced, to the proper and adequate family coexistence to the child, since, it is a legal duty and not moral. [5]

In these terms, Tartuce (2019, p. 434) maintains that: “Imposing the forced fulfillment of visits does not in itself cause harm to the minor. The parent will be present, and the child will not feel rejected. If there is fear of possible mistreatment, coexistence can be monitored”. Children can and should require the proper coexistence and care of their parents or guardians, since when not fulfilled spontaneously, besides the possibility of civil reparation, depending on the case may occur the suppression of family power based on the negligence of its exercise. (JABUR, 2019).

At a time when rights are guaranteed, and one of them being access to justice, it is necessary to think that in addition to this, it is necessary to have an effective judicial benefit. Thus, there is no point in the State saying the law, if it is not able to protect it and/or enforce it fairly (CASAGRANDE; TEIXEIRA, 2019). In other words, it is of no use to the person of the child to have his or her right regulated in a judicial executive order if the latter cannot be fulfilled when there is resistance of the parent to comply with his or her obligation to do (coexist).

The Civil Process is the form that is today for the realization of the material rights conceived in the legal order, and it is through the Code of Civil Procedure 2015 - Law n. 13.105/2015 - that this execution procedure is organized that aims at the satisfaction of an obligation determined in a judicial or extrajudicial enforcement order.

Normally, family life, because it is a right of vulnerable person, will be available in a judicial executive order (art. 515, CPC), whether rendered in a judgment or even in an agreement made by the parties, approved by the competent court. That will follow the procedure of the Fulfillment of Sentence that Recognizes the Requirement of Obligation to Do or Not to Do, stipulated in art. 536 to 537 of the 2015 Civil Procedure Code. (BRASIL, 2015).

About the subject, Madaleno (2019, p. 475-476) says:

> The doctrine and jurisprudence have understood the right of visits as a dutyenforceable, including by the imposition of a financial fine of the children, it being certain that the parents have the duty of contact with their children and whether, perhaps, they are bound by this obligation, out of selfishness or revenge against the other parent, his former affective partner, [...] being salutary that the judge state force, through financial threat, custody-free parents exercising the duty of coexistence, because only in this way can realize that there are other ways to distill their hatred for the conjugal love that has been undone.

The process of sentence enforcement is initiated when there is no addition of the determinations listed in the judicial executive order spontaneously. This is a typical document that guarantees the holder the right to a certain benefit (certain, net and enforceable - art. 783, CPC), allowing, if not fulfilled, the initiation of judicial protection of an executive nature, which

5 Special Resource. Civil and Civil Procedure. Regulation of visits. Approved agreement. Noncompliance. Execution. Fitting. 1. In the field of visits, the guardian of the minor is liable for an obligation to do, or is, has the duty to facilitate the coexistence of the child with the visitor on the days previously stipulated, should refrain from creating obstacles to the fulfilment of that which has been determined in judgment or laid down in agreement. 2. Atransaction, duly approved in court, equates to the judgment of the merits of the contract and has value of sentence, giving rise, in case of non-compliance, to the execution of the obligation to do, being able the judge, including set a fine to be paid by the refusing guardian. 3. Special appeal known and provided in order to determine the return of the case to the judgment of first degree for regular prosecution. (STJ. Resp. n. 701.872-DF. Fourth Turma. Rapporteur: Minister Fernando Gonçalves. Tried on 12.12.2005).

has as main characteristic the practice of coativa material acts, which aim to provide the forced addition of the service. (GARJARDONI; et al., 2018).

Because the realization of family life depends almost exclusively on the fulfillment of the obligation to make the parent not guardian, the executive title does not prove to be self-sufficient, in that the assured right depends on a benefit by the plaintiff, thus requiring an executive tutelage, so that there is the implementation by the executioner (GARJARDONI; et al., 2018). “The right to coexistence creates an obligation to make a unique, personal obligation that must be fulfilled personally” (DIAS, 2017, p. 566).

The Judiciary Branch may use coercive measures (periodic fine) - which “has and must have, within the Family Law, discouraging character of the inadequacy of the assumed obligations” (MIGUEL FILHO, 2006, p. 818) - or subrogation (search and seizure or reinstatement of ownership) so that it can provide the execution with the proper executive guardianship, however, in the case involving noncompliance of coexistence, it remains only

the possibility of application of astreinte[6], based on art. 213 of the Statute of the Child and Adolescent - Law n. 8.069/90 -, since only the parent can fulfill this obligation and no one else. (BRASIL, 1990).

About the application of daily fine involving the noncompliance of living with children, Teixeira and Tepedino (2020, p. 318) clarify that:

> One of the possibilities to compel one of the parents to live with their children is the imposition of a fine provided for in arts. 497 ff. of the CPC, when it is understood that coexistence is an obligation to do, because it is through it that many duties arising from parental authority, such as education and creation, are realized. However, the solution is criticized in that it leads to the monetarization of family relations and the imposed conviviality will not always be better for the child. Although the fine was provided as a penalty to the alienating parent by art. 6º, III, of Law 12.318/2010 (ending the argument that family relations would be mixed with financial matters), its function in these cases is coercion to comply with the cohabitation clauses established judicially (by agreement, interlocutory decision or judgment).

The monetary value of the daily fine is not the focus the execution, in fact it is only the available means to try to achieve the realization of the obligation to do, thus, such measure aims to “constrain the debtor not to default, ie to fulfill the assumed obligation. And it is not punitive in nature of the inadequacy” (MIGUEL FILHO, 2006, p. 819).

It basically consists of psychological pressure exerted on the executed person, putting him before two scenarios: either he fulfills the judicial command or he will be fined (astreinte) (ASSIS, 2013). “That is, it is thought in the coactive practice of material acts that aim to provide the forced satisfaction of a due and inadvertent service, to conform the external world to the determination constant in the judicial executive order” (GARJARDONI; et al., 2018, p. 672).

Unlike the food execution that has the possibility of using the threat of arrest (art. 528, § 3º, CPC), as well as the expropriating means (attachment) (art. 528, § 8º, CPC), the execution

6 Enforcement of obligation to do. Visits. Fine. Having determined that in case of breach of the visitation agreement would be imposed a fine on Vairago and having her, even aware of the decision, ignored the determination, correct if it shows the fixed indemnity. Until, it brought no foundation plausible that causes the payment of the fine to be elicited. Appeal devoid. (TJ/RS. Seventh Civil Chamber. Civil Appeal n. 70.012.800.207. Rapporteur: Des. ª Maria Berenice Dias. Tried on 21.12.2005).

of family coexistence only has this indirect execution mechanism, which is the fine in money (astreinte). (BRASIL, 2015).

Concerning these issues, Amarilla (2014, p. 205) lists that:

> Regarding the practice of parenting, it is understood that the State may require fathers and mothers to provide all the material support necessary for the offspring, always with a view to the integral protection of the interests of children and adolescents. However, it should be emphasized that the material support will not provide the offspring of what it most needs, because the most profound and significant bond that can be conceived for a child as to his father and mother [...].

As is well known, such a tool of coercion ends up being ineffective when the executed has no assets to be pawned. On this point, Assis (2013, p. 176) precepts about this "failure" that permeates the execution process, "[...] and consists in the fact that it does not induce to the fulfillment the recipient of the order devoid of attachment". In this way, the parent who refuses to carry out the coexistence, if he has no assets to answer, the fixation of astronomer in nothing will change his attitude, which will continue to inertia in the face of the child and/or teenager.

The process is not only an individual guarantee, but is also regarded as a transcendental fundamental right, which aims at positive state actions (KNOPFHOLZ, 2011). When the process does not reach the desired end, then there is talk of a fruitless executive process. But by placing a fundamental, essential and structuring right for the person, a right that is that of family coexistence, the State cannot remain inert, under pain of violating its own foundations. "We understand, in this situation, the complex causes of the present serious crisis of the executive function" (ASSIS, 2013, p. 13).

The simplistic treatment that the Judiciary continues to give to issues related to the reorganization of relations between parents and children cause a crisis in the face of the realization of the rights of juvenile (GROENINGA, 2009). "It is clear that the Judiciary can not fail to protect the rights of the holders of a claim, or let go of parental irresponsibility cases" (CARDIN; SANTOS; GUERRA, 2015, p. 142). However, to expect that the affective abandonment, and consequently irreparable harm to the child and adolescent, and to believe that only the indemnities will solve the problems of psychic and structural order of the person, is a direct violation of the Federal Constitution and the international values of respect and promotion of human rights.

What is currently evident is that the process of sentence enforcement, which aims at the adimplementation of family coexistence, has a superficial treatment, applying "remedies" (astreinte), which often render ineffective in its application. "The remedy, however, acts only on the wound, not attacking the cause" (SPENGLER, 2006, p. 51).

The patrimonialista ideology that marked the codification of 1916 is still present in the Civil Code of 2002 and reflects directly in the Code of Civil Procedure of 2015, however, this cannot prevail over the existential values that emanate from the Federal Constitution of 1988, under penalty of leading to a systematic and axiological inversion (SCHREIBER, 2016). "The procedural laws in force in our order, including the novel of 2015, have a strictly patrimonial character and are, in essence, bureaucratic, which prevents an effective protection of these ethereal rights" (MEDINA, 2017, p. 40).

The possibility of civil reparation is already pacified in the courts when the negligence or rejection of the duty of care is established. In this sense, the failure to do so, the repeated and unjustified parental omission regarding family coexistence by the guardian parent, could be grounds for liability for moral damage to the child. (BOSCHI, 2005).

Concerning the issues questions, Basset (1993, p. 228-229) considers that:

> *Any action or omission that totally or partially violates the subjective rights-duties of the family that emerge from the filiatory bond, that causes appropriate damage, Whether these are of an extra-marital or patrimonial nature, must oblige to repair. The right may not remain impassive in the face of irresponsible paternity or motherhood, enshrined in an immunity that secures the parent from his duties, from the obligation, in the face of the damage caused, to make full reparation, although this qualifier is presented in the historical-experiential reality of the victim as a utopia.*

However, the financial compensation in these cases of affective abandonment, or even the application of a daily fine for failing to live together, does not stop carrying traces of capitalist order, "in the sense that with the condemnation, the person receives a value to compensate or mitigate an ill suffered, a fact that increases the judicial process too much without really solving the problem" (CARDIN; SANTOS; GUERRA, 2015, p. 142).

The problem that plagues procedural effectiveness is related to its interpretation and application. The Process is an instrument in favor of the Judicial Power for the resolution of conflicts, and for its effectiveness to be satisfactorily effective, it cannot be left aside that the Process (and the Law) is a cultural identification, and then needs to be applied to the light of time and reality that if this (MÖLLER, 2029). "There is a real social and legal crisis that affects numerous institutions of society, the family being the main affected by this phenomenon" (CARDIN; SANTOS; GUERRA, 2015, p. 132).

The way to treat the right of family coexistence is totally inadequate and insufficient. It is demonstrated that the legal and legislated technical means in the implementation process have not yet evolved sufficiently to guarantee the effective legal protection. (ASSIS, 2013).

Understanding these questions involved procedural insufficiency, it is noted that the civil process needs a greater cognitive openness to the protection of rights, so that it can respond in a way that does not simplistic the complexities of the world. The process needs to be observed from its complexity and importance, in short, enable this, means that can give a satisfactory response to the social diversities that flow into the judiciary every day. (MÖLLER, 2029).

It remains clear that there is a limitation of the procedural mechanisms in the face of the implementation of the stipulated family coexistence regime (TARTUCE, 2019). However, such limitations cannot be an obstacle to the realization or at least the attempt to materialize the fundamental right of the child and the adolescent.

In this way, "the Family Law demands speed in the solution of its conflicts, because the dissatisfaction supported by the parties involved in pendenga causes so much bitterness that a time-consuming process will not help, quite the contrary" (BEZERRA; SOARES, 2019, p. 72). Access to justice not only embraces its literal meaning, but also covers having the right to a due process, a process that needs to respect individual guarantees and still manages to produce an effective decision. (CASAGRANDE; TEIXEIRA, 2019)

As already maintaining, it is possible to impose the daily fine payment for the parent who fails to comply with their duty of coexistence, and also in fixing compensation to the parent who is missing their care obligations, which end up violating the fundamental rights and personality of the child and the adolescent.

However, it is also known that such decisions alone do not solve family problems at their source.

For these reasons, it is necessary to rethink the process, the coercive measures and the way in which family conflicts are dealt with, going beyond the predominant patrimonial vision in material and procedural legislation, in order to at least try to protect subjective rights, existential and structuring of the human person.

3 THE PHILOSOPHY AND THE NEED FOR A PROCEDURAL AND REGULATORY AMENDMENT

The family modification and restructuring not only changed the form of treatment, but also put the child and adolescent at the top, as the first and most important family member, aiming to have their needs met in a comprehensive and satisfactory way.

It broke with the old notion of belonging (related to property) of the parent (usually the male figure of the relationship), thus causing the repositioning of children to the center of any legal discussion (AMARILLA, 2014). That said, “with the new contours, drawn from the principle of dignityehumana, the child and the adolescent began to be perceived differently in the family group” (BRETAS; OLIVEIRA, 2019, p. 47)

On the theme Grisard Filho (2016, p. 46) clarifies that: “What exists is a uniform conception centrist son, which shifts its fulcrum from the person of the parents to the person of the children [...]”. In other words, the conception of the centrist child came to honor the child within this family relationship, entrusted to parents to observe, respect and promote their rights.

This new concept of family relationships is justified in so far as children are vulnerable persons, “since they can be oppressed in various possible ways, such as the lack of responsible parenting portrayed by rejection or intrafamily violence [...]” (MORAES; ROSA, 2017, p. 39). The issues involved in protecting children and adolescents are now treated as a supraindividual and internationalized problem. (MARQUES; MIRAGEM, 2012).

The principles aimed at the Law of Families suffered in their entirety a rereading, turning to the protection and welfare of the child and the adolescent, and in a subsidiary form of the other members. In short, the principles act as true enforceable norms to be applied to the greatest extent possible, varying on a case-by-case basis.

The principle application before the specific case becomes imperative and necessary, given that this protective framework contributes “to the realization of the full development of the personality of family members and the protection of their personality rights” (BARRETO; CARDIN, 2007, p. 304).

These rights that in the sayings of Tartuce (2017, p. 153) have as objective "the ways of being, physical or moral of the individual and what one seeks to protect with them are, exactly the specific attributes of personality, being personality the quality of the entity considered person".

It is understood that the constitutional principles show a path to follow, limits to be observed and yet, a minimum to be respected given the weighting and proportionality, of those who are in short the fundamental rights and personality (BARRETO; CARDIN, 2007). It follows that, regardless of the branch of law, whether public or private, all are influenced by the Constitution and the international precepts of protection of the human person.

In this logic, civil procedural law should also be guided by constitutional principles aimed at protecting children and adolescents. Since the constitutional precepts are the basis of the Democratic Rule of Law and that aims at the valorization of the human being (CAMARGO; JACOB, 2020). "Procedural law, a branch of public law, is governed by rules that are found in the Federal Constitution and in infraconstitutional legislation" (NERY JUNIOR, 2017, p, 56).

Exacerbated individualism and the liquidity of relationships put at risk the fundamental rights and personality of vulnerable staff within the family relationship, because without the proper surrender and support of parents, The son will not be able to fully develop his personality, thus giving rise to an evil for the whole society, which only maximizes this crisis of post-modernity. (CARDIN; SANTOS; GUERRA, 2015).

At this point, regardless of the feeling that the parent nourishes by the child, family coexistence is a fundamental right for the development of the child and adolescent, so its effectiveness cannot be hostage to the subjective wills and desires of the guardian parent.

This statement is based on the primacy of human dignity and current legal values. (MORAES; VIEIRA, 2020).

As already stated, the civil liability applied to matters involving parental care only provides for the pecuniary conviction, or even the daily fine applied for the default of the regulated coexistence, which as you well know, does not repair the damage caused, can only provide a mitigation of the damage, through the payment of therapy. "In the perspective of full reparation of the victim, the son, who had his psychic integrity violated - and, ultimately, his dignity - continues without any kind of compensation for the damage suffered" (TEIXEIRA; TEPEDINO, 2020, p. 298). Since, what is desired is conviviality, care, zeal and not money, one wants to have a father and mother, not numbers in a bank account.

Thus, it is necessary a much more creative, sensitive and capable jurisdictional action for conflict resolutions, even in the execution phase, since the judge can, based on art. 139 of the 2015 Code of Civil Procedure, to adopt atypical coercive measures (item IV), to encourage the promotion of self-cmposition (item V), or to determine, the personal attendance of the parties to try to understand the reason for such resistance in the fulfillment of coexistence (item VIII), among other provisions that are in its power. (BRASIL, 2015).

Under the theme addressed Bezerra and Soares (2019, p. 57) clarify that:

> It is of utmost importance that the Judiciary Power always remains active as a controlling and protective entity of family rights, considering that any society is structured and has as a basis for the formation of the State a healthy

> and conflict-free family. Since the damage caused by the failure to resolve family disputes can result in serious irreversible damage to society.

While an adequate law for the treatment of family conflicts does not come, it is the duty of the Judiciary to remedy the legislative failures of the current legal act (SCHERBAUM; ROCHA, 2018). It needs to equip itself with tools that strengthen the legal system, focusing on the protection of the person and their individual guarantees (FERMENTÃO, 2016). It seems that the Judiciary forgets that "conflict is a complex mechanism, derived from the multiplicity of factors, which are not always defined in its regulation, and therefore are not only normativity and decision" (SPENGLER, 2006, p. 34).

No normative device, whether of material or procedural law, should have its interpretation removed from the impositions and limits set by the Federal Constitution of 1988 (CAMARGO; JACOB, 2020). In this way, it is stated that, "the enforcer of the infraconstitutional rule, among more than one possible interpretation, should seek to make it compatible with the Constitution, even if it is not the one that most obviously stems from its text" (BARROSO; BARCELLOS, 2003, p. 164).

It is necessary to break with old conceptions and lessons, so that in jurisdictional practice a positive effect on reality can be achieved (BARROSO; BARCELLOS, 2003). Given that, "[...] it is only through a differentiated action of the role of the judge, to be obtained through hermeneutic activity, that it will be possible to guarantee the effectiveness of the jurisdictional provision and the so desired justice' in the most complex cases" (MEDINA, 2017, p. 84).

If we insist on the current procedural formulation for the Law of Families, we will only perpetuate situations of insufficiency, violations of rights and irreparable damage, especially to the vulnerable person of this relationship, the child. It is well known that, the solution of the family conflict in the process of knowledge comes only after a long process, that usually does not come to pacify the parties, but on the contrary, imposes something that does not solve, only attacks (SPENGLER, 2006). "The judicial decision of merit carries the weight of state intervention, is due to the exclusive duration of the process, contributes to exacerbate contentiousness in the community, besides counting on the low credibility of the population" (SILVA; CARACIOLA, 2018, p. 447).

> Moreover, it is common that, in family relations, the judicial process is only the most apparent portion of a much broader and deeper conflict, which is not brought to the record. The solution imposed by the judge on the parties, under such conditions, will represent a new source of dispute, which will often trigger new judicial measures, including to obtain enforced compliance with the previous decision. (GARJARDONI; et al., 2018, p. 1177).

It remains clear that when it comes to family issues, the judge is technically limited to appreciate and glimpse all the nuances that permeate the parties. Because usually disputes, in the knowledge or execution phase, have a great load of feelings and stories. For this fact is that, "interdisciplinarity imposes then to the right operator who, aware of its own limits, transcends its specialty, welcoming contributions from other disciplines" (TOMASZEWSKI, 2004, p. 237). In order for conflicting family relationships to be adequately grasped and understood, specialized knowledge is required, which the judge usually does not have. (GARJARDONI; et al., 2018).

Thus, it is highlighted the auxiliary professionals of justice who work on psychological and social issues. “In this sense, it is indispensable to the work of the psychologist who mediate the processes in Family Law, contemplating the affective ties that will be beneficial in the evolution of the child” (PEREIRA; ARAÚJO; RIBEIRO, 2020, p. 10). It will be these professionals who will really capture possible outcomes for the resolution of family conflicts, and from the reports the judge may grant a more specific and effective judicial benefit. “And interdiscipline has played a fundamental role in this process of awareness of the complexity of relationships and the multidetermination of conflicts and impasses” (GROENINGA, 2009, p. 154).

The consensual environment already widespread in both practice and theory is the most appropriate form of conflict resolution of a family nature, as these contribute to the parties' finding the reasons and reasons for the actions taken, and from this identification, on their own to solve the problems (TARTUCE, 2019). And yet, it turns out that, “consensual means are less impactful, faster, less bureaucratic, and tend to last. This is because the composition is achieved through the participation of the interested parties, and is therefore not imposed coercively” (SILVA; CARACIOLA, 2018, p. 455). However, due to the constant situations of family conflicts and offenses to the rights of children and adolescents, it is necessary that the Brazilian legislator provide immediate protection regarding family coexistence.

For these and other reasons, the law must be the means of achieving justice, and not just legislative ideas. For justice to occur effectively, it is necessary to have human dignity as its mirror, objective (FERMENTÃO, 2016). Therefore, when it does not occur to coexistence in a repeated and unjustified way, the dignity will be violated, and immediately there will be an injustice, which ends up tarnishing the entire legal system.

Thus, Scherbaum e Rocha (2018, p. 15) point out that:

> The right itself is in constant motion. All aspects of life in society influence the creation of law in the same way that created law directly influences society. Under this same tuning fork, it is evident that the right that emanates from society to society accompanies the facts, and must comply with the demands created by the society to which it was created.

Given this, it is evident that the advances of the national and international society, make it stand out the need for new effective instruments for the effective protection of existential rights (CASAGRANDE; TEIXEIRA, 2019). Thus, rights and guarantees addressed to jurisdictional issues and their way of conducting - the process - should be able to keep up with these advances. (KNOPFHOLZ, 2011).

In view of this, it is clear that the litigants, when using the Judiciary Power, have certain expectations in face of it, being they: (a) that a concrete legal rule be formulated, demonstrating how this relationship should take place - which of them is right; (b) the possibility of enforcing the legal rule imposed on the “loser”, if the latter does not comply voluntarily; and (c) in situations that require some urgency, the judicial benefit is swift and satisfactory (ASSIS, 2013). “The provision of jurisdiction is the essence and purpose of the judiciary, one of the pillars of the democratic rule of law. With it, the Judiciary Power is in charge of resolving dealings and granting guardianship, in order to promote justice and social peace” (FERIATO; MARCH, 2019, p. 300).

The Civil Process and its effectiveness are necessary for the realization of the various fundamental rights and personality conferred to persons through the legal system. A law

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will be a mere statement of intent if there are no means to ensure its proper enforcement (FERIATO; MARCH, 2019). In no way does the Federal Constitution of 1988, come to guarantee rights, if, in practice, the responsible power, the Judiciary, It is discredited and inefficient. (CASAGRANDE; TEIXEIRA, 2019).

The procedural vehicles adopted both in the resolution of conflicts involving patrimonial law and existential law are the same, there is no distinction. There is a clear structural deficiency in procedural legislation. "And executive measures, which represent the core of the forms of action of rights, fall into obsolescence" (ASSIS, 2013, p. 13). This failure makes the realization of the right to family coexistence unfeasible. Because there is no legislation or still a north for the judge to "force" the parent to comply with the conviviality.

That said, "[...] it is necessary to overcome the idea that the loss of family power is the only possible sanction for the parent who does not fulfill the duties of fatherhood" (TARTUCE, 2019, p. 433). For this "sanction" is more for a prize, exempting the parent from his duties. After all, the family is and always has been the social entity responsible for the development and structuring of the personality of the new citizens (CARDIN; SANTOS; GUERRA, 2015), and can no longer accept omissive, negligent and harmful postures aimed at children. Both parents are responsible, and when one fails to do his duty, it is up to the State to enforce it, even if necessarily.

Based on the above, what is proposed to solve the demands involving the right to family coexistence and so many other conflicts of a family nature, is the implementation of a specific procedural system, since it is no longer possible to continue with the current one, that it ends up violating rights rather than protecting them. The current procedural law tends to deal with conflicts of a strictly patrimonial and non-existent nature. (MEDINA, 2017).

The need for specific procedural legislation for family conflicts is extremely urgent, given the peculiarities of these conflicts, and also the insufficiency of the current code in dealing with them. Thus, for effectiveness to occur in the process of fulfilling the sentence of family coexistence, it is necessary to implement adequate means for this purpose. It is only possible to protect children and adolescents when mechanisms are created that can, in fact, resolve disputes involving them and not inflame them further.

The new procedural legislation should be adopted as a coercive measure for this type of obligation, in addition to existing assets. Thinking about the possibility of determining its compliance under penalty of focusing on the crime of disobedience (art. 330 of the Penal Code of 1940) and consequently in prison 15 (fifteen) days to 06 (six) months of the parent executed, and also in the application of fine (BRAZIL, 1940). In addition, in a supplementary and analogous way, provide in its legal body that the judge will have to determine the psychological and/or biopsychosocial accompaniment both of the parent who refuses to perform the coexistence, as the child and/or adolescent, in the same molds of art. 6 of Law No. 12,318 of 26 August 2010 on parental alienation.

The formulation of a procedural law aimed at the Law of Families, does not aim to violate the principle of minimal state intervention, nor even dictate a formula ready and plastered for all families with regard to the raising of children. "However, a minimum state does not mean disregard for people, but respect for their individual capacities, such as the faces of the same coin" (GRISARD FILHO, 2010, p. 72).

It is up to the State to curb attacks on rights aimed at the protection of human dignity, this being the very reason for the existence of the State - protection of the person, and especially of the vulnerable (FERMENTÃO, 2016). “In order to advocate the realization of responsible parenthood, it is essential that there are instruments that mean a form of sanction for the violator of the ordinance” (TARTUCE, 2019, p. 433).

In the words of Boschi (2005, p. 213) “What is lost and what is lost in terms of love, affection, attention or assistance can never be restored”. Thus, this sentence raises the urgency of procedural mechanisms that effectively guarantee satisfactorily, compliance with the right to family coexistence, avoiding the configuration of harm, and consequently the need for civil reparation for affective abandonment, and still promoting an improvement throughout society.

CONCLUSIONS

Children and adolescents are vulnerable as they are at a delicate stage of development. Glimpsing such vulnerability the Federal Constitution of 1988 considered necessary the protection of this person, and entrusted the family, society and the state itself in the guardianship of the infant population.

Faced with this protection, the right to family coexistence is shown to be the main fundamental right of this developing person, because it is through this right that all others will be realized. It is through living together that the person of the child learns, grows and develops. Thus, a right mainly of the child and not of the parents, for this one it is much more as a moral duty, but mainly legal, in doing, to carry out the coexistence when there is no longer the affective bond between the parents. Parents are separated but not these from their children.

Thus, at a time when there is parental negligence, an omission in the observance of properly regulated coexistence in a court order, it is possible to speak of a forced execution. However, the legal act that regulates civil proceedings has a patrimonial and non-existent bias, imposing certain limitations on the judge, which is only seen in the possibility of daily fine (astreinte) as a coercive measure.

It is well known that when there is no equity at all it is no use to impose a fine. Thus, it is concluded that there is a procedural deficiency in the protection of this fundamental right of the child and the adolescent. There is an urgent need for a rereading of coercive measures, as well as in the conduct of the sentencing process, and even previously, in the regulation of family coexistence.

Aware that there is a problem in the treatment of family conflicts, and that the self-cmpositive methods are the true salvation for the resolution of these conflicts which in their great majority are existential in nature. It is the responsibility of both the Legislative Power and the Judiciary to promote these methods more and more, in an adequate and satisfactory way, in order to foster dialogue and not litigation, which aims at the actual resolution of the problem and not only to treat it superficially and inadequately.

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However, it is also up to these same bodies to provide an immediate and to some extent effective solution to issues involving the right to family coexistence. Thus, it is possible to think of the possibility of the Judiciary to adopt as a coercive measure the arrest of the non-guardian parent who does not comply with the coexistence, based on the crime of disobedience provided for in art. 330 of the Penal Code, as well as determine that this parent and offspring, undergo psychological and/or biopsychosocial follow-up, aiming at reestablishing communication and effective right to family coexistence.

It is clear that we need our own legislation to deal with family conflicts, from the knowledge stage to the implementation process. Having as a premise the protection and promotion of children's rights.

With regard to the right to family coexistence, it is well known that, the time lost and the damage caused by family not living together are not repairable with compensation. This is why it is necessary to think of ways to avoid harm, to effect family coexistence, even if initially forced, in order to rescue this absent parent, and to promote their awareness of their duties, and thus responsible parenting.

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CIVIL RESPONSIBILITY AS A WAY TO CORRECT INJUSTICES IN CASE OF VIOLATION TO DATA PROTECTION BY THE JUDICIARY

A RESPONSABILIDADE CIVIL COMO INSTRUMENTO DE CORREÇÃO DE INJUSTIÇAS NO CASO DE VIOLAÇÃO À PROTEÇÃO DE DADOS PELA FUNÇÃO JURISDICIONAL

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ABSTRACT

In the doctrine and jurisprudence, only in cases provided for in specific legislation and in the Federal Constitution, is the State's civil liability arising from the jurisdictional function allowed. However, as the protection of personal data is a fundamental right, one must glimpse about the State's responsibility in relation to judicial acts beyond these assumptions. The Judiciary seeks to adapt itself, by technology, for the development of its activity. At the same time, it needs to preserve citizens' privacy. It is a complex reality, which needs to be understood by the operators of the law, seeking the best interpretation of the law to meet the public interest and the data protection.

KEYWORDS: State civil liability. Protection of Personal Data. Judiciary.

RESUMO

É assente na doutrina clássica e na jurisprudência que apenas nas hipóteses previstas na legislação específica e na Constituição Federal é admitida a responsabilidade civil do Estado que decorre da função jurisdicional. Todavia, reconhecido que a proteção de dados pessoais é direito fundamental, deve-se conjecturar a responsabilidade do Estado em relação aos atos judiciais para além dessas hipóteses. O Judiciário busca se adequar, a partir da tecnologia, para o desenvolvimento de sua atividade. Ao mesmo tempo, todavia, precisa preservar a privacidade dos cidadãos. Trata-se de uma realidade complexa que deve ser entendida pelos operadores do Direito, buscando-se a melhor interpretação normativa a atender ao interesse público e à proteção de dados.

PALAVRAS-CHAVE: *Responsabilidade civil do Estado. Proteção de Dados Pessoais. Judiciário.*

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INTRODUCTION

The issue of the storage, sharing and disclosure of personal data is an essential issue of interest to States. For this reason, many laws have emerged for the purpose of regulating this matter.

In Brazil, the Law nº 13.709/2018 was recently published, better known as General Law of Protection of Personal Data (*Lei nº 13.709/2018, Lei Geral de Proteção de Dados Pessoais – LGPD*). According to article 1, this law aims to "protect the fundamental rights of freedom and privacy and the free development of the personality of the natural person" (*"proteger os direitos fundamentais de liberdade e de privacidade e o livre desenvolvimento da personalidade da pessoa natural"*) (BRASIL, 2018).

There are other constitutional norms and principles that also address the issue; the Law on Access to Information (Law nº 12.527), the Internet Civil Rights Law (Law nº 12.965), the Consumer Protection Code, and among others, prevailing in all of them the orientation that restrictions should be envisaged in the processing of personal data, as well as greater control over their use.

The use of personal data imposes the idea of surveillance and security, and it is relevant to consider the legal consequences that may arise in the event of leaks or misuse of personal data.

The Judiciary, in the exercise of its jurisdictional function, has access to several types of personal data, among them: identity documents, personal taxpayer registration (*CPF - cadastro de pessoa física*), passport, voter registration and other extremely sensitive data.

Article 5, item II of the Brazilian law in focus (*LGPD*) provides that sensitive personal data is all personal data about racial or ethnic origin, religious beliefs, political opinion, affiliation to a union or organization of a religious, philosophical or political nature, health-related information or to sexual life, genetic or biometric information, when linked to a natural person. These are kinds of information that open up scope for discrimination, and can be used to harm people in various ways, creating prejudice/preconception (BRASIL, 2018).

The problem, however, presents itself in the accessibility of these data by third parties, inasmuch as, when they become public processes, they can be used to awaken prejudiced actions, being able to violate the dignity of the human person, sometimes in a definitive way, allowing discrimination (FRAZÃO, p. 34, 2019).

The Judiciary therefore faces a major challenge: to inform the whole of society of judicial processes and judgments and, at the same time, to preserve the privacy of those under jurisdiction or of those subject to the jurisdiction.

With regard to liability and compensation for breach of data protection rules, the article 42 of the *LGPD* provides that the controller or operator of the data that, in his activity, causes harm to others, is obliged to repair it. which is a "repetition" of the general rule of accountability of the Brazilian Civil Code (arts. 186 e 927) (BRASIL, 2002).

In view of this, it is noted that the *LGPD* is generic, not expressly mentioning how the law itself should be applied to the Judiciary services.

This article deals with this issue, considering the possibility of State civil liability in the event of serious damage caused by the Judiciary due to violation of data protection rules.

The Brazilian Supreme Court (*Supremo Tribunal Federal – STF*), in the judgment of the Precautionary Measure in Direct Actions of Unconstitutionality (*Medida Cautelar nas Ações Diretas de Inconstitucionalidade*) nº 6387, 6388, 6389, 6393, 6390, made a historic decision, expressly recognizing the fundamental right to the protection of personal data, when suspending the application of Provisional Measure 954/2018 (*Medida Provisória 954/2018*), which obliged telephone operators to pass on to Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatistica – IBGE) data identified from their consumers of mobile telephones, cell phones and addresses (BRASIL, 2020).

The *STF* Ministers, even before the inclusion of this right in the constitutional text, already consider the protection of personal data as an autonomous fundamental right, which differs from the protection of intimacy and privacy, since the protected object is distinct[2].

The importance of the fundamental right to the protection of personal data and the current influence of the Judiciary in the Brazilian social context are crucial to highlight the relevance of accountability or responsibility, guaranteeing, to those affected by the jurisdictional provision, the right to compensation, considering the objectives and foundations of Federative Republic of Brazil and the Democratic State of Law.

The State has the duty to indemnify anyone who, by state act or omission, suffers losses. Thus, it is essential to find a way to reconcile the judicial function, the protection of personal data and the right to compensation in the event of damage.

At this point, it is a challenge to adapt the data protection rules to the public interest and the access to justice, mainly because, as already noted, the Judiciary also uses sensitive data, subject to special processing conditions.

In order to analyze this identified problem, it was considered, as a theoretical reference, works and scientific articles, as well as pragmatic issues, mainly in view of the little theoretical and unprecedented development on the theme.

In introductory lines, the expectation is that this study will be useful to the legal community and society, delimiting the subject and deepening the central issues, in order to contribute to the construction of an analysis according to the dictates of the Democratic State of Law.

1 THE PROBLEM OF THE STATE'S IRRESPONSIBILITY IN THE EXERCISE OF THE JURISDICTIONAL FUNCTION

The Civil Procedure Code of 2015 (*Código de Processo Civil Brasileiro de 2015 – CPC*), in article 143, I and the Complementary Law nº 35/1979 – Organic Law of the National Judi-

2 For further information on the unconstitutionality defects raised in MP 954, see the indicated article. Available in: https://www.jota.info/opiniao-e-analise/artigos/a-encruzilhada-da-protecao-de-dados-no-brasil-e-o-caso-do-ibge-23042020. Accessed on: March 4, 2020.

ciary (*Lei Complementar nº 35/1979 – Lei Orgânica da Magistratura Nacional*), in article 49, I, prescribe that the magistrate will answer for losses and damages when, in the exercise of his functions, proceed with intent or fraud (BRASIL, 2015).

In addition, under the terms of item II of Article 143 of the Civil Procedure Code of 2015 – *CPC*, if the judge refuses, omits or delays, without just reason, a measure that must order ex officio or at the request of the party, this judge may also be held responsible. However, these hypotheses will only be verified after the party requests the judge to determine the measure and this request is not considered within 10 (ten) days (BRASIL, 2015).

The Brazilian Constitution also provides for State accountability, due to judicial error, with imprisonment beyond the time fixed in the sentence, according to article 5, item LXXV (BRASIL, 1988).

In assumptions different from those presented above, in classical doctrine and jurisprudence, the rule is that of the State's irresponsibility, based on several arguments pointed out.

Defenders of the state irresponsibility thesis argue, first, that judicial decisions are subject to appeal.

Thus, if the instrument is made available to the party in order to protect itself from the "injustices" committed in the process, it would be unnecessary to discuss, in another action, the decision or possible judicial liability.

> The argument used is that judicial decisions are normally subject to appeal and that the appeal is exactly the regular and sufficient instrument of the parties to protect themselves against judicial injustice. (*O argumento empregado é o de que as decisões judiciárias são normalmente sujeitas a recurso e que o recurso constitui exatamente o instrumento regular e suficiente das partes para protegerem-se contra injustiça judiciária*) (CAPELLETTI, 1989, p. 27).

However, it should be noted that the appeal doesn't present itself as a capable means to allow the parties the full possibility of evidentiary instruction, available in the event of a civil liability lawsuit.

In addition, the appeal may not reform an eventual irregular decision and, when it is no longer applicable, it will allow this decision, as a res judicata, to be no longer subject to discussion. On the issue, Cappelletti also points out:

> But, once the judge's decision, no longer subject to appeal, becomes definitive, it acquires the authority of res judicata [...]. Although, by hypothesis, erroneous in fact or in law, the unappealable decision creates its own "truth" and its own right; she *facit jus*. And the conclusion is that civil liability cannot even be recognized, given that this responsibility presupposes the act contrary to the law, the "damnum iniuria datum", an injury that, in principle, cannot derive from the decision that facit jus. (*Mas, uma vez que a decisão do juiz, não mais se sujeita a recurso, torna-se definitiva, adquire a autoridade de coisa julgada [...]. Ainda que, por hipótese, errônea de fato ou de direito, a decisão passada em julgado cria a sua própria "verdade" e o seu próprio direito; ela facit jus. E a conclusão é que a responsabilidade civil sequer pode ser reconhecida, dado que dita responsabilidade pressupõe o ato contrário ao direito, o "damnum iniuria datum", injúria que, por princípio, não pode derivar da decisão que facit jus*) (CAPELLETTI, 1989, p. 27).

It is also argued about the absolute judicial irresponsibility because the act of the judge is considered an act of the State, protected by the principle of legitimacy, thus verifying an accentuated dependence of the judges on the Executive (CAPELLETTI, 1989, p. 25).

However, the principle of the presumption of legitimacy, present in state acts, is not suitable to remove civil liability in relation to judicial acts, since the principle of general irresponsibility of the State in the exercise of activities has long been abandoned.

It is observed that there is another argument, presented by Mauro Capelletti, also historically used to remove responsibility, namely: from the authority of res judicata in judicial decisions.

> The strength of the res judicata principle, in particular, is not in the dictates of an abstract logic, but only in the ends or values that the legal systems try to pursue through that principle. It is generally recognized that such an end or value is found in social peace and in the certainty of the right: the judicial decision, regardless of the fact that it is correct or not (in fact and in law), must at some point end the litigation. (*A força do princípio da coisa julgada, em particular, não está nos ditames de uma lógica abstrata, mas apenas nos fins ou valores que os sistemas jurídicos intentem perseguir mediante aquele princípio. É geralmente reconhecido que tal fim ou valor se encontra na paz social e na certeza do direito: a decisão judiciária, prescindindo do fato de que seja ou não correta (de fato e de direito), deve em determinado ponto dar fim ao litígio*) (CAPELLETTI, 1989, p. 29).

The principle of res judicata (*res judicata facit jus*) is related to the idea of sovereignty of state power, which is more specifically revealed in the independence of the judges (CAPELLETTI, 1989, p. 24).

However, in the "responsive" model, which does not admit its total denial, there is an effort "to achieve the balance between independence and social responsibility-control, in order to avoid, at the same time, subjection and also the closing and the isolation of the judiciary" ("*em realizar o equilíbrio entre independência e responsabilidade-controle social, com o fim de evitar, ao mesmo tempo, a sujeição e igualmente o fechamento e o isolamento da magistratura*") (CAPELLETTI, 1989, p. 10).

In these terms, the premise is: where there is power there must be responsibility.

Thus, in a rationally organized society, there is a directly proportional relationship between power and responsibility. Judges exercise a power. And "a power not subject to accountability represents pathology" ("*um poder não sujeito a prestar contas representa patologia*") (CAPELLETTI, 1989, p. 18).

> [...] it seems beyond doubt that a system of liberal-democratic government - a system, therefore, that wants to guarantee the fundamental freedoms of the individual in a regime of social democracy, as provided for in the Italian Constitution - is above all one in which there is a reasonable ratio of proportionality between public power and public responsibility, in such a way that the growth of power itself corresponds to an increase in controls over the exercise of such power. This correlation is inherent in what is commonly called a system of checks and balances, checksand balances. (*[...] parece fora de dúvida que um sistema de governo liberal-democrático - um sistema, pois, que queira garantir as liberdades fundamentais do indivíduo em um regime de democracia social, como é previsto na Constituição Italiana - é*

> *sobretudo aquele em que exista razoável relação de proporcionalidade entre poder público e responsabilidade pública, de tal sorte que ao crescimento do próprio poder corresponda um aumento dos controles sobre o exercício de tal poder. Esta correlação é inerente ao que se costuma chamar de sistema de pesos e contrapesos, checksand balances*) (CAPELLETTI, 1989, p. 18).

Continuing with this analysis, it should be considered that the "immunity" of judges, provided for in practically all legal systems, constitutes a problem of balance between values guarantees and independence, as demonstrated by Mauro Capelletti:

> [...] the problem of the judges' immunity is, more precisely, the problem - less absolute and more pragmatic, of limits of responsibility, that is, a problem of balance between the guarantee value and the instrumental of independence, external and internal of the judges, and the other modern (but also ancient, as it turned out) value, of the democratic duty of accountability (*[...] o problema da imunidade dos juízes é, mais precisamente, o problema – menos absoluto e mais pragmático, de limites da responsabilidade, vale dizer, um problema de equilíbrio entre o valor de garantia e instrumental da independência, externa e interna dos juízes, e o outro valor moderno (mas também antigo, como se viu). do dever democrático de prestar contas*) (CAPELLETTI, 1989, p. 33).

When quoting TROCKER, the author points out:

> As Trocker wrote, [...] "the privilege of the magistrate's substantial irresponsibility cannot constitute the price that the community is called to pay, in exchange for the independence of its judges" (*Como escreveu Trocker, [...] "o privilégio da substancial irresponsabilidade do magistrado não pode constituir o preço que a coletividade é chamada a pagar, em troca da independência dos seus juízes"*) (CAPPELLETTI, 1989, p. 33).

For these reasons, it is seen that immunity and independence shouldn't be seen as concepts capable of nullifying democratic values, as is already the case with regard to the responsibility of other agents who exercise public power.

The unique jurisdictional function cannot be a pretext for irresponsibility, especially in the light of the Democratic State of Law.

> It cannot sustain state irresponsibility in the fact that the exercise of the judicial function is a 'manifestation of sovereignty' (it would be justified in the maxim regalengathe king can do no wrong). The idea of sovereignty isn't opposed to that of State responsibility, which is also subject to law. On the other hand, if the argument were admitted, the State would also be irresponsible for acts of the Executive, which, today, is no longer admitted (either in doctrine or in jurisprudence) (*Não pode sustentar a irresponsabilidade estatal no fato de ser o exercício da função judiciária uma 'manifestação da soberania' (seria justificá-la na máxima regalengathe king can do no wrong). A idéia de soberania não se contrapõe à de responsabilidade do Estado, que também se submete ao Direito. Por outro lado, se se admitisse o argumento, o Estado também seria irresponsável por atos do Executivo, o que, hoje, não mais se admite (seja na doutrina seja na jurisprudência)*) (DERGINT, 1994, p. 227).

The Judiciary has the traditional mission of applying the law to the specific case, controlling the other "powers", protecting fundamental rights and guaranteeing the Democratic Constitutional State of Law.

The model of irresponsibility in the face of judicial acts isn't in line with the principles of the Constitution of the Republic.

> If, on the one hand, it is certain that the State should not respond indiscriminately in cases in which it has not contributed in any way to the advent of the damage; on the other hand, it cannot be overlooked the fact that its performance is based on the protection and respect for the rights of the community, making its irresponsibility inadmissible in cases where it serves as an instrument of perpetuation of injustices and violation of the fundamental principles of Law (*Se por um lado é certo que o Estado não deve responder indiscriminadamente em hipóteses nas quais não contribuiu de qualquer modo para o advento do dano; por outro, não se pode negligenciar o fato de que sua atuação tem como pressuposto a proteção e o respeito aos direitos da coletividade, tornando inadmissível sua irresponsabilidade nos casos em que esta sirva como instrumento de perpetuação de injustiças e de violação dos princípios fundamentais do Direito*) (SILVA, p. 11, 2002).

Therefore, it's essential to create a model of legal responsibility, which finds a balance between independence guaranteed to the career of magistrate and the responsibility for the exercise of a state function.

2 CIVIL RESPONSIBILITY AS AN INSTRUMENT FOR CORRECTION OF INJUSTICES IN THE EVENT OF BREACH OF DATA PROTECTION BY JURISDICTIONAL FUNCTION

Among the fundamental rights guaranteed by the Constitution of the Republic is access to justice.

For Mauro Cappelletti and Bryant Garth, access to justice is "the fundamental requirement - the most basic of human rights – for a modern and egalitarian legal system that aims to guarantee, and not just proclaim the everyone's rights" (*"o requisito fundamental – o mais básico dos direitos humanos – de um sistema jurídico moderno e igualitário que pretenda garantir, e não apenas proclamar os direitos de todos"*) (CAPPELLETTI, 1988, p. 12).

From there, it is possible to conclude that the doctrinal impediment of accountability through the judicial system violates access to justice, being abusive to prevent injuries by judicial acts - in the legal spheres, injuring citizens, from being liable for compensation.

It should be noted that, in relation to state acts issued by the Executive, the so-called Theory of Objective State Responsibility, provided for in the Brazilian Constitution of 1988, in § 6º of art. 37.

> Art. 37. The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities will obey the principles of legality, impersonality, morality, publicity and efficiency and, also, to the following: (Wording given by Constitutional Amendment nº 19, 1998).
>
> [...] § 6º - Legal entities governed by public law and those governed by private law that provide public services shall be liable for the damages that their

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> agents, as such, cause to third parties, ensuring the right of recourse against the person responsible in cases of intent or guilt.
>
> (*Art. 37. A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte: (Redação dada pela Emenda Constitucional nº 19, de 1998).*
>
> *[...] § 6º - As pessoas jurídicas de direito público e as de direito privado prestadoras de serviços públicos responderão pelos danos que seus agentes, nessa qualidade, causarem a terceiros, assegurado o direito de regresso contra o responsável nos casos de dolo ou culpa*) (BRASIL, 1988).

According to this provision, legal entities governed by public law have strict liability for damages caused by their agents.

The State's strict liability represents the State's obligation to indemnify, regardless of fault, in the exercise of its activities (functions), the damages caused by any of its agents, as a result of unilateral, lawful or unlawful, commissive or omissive, material or legal, subject to legal exclusions and future right of return/compensation (*"direito de regresso"*).

At this point, it is worth mentioning that acts considered functional, administrative, atypical to the function of judging, such as measures taken for the administration and functioning of the Judiciary, if they mean harm to third parties, based on national doctrine and jurisprudence, can generate strict liability of the State, under the terms of art. 37, § 6º of the Brazilian Constitution of 1988 (BRASIL, 1988).

> The State's liability is restricted to damages caused by administrative officials, as such, to third parties; doesn't answer the State for possible damages, resulting from wrong decisions or judicial acts, according to the doctrine already accepted and enshrined in the jurisprudence of the courts (*A responsabilidade do Estado se restringe aos danos causados por funcionários administrativos, nessa qualidade, a terceiros; não responde o Estado por possíveis danos, oriundos de decisões ou atos judiciais errados, segundo a doutrina já aceita e consagrada pela jurisprudência dos tribunais*) (STOCO, 1996, p. 414).

In addition to acts of an administrative nature, some indoctrinates argue that, although state accountability is possible, this would be applicable only in the cases expressed in law, as already registered in this article.

Yussef Cahali, however, rejects this argument:

> The argument that the State only responds for judicial acts in the cases expressly stated in the law, which, thus, would represent exceptions to an alleged immunity of the State, doesn't proceed - even without legal correspondence. In any case, the principle of state responsibility is enshrined, literatim, in a constitutional rule (art. 37, § 6º, BC/1988 (LGL\1988\3)), applicable to harmful executive, legislative and judicial acts. It cannot be said that there is a gap in the legal system. Even if there were, it wouldn't exempt the judge from judging, and he should resort to analogy, customs and general principles of law (*Não procede o argumento de que o Estado somente responde por atos judiciais nas hipóteses expressamente declaradas em lei, que, assim, representariam exceções a uma pretensa imunidade do Estado - igualmente sem correspondência legal. De qualquer forma, o princípio da*

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responsabilidade estatal encontra-se consagrado, textualmente, em regra constitucional (art. 37, § 6.º, CF/1988 (LGL\1988\3)), aplicável aos atos danosos executivos, legislativos e judiciais. Não se pode dizer que existe uma lacuna no sistema jurídico. Mesmo se houvesse, ela não eximiria o juiz de julgar, devendo ele recorrer à analogia, aos costumes e aos princípios gerais do direito) (CAHALI, 2007, p. 512).

Although this discussion isn't new, it's observed that civil liability in the face of damages arising from acts of the Judiciary hasn't yet been accepted by the legislation or even by the Judiciary itself, as highlighted by Marcus Paulo Queiroz Macedo.

> As Augusto do Amaral Dergint warns (1994, p. 225), "it's impossible to talk about state responsibility for legal acts without controversy", since "the dominant Brazilian doctrine defends the thesis of responsibility; however, it's still on a purely theoretical level, because it wasn't accepted either within the scope of legislation or within the scope of the Judiciary" (DI PIETRO, 1994, p. 86). In the same sense, adds Ruy Rosado do Aguiar Júnior (1993, p. 6): "the idea of state responsibility for jurisdictional acts has made little progress in law and in the application of the Courts, despite today the majority support of the doctrine, predominantly favorable to its full incidence". Indeed, this accountability has been defended for a long time in the country, having as seminal positions those of Juary C. Silva (1965), José Cretella Jr. (1970) and Aguiar Dias, who, still under the aegis of the 1946 Constitution, stated (2006, p. 864): "Whatever the role of the Judiciary, it is certain that Judges are servants of the State and act on their behalf. And the Constitution, when considering the responsibility of the State, doesn't allow questioning except the causal relationship between the damage and the public service, and there should be no privilege for impunity for damage caused by an act classified by the Judiciary itself as manifest illegality"
>
> (*Como adverte Augusto do Amaral Dergint (1994, p. 225), "é impossível falar sobre a responsabilidade estatal por atos judiciais sem polemizar", uma vez que "a doutrina brasileira dominante defende a tese da responsabilidade; no entanto, ela ainda está no plano puramente teórico, porque não foi acolhida quer no âmbito da legislação, quer no âmbito do Poder Judiciário" (DI PIETRO, 1994, p. 86). No mesmo sentido, aduz Ruy Rosado do Aguiar Júnior (1993, p. 6): "a idéia da responsabilidade estatal por ato jurisdicional pouco avançou na lei e na aplicação dos Tribunais, apesar do hoje majoritário apoio da doutrina, preponderantemente favorável à sua plena incidência". Com efeito, esta responsabilização já é defendida há muito no país, tendo por posições seminais as de Juary C. Silva (1965), José Cretella Jr. (1970) e Aguiar Dias, o qual, ainda sobre a égide da Constituição de 1946, afirmou (2006, p. 864): "Qualquer que seja o papel do Judiciário, o certo é que os Juízes são servidores do Estado e agem em seu nome. E a Constituição, ao cogitar da responsabilidade do Estado não permite indagação senão sobre a relação de causalidade entre o dano e o serviço público, não devendo haver privilégio para impunidade de um dano causado por ato classificado pelo próprio Judiciário como ilegalidade manifesta*") (MACEDO, 2008, p. 229).

However, it appears that the failure to adopt the theory of state responsibility is even more serious today, in which the central role of the Judiciary is seen, considered as the protagonist of the political and social scenario, and given the inclusion of technology in the service of the Judiciary.

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Parallel to the increased participation of the Judiciary, the process was implemented in electronic media, increasingly intensifying the use of technology to maintain jurisdictional activities.

Without moving from his office, the lawyer may, from a register made with the Judiciary, file lawsuits, consult procedural documents, manifest himself and receive subpoenas.

In this case, lawyers need to register themselves in electronic judicial systems, "when they will create an identifier and password to access the system, as well as create a digital signature, which will enable procedural acts to be carried out with maximum security, maximum authenticity and maximum speed" (*"momento em que criarão um identificador e uma senha de acesso ao sistema, bem como criarão uma assinatura digital, a qual possibilitará a realização dos atos processuais com a máxima segurança, máxima autenticidade e máxima celeridade"*) (CARVALHO, 2010).

The virtualization of the judicial procedure also occurs in other situations, such as, for example, "tele-sustainability" (*"telessustentação"*) or oral distance support. In this "tele-attendance" (*"telecomparecimento"*), the lawyer accompanies the judgment session from a distance, intervening in it, even if he didn't physically appear.

However, in times of "big data", there is no doubt that everyone who has databases of other people's information has a duty to promote forms of control, protection and adequate management of that data, in order not to compromise citizens' rights.

The term "Big Data" describes not only the appropriate technology for data capture, but also the growth, availability and exponential use of structured and unstructured information that circulates on the internet (SIMÃO FILHO; SCHWARTZ, 2018, p. 217).

The existence of technology-based platforms for the generation, reception and transmission of data that will be processed, analyzed and transformed into algorithms is a phenomenon that works as the basis for this concept of Big Data, to characterize the Fourth Industrial Revolution.

> At least two technological revolutions are directly linked to the genre of what was conventionally called the fourth industrial revolution, namely: the data-based business revolution resulting from the discovery and use of new data sources generated by social media and the growth of mobile telephony and diversified digital systems for capturing information and images, with the potential to completely modify a company's traditional value generation process. The good agglutination of these data, in an adequate digital base, can generate additional knowledge about the user's interest, passions, affiliations, networks and relationships, as well as loyalty elements of such an order that the process of attracting and prospecting customers is infinitely optimized, and another revolution arising from the implantation of the Internet of Things (*Pelo menos duas revoluções tecnológicas estão diretamente ligadas ao gênero do que se convencionou denominar de quarta revolução industrial, qual seja: a revolução dos negócios baseados em dados decorrente da constatação e utilização de novas fontes de dados gerados por meios sociais e pelo crescimento da telefonia móvel e sistemas digitais diversificados de captação da informação e imagens, com potencial para modificar por completo o processo tradicional de geração de valor de uma companhia. A boa aglutinação destes dados, em uma base digital adequada, pode gerar conhecimentos adicionais sobre o interesse, as paixões as afil-*

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> *iações, redes e relações do usuário, além de elementos de fidelização de tal ordem que se otimize ao infinito o processo de captação e prospecção de clientela, e a outra revolução decorrente da implantação da Internet das Coisas*) (SIMÃO FILHO; SCHWARTZ, 2018, p. 224-225).

At this point, there is an essential issue to be considered, namely, the privacy of the citizen, especially in view of the constant concerns about its violation with the evolution of the information society. On this new reality Laura Schertel Mendes defends:

> In a connected society, data protection is no longer a right among many, but an essential element for maintaining citizens' trust in the communication and information structures, as well as for the necessary flow of data and innovation resulting from it. As a regulation of a communicational and informational order, which is by definition multidimensional, data protection aims to balance the rights of protection, defense and participation of the individual in communicative processes (*Em uma sociedade conectada, a proteção de dados não é mais um direito entre tantos, mas um elemento essencial para a manutenção da confiança dos cidadãos nas estruturas de comunicação e informação, bem como para o necessário fluxo de dados e inovação dele decorrente. Como regulação de uma ordem comunicacional e informacional, que é por definição multidimensional, a proteção de dados tem como objetivo equilibrar os direitos de proteção, de defesa e de participação do indivíduo nos processos comunicativos*) (MENDES, 2020).

Personality protection in the digital society must also consider the individual's capacity for interactional development, that is, the human person's capacity for progress, which only develops through other people, which reinforces the need to protect privacy.

On the one hand, however, there is a concern with the defense of the privacy of individuals, engaging in intense discussions about data leaks, public and private; on the other, there is a need to verify the existence of a public interest related to that citizen, relevant to the community.

So, how to make the public interest of procedural information compatible with the right to privacy?

Initially, it should be kept in mind that the Judiciary must also comply with the Law of Protection of Personal Data (*Lei Geral de Proteção de Dados - LGPD*) (BRASIL, 2018).

This law dedicates a chapter with nine articles (Chapter IV) exclusively to address the topic "Treatment of Personal Data by the Public Sector" (*"Tratamento de Dados Pessoais pelo Setor Público"*), indicating integration with the Access to Information Law (*"Lei de Acesso à Informação"*).

Therefore, in the same way that private institutions must observe a specific purpose for carrying out the processing of personal data, the legal entity of public law must also adopt the specific public purpose and public interest for carrying out the processing of their data.

It's verified, then, that it will be up to the Judiciary to guarantee that the use of the data follows the special purposes that concern the execution of the functions of that body and, at the same time, the balance between the need to publicize the information and the rights of the holders.

The articles 25, 26 and 27 of the *LGPD* are responsible for describing how and when the sharing of personal data managed by the public sector can occur. (BRASIL, 2018)

The data must be maintained in an interoperable and structured format for shared use, with a view to legitimate, expressed and previously defined purposes, namely: execution of public policies, provision of public services, decentralization of public activity and dissemination, and access information by the general public.

As a rule, the transfer of personal data to private entities is prohibited. The exception occurs in situations where the data is publicly accessible; when there is a legal provision or the transfer is supported by contracts, agreements or similar instruments; or that the performance of a service or measure requires it. Exceptions are also made in the event that the transfer of data is intended solely to prevent fraud and irregularities, or to protect and safeguard the security and integrity of the data subject, provided that processing for other purposes is prohibited.

The article 27 further states that there must be consent from the owner of the data so that it can be shared between the Public Administration and a private entity, with some exceptions (BRASIL, 2018).

Article 31, on the other hand, provides that public bodies are subject to specific administrative measures; as a result, it is up to the national authority to ensure that appropriate and proportionate measures are taken when the processing of personal data is breached in public bodies (BRASIL, 2018).

This idea is complemented by the determination of article 32, which announces the need for public institutions to foresee the impact of privacy within the scope of public administration, which will certainly have great consequences, as it will require several public policies to adapt and conform the public sector to the new regulation (BRASIL, 2018).

From the law, it is also seen that the administrative sanctions to which public entities are subject are milder than those to which private entities are subject, being established in § 3º of article 52. Examining the aforementioned article, although there is no penalty for public entities, sanctions such as blocking personal data can have a major impact on public performance (BRASIL, 2018).

Having said these considerations, there is no doubt that the Judiciary must respect the *LGPD*, under penalty of creating effective legislation only for the private sector, without observance for the public sector, which has the largest volume of stored data.

Based on this, the National Council of Justice (*Conselho Nacional de Justiça*) created, through Ordinance 63/2019 (*Portaria 63/2019*), a working group designed to prepare studies and proposals on policies for access to court procedural databases, especially when there are commercial purposes. According to Minister Dias Toffoli, the main concern is with “the caution that must be kept regarding unrestricted access to relevant information about the citizen” (*“a cautela que se deve guardar quanto ao acesso irrestrito a informações relevantes sobre o cidadão”*) (RACANICCI, 2019).

Along the same lines as the other “powers”, the *CNJ* published, after these previous studies were carried out, Recommendation 73/2020 (*Recomendação 73/2020*), with guidelines for the adequacy of all Judiciary bodies, instituting a national standard for the protection of personal data existing in its databases (BRASIL, 2020).

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Regarding the importance of regulating this theme, the guidelines of Yuval Noah Harari are:

> Thus, we would do better to invoke jurists, politicians, philosophers and even poets to turn their attention to this puzzle: how to regulate data ownership? This is perhaps the most important political issue of our age. If we are unable to answer that question soon, our socio-political system may collapse (*Assim, faríamos melhor em invocar juristas, políticos, filósofos e mesmo poetas para que voltem sua atenção para essa charada: como regular a propriedade de dados? Essa talvez seja a questão política mais importante da nossa era. Se não formos capazes de responder a essa pergunta logo, nosso sistema sociopolítico poderá entrar em colapso*) (HARARI, p. 110-111).

The judicial process is public by virtue of the provision in item LX of article 5º, that provides: "the law can only restrict the publicity of procedural acts when the defense of privacy or social interest so requires" (*"a lei só poderá restringir a publicidade dos atos processuais quando a defesa da intimidade ou o interesse social o exigirem"*) (BRASIL, 1988).

This publicity ends up also reaching the personal data that may appear in the lawsuits, which, due to article 7º, § 4º, of the General Law of Protection of Personal Data (*LGPD*), are made manifestly public by their owners (BRASIL, 2018).

For this reason, it is difficult to measure the impacts resulting from the exercise of the jurisdictional function in relation to data protection, especially with regard to the scope of the damage that can be verified, as well as in relation to the illegality of state conduct.

However, it is certain that the eventual creation of bureaucratic embarrassments and constraints - or even the restriction of consultation by the parties on the processes - will not eliminate the risk of leaks and the access to personal documents.

In spite of this, it is important to highlight that, in relation to jurisdictional processes, there is no doubt that the State and society may have a right, as a general rule, to knowledge of the "other", but only if necessary. Otherwise, it is necessary to preserve the privacy of citizens to the maximum, in compliance with the constitutional protection of privacy and data protection.

The exposure of personal data needs to be measured in order to allow the control of jurisdictional acts and comply with the principle of publicity, without becoming excessive, to the point of configuring sensational or purposeless exposure.

At this point, it's necessary to bring some considerations by Laura Mendes on the constitutional protection of the right to data protection:

> Advancing, then, in its contours, it can be said that the fundamental right to data protection entails both a subjective right of defense of the individual (subjective dimension), as well as a duty of state protection (objective dimension). In the subjective dimension, the attribution of a subjective right to the citizen ends up delimiting a sphere of individual freedom from not suffering undue intervention from state or private power. The objective dimension represents the need for the realization and delimitation of this right through state action, from which the State's protection duties arise to guarantee this right in private relations. This means that the actions of the State come to be controlled both by its action, as well as by its omission (*Avançando, então, em seus contornos, pode-se dizer que o direito fundamental à proteção de dados enseja tanto um direito subjetivo de defesa do*

> *indivíduo (dimensão subjetiva), como um dever de proteção estatal (dimensão objetiva). Na dimensão subjetiva, a atribuição de um direito subjetivo ao cidadão acaba por delimitar uma esfera de liberdade individual de não sofrer intervenção indevida do poder estatal ou privado. A dimensão objetiva representa a necessidade de concretização e delimitação desse direito por meio da ação estatal, a partir da qual surgem deveres de proteção do Estado para a garantia desse direito nas relações privadas. Isso significa que os atos do Estado passam a ser controlados tanto por sua ação, como também por sua omissão*) (MENDES, 2020).

Furthermore, it's possible that the exposure may cause significant damage to the data subject, which needs to be conjectured and analyzed, according to the rules of the existing legal system, also considering an interpretation consistent with the Democratic State of Law.

With regard to civil liability and compensation, the article 42 of the *LGPD* provides that the controller or operator of the data that, in its activity, causes harm to others, is obliged to repair it. Processing agents will not be held responsible only when they prove: that they have not carried out the processing of personal data attributed to them; that, although they have carried out the processing of personal data attributed to them, there has been no violation of data protection legislation; or that the damage is due to the sole fault of the data subject or third party (art. 43) (BRASIL, 2018).

The *LGPD*, in its article 6º, also foresees the principle of responsibility and accountability, being registered that it is the burden of the agent to demonstrate the adoption of effective measures capable of proving compliance with the rules of protection of personal data and its effectiveness. If he doesn't demonstrate, in the case of damage resulting from a breach of data security, the one who, when failing to adopt the security measures provided for in art. 46 of the same law, give cause to the damages (BRASIL, 2018).

Regarding the duty to observe the data protection and security legislation, the article 44 is clear in stating that the processing of personal data will be irregular considering some relevant circumstances, including: the way in which it is carried out; the result and the risks reasonably expected of it; the techniques for processing personal data available at the time it was carried out (BRASIL, 2018).

Note that the provisions of the *LGPD* are general, not expressly mentioning how the law should be applied to the services of the Judiciary. It's a mere repetition of the general rule of civil liability of the Civil Code, present in articles 186 and 927 (BRASIL, 2002).

At this point, by not specifically dealing with the civil liability of public entities or bodies, the Law leaves the interpreter to the task of integrating the protective system.

The Constitution of the Federative Republic of Brazil brings the theory of strict responsibility, in the form of administrative risk, in art. 37, § 6º (BRASIL, 1988).

The specific rule of thumb on the matter must admit the invocation of the referred rule to give the State responsibility for legal and illegal acts, on the grounds that, within the scope of the Democratic State of Law, all jurisdictional action is subject to the Law itself, being referred to the general principle of civil liability of the State.

Majority doctrine defends that it is a theory that allows the adoption of causes that are excluded from the State's responsibility, namely: victim's fault, third party's fault, act of God

or force majeure, with the theory of integral risk being excluded, which doesn't admit such exclusions (CARVALHO FILHO, 2007, p. 498-499).

Mostly, it is also permitted to apply strict responsibility in the event of a commission act (action). There is divergence, however, with regard to omissive acts, when Subjective Responsibility is applied for some authors.

A more conservative doctrine states that the original constituent legislator wanted to predict the appropriateness of the rule of the aforementioned provision only for commissive acts. On the other hand, other indoctrinators affirm the thesis to the contrary, advocating the application of strict responsibility for commissive and omissive acts. The controversy stems from the presence of the verb "cause" in the wording of article 37, § 6º, of the Brazilian Constitution.

According to Luiz Carlos Figueira de Melo and José Luiz de Moura Faleiros Júnior:

> With regard to said divergence, on the one hand, there is the doctrinal current led by Celso Antônio Bandeira de Mello, José dos Santos Carvalho Filho, Maria Sylvia Zanella di Pietro, Oswaldo Aranha Bandeira de Mello, Rui Stoco, among other authors , who maintain that the State's civil responsibility must follow the subjective theory in the omissive behaviors, being proof of the element of fault ('faute') essential for its configuration. In another, minority aspect, in contrast to the subjectivist thesis, there is the current led by Hely Lopes Meirelles, Celso Ribeiro Bastos, Odete Medauar, Álvaro Lazzarini, Weida Zancaner Brunini, Yussef Said Cahali, among others, advocating the thesis that the State, in view of the provisions of article 37, § 6º, of the Constitution of the Republic, must respond objectively for the damages caused to third parties, either by action or omission, focusing on both types of conduct as possible causes of the damage (*No que diz respeito à dita divergência, de um lado, posiciona-se a corrente doutrinária capitaneada por Celso Antônio Bandeira de Mello, José dos Santos Carvalho Filho, Maria Sylvia Zanella di Pietro, Oswaldo Aranha Bandeira de Mello, Rui Stoco, dentre outros autores, que sustentam que a responsabilidade civil do Estado deve seguir a teoria subjetiva nas condutas omissivas, sendo imprescindível a comprovação do elemento culpa ('faute') para sua configuração. Numa outra vertente, minoritária, contrapondo-se à tese subjetivista, tem-se a corrente liderada por Hely Lopes Meirelles, Celso Ribeiro Bastos, Odete Medauar, Álvaro Lazzarini, Weida Zancaner Brunini, Yussef Said Cahali, dentre outros, advogando a tese de que o Estado, em face do disposto no artigo 37, §6º, da Constituição da República, deve responder objetivamente pelos danos causados a terceiros, seja por ação ou omissão, enfocando ambas as modalidades de conduta como possíveis causas do dano*) (FALEIROS JÚNIOR; MELO, 2019, p. 100).

Subjective responsibility is that originated from the Administration for the malfunction of the service, delayed operation or due to its non-existence, the outcome of which must be concretely evaluated and analyzed. According to José dos Santos Carvalho Filho:

> The theory was enshrined in the classic Paul Duez doctrine, according to which the victim would not need to identify the state agent causing the damage. It was enough for him to prove the malfunction of the public service, even if it was impossible to name the agent who caused it. The doctrine, then, called the fact as: anonymous guilt or lack of service (*A teoria foi consagrada pela clássica doutrina de Paul Duez, segundo a qual o lesado não precisaria identificar o agente estatal causador do dano. Bastava-lhe comprovar o mau funcionamento do serviço público, mesmo que fosse impossível apontar o*

> *agente que o provocou. A doutrina, então, cognominou o fato como culpa anônima ou falta do serviço*) (CARVALHO FILHO, 2007, p. 489).

In these cases, it's a matter of subjective responsibility, since it is founded on the anonymous fault of the service. It's necessary to emphasize that the State's guilt is only presumed when the service worked late or didn't work (ANDRADE, 2005, p. 29).

It is worth mentioning that for those who understand that state responsibility is always objective, regardless of whether it was caused by state action or omission, responsibility for acts, even if lawful, must consider social solidarity or the principle of equality.

Social solidarity (or the principle of equality) is to compensate for any inequality created by the state activity itself and is justified insofar as all members must compete for the repair of the damage. Discourse on this hypothesis Celso Antônio Bandeira de Melo:

> In effect: the legal order can foresee and provides for the eventual contrast between two interests, both valuable and both deserving of guardianship and protection. It also provides for a solution in these cases. If a public interest cannot be satisfied without the sacrifice of a private interest, also protected, the normative solution will dictate the preponderance of the first, in cases where it should prevail, without, however, ignoring or undermining the protection of the private interest to be reached. A duty is then established to indemnify those whose rights have been sacrificed in order to be able to pursue another greater interest. That is to say: there is a conversion of the right reached into its equivalent equity expression (*Com efeito: a ordem jurídica pode prever e prevê o eventual contraste entre dois interesses, ambos valiosos e ambos merecedores de tutela e proteção. Prevê igualmente solução nestes casos. Se um interesse público não pode ser satisfeito sem o sacrifício de um interesse privado, também tutelado, a solução normativa ditará a preponderância do primeiro, nos casos em que deva prevalecer, sem, contudo, ignorar ou menoscabar a proteção do interesse privado a ser atingido. Estabelece-se, então, um dever de indenizar àquele cujo direito foi sacrificado a fim de poder-se realizar outro interesse maior. Vale dizer: opera-se uma conversão do direito atingido em sua equivalente expressão patrimonial*) (MELO, 2003, p. 853).

On the other hand, for those indoctrinators who differentiate the applicability of subjective or objective responsibility depending on dealing with omissive or commissive acts, current with which it is affiliated, it's important to point out that the situations of abnormal functioning or defective functioning of the jurisdictional public service is hypothesis denial of justice, meaning omissive state activity (DIAS, 2004, p. 195).

In these cases, one should defend the adoption of the subjective theory of responsibility, coined in French law, which is shaped by the anonymous fault of the public service.

The malfunctioning of justice can result from the fault of its agent, determined and individualized, or from anonymous fault, simple lack of service.

The accumulation of work, whose entrance cannot be controlled, the insurmountable lack of Judges and servers and the lack of security or sufficient resources (including technological) are determining factors of abnormal functioning, without being able to determine who should be assigned the lack. For the injured party, it is enough to demonstrate the failure of the service, the damage and the causal link.

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Malfunction corresponds to the most general hypothesis of denial of justice. It is usually characterized by procedural illegality that can occur in any plan, due to the agent's action in the performance of his procedural function, and serves as an example: the excessive execution of the sentence (art. 5°, LXXV, of the Brazilian Constitution) (AGUIAR JÚNIOR, 1993, p. 49-50).

For acts of an activist character, even if lawful, the responsibility will be objective, when, as already defended, the interpreter must use social solidarity or the principle of equality. At this point, it is also worth pointing out that, for lawful acts, it's not necessary to individualize guile or guilt.

In short, in the proposed study hypotheses, civil liability for an act arising from the jurisdictional function, even if lawful, commissive or omissive, is feasible through the article 37, § 6º of BC/88. In the case of a commission act, lawful or unlawful (occasion when the interpreter must use the principle of equality), by applying the theory of administrative risk, in an objective manner; in the case of an omissive and unlawful act, by the application of subjective liability for administrative fault (BRASIL, 1988).

With these considerations in mind, the next step will be to investigate jurisdictional acts in which the State's theory of civil liability is liable.

It should be noted, as relevant, that the theory of Administrative Risk, in tune with the majority current of the indoctrinated already presented, defends that the causal nexus and consequently the State's civil liability is not extended to any case in which the loss has been proven, being possible to disregard the duty to indemnify when those excluded from liability are present.

In the case of exclusionary or mitigating causes for liability for legal acts, Aguiar Júnior exemplifies:

> The following are exonerating causes of the State's responsibility: a) when the damage results exclusively from the intentional or wrongful action of the party (failing to provide evidence, providing inaccurate clarifications, omitting the acts to be attended, colluding with the other party , inducing witnesses, withholding or losing records, failing to practice acts of duty, corrupting those who participate in the judicial scene, etc.). If there is competition from blame, the State's responsibility will be mitigated in proportion to its causal participation; b) the damage results from a misinterpretation given by the Judge to the law. The indeterminate concepts ('honest woman', 'relevant reason', 'public interest', etc.) and the general clauses (in which the Judge must previously establish which standard of conduct should have been observed for the case, as in art. 159 of the CC), leave to the Judge a wide spectrum of decisions, the option of which must be admitted while not arbitrary, that is, while based on the current legal system; c) the damage results from force majeure, as it is a cause foreign to the service, ordinarily unpredictable in its production and always absolutely irresistible. The fortuitous event, being an internal event, directly connected with the functioning of the service but with an unknown cause, doesn't exempt the State from being responsible for the malfunctioning of the service. While in force majeure the cause of the damage is external, with no causal link between the action of the Judge or the service and the result, in the fortuitous case the cause is the lack of service, although unknown; d) the damage was caused by a third party, the result of which wasn't for the State to avoid, in the circumstances of the event;

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> e) the State of defensive need, when the danger was created by the injured person, who thus suffers the damage resulting from the necessary action of the State to remove the danger. In other cases, there is no exclusion: 'The state of need pre-excludes wrongdoing, not the responsibility' (*São causas exonerativas da responsabilidade do Estado: a) quando o dano decorre com exclusividade da ação dolosa ou culposa da parte (deixando de fazer prova, prestando esclarecimentos inexatos, omitindo-se nos atos a que deve comparecer, conluiando-se com a outra parte, induzindo testemunhas, retendo ou extraviando autos, deixando de praticar atos de seu dever, corrompendo os que participam da cena judiciária, etc.). Se há concorrência de culpas, a responsabilidade do Estado será atenuada na proporção de sua participação causal; b) decorrer o dano de má interpretação dada pelo Juiz à lei. Os conceitos indeterminados ('mulher honesta', 'motivo relevante', 'interesse público', etc.) e as cláusulas gerais (nestas devendo o Juiz estabelecer previamente qual a norma de conduta que deveria ter sido observada para o caso, como no art. 159 do CC), deixam ao Juiz largo espectro decisório, cuja opção deve ser admitida enquanto não arbitrária, isto é, enquanto fundamentada dentro do sistema jurídico vigente; c) resultar o dano de força maior, pois é uma causa estranha ao serviço, ordinariamente imprevisível em sua produção e sempre absolutamente irresistível. O caso fortuito, por ser um evento interno, diretamente conectado com o funcionamento do serviço mas com causa desconhecida, não isenta de responder o Estado pelo mau funcionamento do serviço. Enquanto na força maior a causa do dano é externa, inexistindo nexo de causalidade entre a ação do Juiz ou do serviço e o resultado, no caso fortuito a causa é a falta do serviço, ainda que desconhecida; d) ter sido o dano produzido por terceiro, cujo resultado não incumbia ao Estado evitar, nas circunstâncias do fato; e) o Estado de necessidade defensivo, quando o perigo foi criado pelo lesado, que assim sofre o dano resultante da ação necessária do Estado para afastar o perigo. Nos demais casos não há exclusão: 'O estado de necessidade pré-exclui a ilicitude, não a responsabilidade'* (AGUIAR JÚNIOR, 1993, p. 51-52).

It is clarified that in cases of omission regarding the duty of prevention and security in relation to personal data in jurisdictions, this study adopts the position that liability for lack of service is applicable, which results from non-functioning or insufficient functioning, defaulting, late or slow of the service that the Judiciary should provide.

As pointed out, the liability will be objective for legal acts of an activist character, even if lawful; it will, however, be subjective, in the case of an omissive and unlawful act, as described above.

It's imperative to state that the *LGPD*, in its article 6º, also provides that the activities of processing personal data must observe good faith and the principles of security and prevention (BRASIL, 2018).

The first principle refers to the use of technical and administrative measures capable of protecting personal data from unauthorized access and accidental or illicit situations of destruction, loss, alteration, communication or dissemination; the second, advocates the adoption of measures to prevent the occurrence of damages due to the processing of personal data (BRASIL, 2018).

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The violation of these principles must allow the configuration of moral or material damage to the claimants, subject to indemnity when the malfunctioning of the Judiciary caused serious damage.

However, it is argued that the harmful situation caused by the exercise of lawful judicial function cannot necessarily imply joint and several liability of the State and the magistrate; rather, it implies a direct and exclusive responsibility of the first, considering the judge's responsibility only if, in the exercise of his munus, he acts with intent or fraud.

Thus, the typical jurisdictional act, if harmful, should involve the State's civil liability, regardless of the configuration of the magistrate's personal responsibility, which is more restricted.

This is because the possibility of personal liability of the judges for the damages arising from the exercise of the judicial function must be restricted, in view of the concern to safeguard their essential independence.

In fact, a certain degree of immunity ends up lending itself to guarantee the magistrate the performance of his duties with full autonomy, for the benefit of the claimants.

But, as already defended, a balance must be sought between this independence and a so-called responsibility-control and sanction before society, in order to allow the right to compensation.

Moreover, it should be noted that we aren't here to advocate that any data dissemination by the Judiciary act is reprehensible. Only in view of the marked degree of violation of the rights to privacy and intimacy should accountability be allowed.

As an example, we can consider the case of the 10-year-old child who became pregnant after suffering a series of rapes by her uncle, who started since she was 6 years old, in São Mateus, Espírito Santo, Brazil.

After the Court of Justice of Espírito Santo (*Tribunal de Justiça do Espírito Santo*) granted the child the right provided by law to terminate the pregnancy, conservative movements sought information in the process about where the infant would undergo the procedure to terminate the pregnancy. Her personal data was also collected and improperly posted on social media, which culminated in protests in front of the hospital, calling the victim of the crime "murderer" (ANGELO, 2020).

It is true that Article 17 of the Brazilian law called the Child and Adolescent Statute (*Estatuto da Criança e do Adolescente – ECA*) provides: the inviolability of the physical, psychological and moral integrity of children and adolescents, which includes the protection of the image, identity, autonomy, values, ideas and beliefs, spaces and personal objects (BRASIL, 1990).

This Statute also establishes that it is the duty of the family, the community and society in general, especially the government: to ensure, with absolute priority, the realization and effectuation of the rights relating to life, health, food, education, sport, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence (BRASIL, 1990).

In the case described above, in addition to the fundamental right to the protection of personal data, the right to respect and dignity of the child was violated in the light of the disclosure of procedural and confidential information.

In this case, the principles of security and prevention were also violated, which should govern all activities of processing personal data, considering that the law established as a mandatory rule in relation to these crimes: the secret of justice. Article 234-B of the Brazilian Penal Code states that "the proceedings in which crimes defined in this Title are determined [Crimes Against Sexual Dignity] will run in secret" (*"os processos em que se apuram crimes definidos neste Título [Crimes Contra a Dignidade Sexual] correrão em segredo de justiça"*) (BRASIL, 1940).

According to lessons from Julio Fabbrini Mirabete and Renato N. Fabbrini on this article:

> Although the rule is that of publicity for procedural acts, the Federal Constitution admits the confidentiality necessary to defend privacy (art. 5º, LX) and the Penal Procedure Code authorizes the decree of the secret of justice for the preservation of privacy, private life, honor and image of the victim (art. 201, § 6º). In sexual crimes, in addition to the damage resulting from the infraction itself, the victim must, as a rule, also bear the brunt of the public exposure of her privacy resulting from the initiation of criminal proceedings. To that end, the law established, in relation to these crimes, as a mandatory rule, the secret of justice. In such cases, the judge is not allowed the same discretion as the procedural law affords him. Although the law refers only to the process, secrecy must reach the police investigation, and it is up to the police authority and the judge to adopt in the case records the measures necessary to preserve the victim's privacy. (*Embora a regra seja a da publicidade dos atos processuais, a Constituição Federal admite o sigilo necessário à defesa da intimidade (art. 5º, LX) e o Código de Processo Penal autoriza a decretação do segredo de justiça para a preservação da intimidade, vida privada, honra e imagem do ofendido (art. 201, § 6º). Nos crimes sexuais, além do dano decorrente da própria infração, havia de suportar a vítima, via de regra, também os malefícios da exposição pública de sua intimidade decorrente da instauração do processo penal. Com essa finalidade, a lei estabeleceu, em relação a esses delitos, como regra obrigatória, o segredo de justiça. Não se permite ao juiz, nesses casos, a mesma discricionariedade que lhe faculta a lei processual. Embora se refira a lei somente ao processo, o sigilo deve alcançar o inquérito policial, incumbindo à autoridade policial e ao juiz a adoção nos autos de providências necessárias à preservação da intimidade da vítima.*) (MIRABETE; FABBRINI p.1612).

In cases like this, in which the person is identified from data collected in jurisdictional processes that should run under secrecy, the latter, when suffering various attacks from society itself, such as prejudiced notes, violation of her/his right to locomotion, expression, participation, suffers serious damage liable to indemnity.

In these cases, prejudice and discrimination would leave this individual at the margin, which was only possible due to an illegal act, even if omissive by the State, in relation to the registration of the judicial process and its progress with the possibility of adopting strict/objective liability.

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Being thus present: the cause and effect relationship between state behavior and damage, qualified damage ("legal damage" – *"dano jurídico"*), which goes beyond the inconvenience and sacrifices that are reasonable, tolerable or demandable by the individual.

It should be noted that, in the Democratic State of Law, the suppression or violation of fundamental rights isn't authorized. The application of liability in the event of a breach of data protection by the jurisdictional function is an important instrument for correcting or for reducing injustices and for violating fundamental principles of law.

Therefore, it's necessary to define the proper fulfillment of citizens' rights, making them compatible with the public interest of disclosing data in lawsuits, especially in view of the possibility of serious damage in the case of leaks or disclosure of personal information present in lawsuits.

3 FINAL CONSIDERATIONS

The efficiency of the Judiciary through the use of technology depends on overcoming the technical and legal challenges regarding privacy and protection of personal data, allowing greater adaptation of the institutes in the process to the worrying virtual era.

It's a complex and dynamic reality, which needs to be understood by the operators of the Law, taking into account the fundamental rights and principles of the Constitution, which is only possible if the protection of personal data, privacy and intimacy are considered.

The present work presents as a problem the application of accountability by the State in relation to judicial acts in addition to those expressly provided for in the constitutional text.

Civil liability for a commissive or omissive judicial act, even if lawful, is feasible through article 37, § 6º of BC/88. In the case of a commission, lawful or unlawful act (when the interpreter must use the principle of equality), by applying the theory of administrative risk, in an objective manner; in the case of an omissive and unlawful act, by the application of subjective responsibility for administrative fault.

Thus, once the causal link and the serious damage have been verified, the citizen must be allowed to use legal mechanisms that enable the reimbursement/refund.

The application of liability in case of violation of data protection by the judicial function is an important instrument for correction or reduction of injustice and violation of fundamental principles of Law.

If, on the one hand, it is certain that the State shouldn't respond indiscriminately, it is also certain that, in the event of serious damage, its accountability guarantees an action with a focus on protecting and respecting the rights of the community in the information society.

From all that has been said, it's observed that arguments of irresponsibility don't justify the Judiciary appearing, in isolation, from the rest of the state organization, in particular, in view of the evolution and the considerable increase of its performance in modern society.

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Furthermore, based on the requirements of the Democratic State of Law, the rule should be the State's responsibility for damages arising from the jurisdictional provision and the irresponsibility being the exception.

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LEGITIMACY *AD CAUSAM* FOR POSSESSORY INTERDITES AGAINST POSSESSION MOLESTIES PRACTICED IN THE TIME-SHARING SYSTEM

A LEGITIMIDADE AD CAUSAM PARA OS INTERDITOS POSSESSÓRIOS CONTRA MOLÉSTIAS DA POSSE PRATICADAS NO SISTEMA TIME-SHARING

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ABSTRACT

It's a research that questioned and investigated how is the protection of possession in the case of disseisin practiced against co-owners in the time-sharing regime of arts. 1.358-B to 1.358-N of the Civil Code. For this, the research worked with two hypothetical situations: the first is the case of a disseisin practiced by a third party, that is, by a person outside the time-sharing contract; and the second concerns the possibility of the disseisin being practiced by one of the co-owners against another specifically or against all the others. To confirm the hypothesis, the research had to discuss, preliminarily, about the possibility or not of the split of possession (direct and indirect) in time-sharing, demonstrating that there is such a possibility, both in theoretical and practical bias. In order to achieve these objectives, the research carried out a qualitative bibliographic review to deductively confirm the hypothesis of the split of possession and disseisin practiced among co-owners.

KEYWORDS: Time-sharing. Disseisin. Repossession. Legitimacy. Possessory injunction.

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RESUMO

Trata-se de pesquisa que questionou e investigou como é a tutela da posse no caso de esbulho, turbação e ameaça praticados contra coproprietário no regime de multipropriedade (time-sharing) dos arts. 1.358-B a 1.358-N do Código Civil. Para isso, a pesquisa trabalhou com duas situações hipotéticas: a primeira é o caso de moléstia praticada por terceiro, ou seja, por pessoa estranha ao negócio jurídico de multipropriedade; e a segunda diz respeito à possibilidade de a moléstia ser praticada por um dos coproprietários contra outro em específico ou contra todos os demais. Para confirmar a hipótese, a pesquisa precisou discutir, preliminarmente, sobre a possibilidade ou não de desdobramento da posse (direta e indireta) no time-sharing, demonstrando que há sim essa possibilidade, tanto no viés teórico quanto no prático. Para alcançar esses objetivos, a pesquisa procedeu a uma revisão bibliográfica qualitativa para, dedutivamente, confirmar a hipótese de desdobramento da posse e de moléstia praticada entre coproprietários.

PALAVRAS-CHAVE: *Multipropriedade. Esbulho possessório. Interditos possessórios. Legitimidade ativa. Liminar possessória.*

1. INTRODUCTION

This is a research that aims to ascertain how the possessory interdital protection occurs in the multiproperty or timeshares regime, specifically on the multiproperty rights established by Law nº 13.777/2018, which added to the Brazilian Civil Code the arts. 1.358-B to 1.358-N. If this objective is achieved, the result will be the solution of doubts not only as to the legitimacy *ad causam* in possessory protection, as it will also allow to understand the impact of the legal regime of possession on multiproperty. Through this research it was found that there are few studies that specifically deal with multiproperty in its possessory aspect.

Adequate management of interdict tutelage provides an evident advantage to the tutelage, who may benefit from the eventual granting of an injunction *inaudita altera pars* in the possessory lawsuit of new force. To do so, we start from material law, making it necessary a conceptual and theoretical approach on the diseases of possession applied under the multiproperty/timeshares regime, which innovates with the division of property into temporal fractions, instead of the traditional concept of division of property into spatial fractions.

The problem becomes evident precisely in the face of the peculiar division of property into temporal fractions, as it consequently implies in the manner and in the moment in which the multi-owners exercise the possession. Consequently, doubts arise in the face of the occurrence of possessory conflicts, specifically with regard to the possibility of disease between multi-owners, as well as in the hypothesis that the exercise of the possession of a co-owner is limited by a third party (*penitus extraneus*), in which one wonders: who would be the legitimate part to figure in the active pole of possessory lawsuit.

From the analysis of the split of possession, it was possible to find the answer to the problem presented, so that, theoretically, the multi-owners will be in possession of the thing, either directly, while exercising full control over the thing - while using it during the period pre-established -, as well as when they don't exercise power directly over the thing, as they would be indirect owners - indirect possession.

However, as owners of indirect possession, multi-owners must refrain from using the property, in compliance with the period pre-established in the existing agreement between

multi-owners. Thus, if multi-owners are always possessors, they could suffer disease at any time, so they can avail themselves of interdict protection even if they aren't in direct possession of the property and in the face of any person, even if the other is also a holder of the enjoyment of multiproperty in that fraction of time.

Still, when deepening in the analysis of the diseases and in the unfolding of the possession, the hypotheses were approached: of self-protection and the role of the administrator, as a model, in the occurrence of a disease, which allowed an analysis of the interdict protection in a larger scope. Furthermore, when entering more specifically into the active legitimacy of interditial possessory, it's proposed the possibility of the administrator representing the interests of the multi-owner in court, in analogy to the rule that deals with the building condominium (*"condomínio edilício"*).

Consequently, it was possible to verify the active legitimacy of all multi-owners for the possessory heterotutela (*"heterotutela possessória"*) - which necessarily runs through the consequences of possession -, in order to thus propose possessory interdictions with the objective of ending the disease of possession.

In order to achieve the research result, the deductive method was chosen, so that with the deepening of the studies of the diseases and the deployment of possession within the multiproperty/timeshares, it was possible to extract theoretical premises and practical examples that confirmed the hypothesis suggested.

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2. MOLESTIES OF POSSESSION IN TIME-SHARING

The time-sharing regime presupposes the existence of different owners for the same thing, be it mobile or immovable, so that the division between them occurs in alternating temporal fractions, and not in spatial fractions as occurs in the building condominium (ALPA, 1998, p. 193-200) (PÉREZ, 1992, p. 25 e ss.) (CASTRO, 1989, p. 10 e ss.).

In the case of immovable things, there is the connection of the owners to the legal business (testament or convention) of institution of this sui generis condominium modality (art. 1.358-F of the Brazilian Civil Code), being the responsibility of an administrator (trustee) - who acts as a liquidator or head - control the property and its facilities, equipment and furniture, according to the *caput* of art. 1.358-M.

Despite being a way of exercising property, with peculiar characteristics, in time-sharing there may be limitations to the exercise of possession by multiproprietaries possessors, to the point that sometimes the existence of possession illness practiced by one of the owners before the others is configured (CERVALE, 2014, p. 358-370) (BERNAT, 1992, p. 50). It's to verify this possibility and to discover how to fight it that the investigations of this research were intended.

In Brazil, there are three types of possession molesties: disseisin, turbulence/disturbance and threat (*caput* of art. 1.210 of the Civil Code) (SILVESTRE, 2019, p. 340) (LINS, 1914, p. 155-174). Regarding its practice by third parties, there are no significant changes in rela-

tion to traditional property, that is, one in which there is no periodic fractionation, except for the discussion on active legitimacy.

The disease practiced by a third party - that is, for a *penitus extraneus* to the multi-owner legal business - occurs when a person who is not the owner of the condominium commits acts that prevent the full exercise of possession by the co-owner, either by removing the possessor of the thing, either for acts that hinder the free exercise of possession or, even, for the consistent risk of a future depletion or turbulence. In these cases, the molester will not have legitimate possession of the property before the multi-owners, and it's appropriate to propose possessory interdital tutelage/guardianship for the protection and defense of possession (SILVESTRE, 2019, p. 340-350).

Due to the so-called deployment of possession, these actions can be proposed by any of the multi-owners, considering that everyone keeps the quality of possessors, even those who are not in the exercise of cyclical usufruct, as in this case they will maintain indirect possession. Possession is divided into direct and indirect, so that the direct possessor makes an immediate physical contact about the property, while the indirect mediates this contact through a legal transaction (art. 1.197 of the Civil Code) (PENTEADO, 2014, p. 622).

This development, however, "doesn't cancel the possessory protection that must be granted to each one of the holders of the possessory situation" (*"não anula a proteção possessória que deve ser deferida a cada um dos titulares da situação possessória"*) (PENTEADO, 2014, p. 622), so that both the direct and indirect possessors can defend their possession against third parties, or even against another possessor.

The existence of a nomogenetic time-sharing agreement between the multi-owners presupposes the agreement of the owners to use the property only in its periodic unit, abstaining from the use in the period of the other multi-owners (SMORTO, 1999, p. 279) (MARQUES, 1998, p. 23). Then, there is a distribution of possessory powers among them, resulting from the legal business and which divides possession into direct and indirect.

The direct possession of the property, in the context of time-sharing, is exercised at the moment when the owner is legitimately enjoying his time share.

Art. 1.358-E establishes that the period corresponding to each unit of time can be fixed and determined, floating or mixed. The fixed system requires that possession be exercised by the owner over the same period of time in each year. Thus, the day and time of entry and departure of the multi-owners of their periodic units are previously established. In the floating regime, on the other hand, the determination of the time lapse of each holder will be carried out periodically, not necessarily occurring at the same time of the year. Finally, the mix combines the two systems, merging their characteristics.

Whatever the system adopted in the multi-owner condominium/timeshares condominium, the exercise of all the powers inherent to the property simultaneously occurs only within the agreed time lapse, when the owner will have direct possession of the property (DE COS, 2011, p. 44) (BARDAJÍ, 2000, p. 1429). However, this doesn't remove the quality of possessor of the owner who isn't in use and enjoyment, since "the direct possession, of a person who has the thing in his possession, temporarily, by virtue of personal or real right, doesn't nullify the indirect, of which it was held, and the direct possessor can defend its possession against the indirect one" (art. 1.197 of the Civil Code) (*"a posse direta, de pessoa que tem a coisa em*

seu poder, temporariamente, em virtude de direito pessoal, ou real, não anula a indireta, de quem aquela foi havida, podendo o possuidor direto defender a sua posse contra o indireto").

In a different way, it occurs in the "composse" (common possession of two or more people) (§2º of article 73 of the Brazilian Civil Procedure Code). Here, the division of property takes place in the physical space of the property and the owners jointly exercise possession, imposing the need for both to participate in a possible lawsuit. There is no split or deployment of possession in direct and indirect, since they occur simultaneously.

The time-sharing regime, on the other hand, divides the thing/good into periodic units: each co-owner exercises possession over the entire property during a certain period of time, so that there is no distribution of the physical space itself. (DE COS, 2011, p. 44) (BARDAJÍ, 2000, p. 1429).

The division of possession into direct and indirect guarantees that the possessory protection in the face of a third party is invoked by any of the possessors, according to art. 1.197 of the Civil Code. In this way, the possessory interdicts can be proposed by any of the multi-owners, since the legitimacy *ad causam* results from the quality of possessing the thing, according to item I of art. 561 combined with art. 560, both of the Brazilian Civil Procedure Code: to propose the possessory lawsuit the plaintiff needs to prove his possession, that is, prove that he is the possessor; and the normative formulations speak only of "possession" and "possessor", without specifying whether it's direct or indirect.

Therefore, in this regime, in the case of active legitimacy for interdital protection in the face of a third molester, active litisconsortium will not be necessary, but the optional, guaranteeing the multi-owners the freedom to sue without imposing the obligation to integrate the lawsuit.

In the diseases practiced among the co-owners (proprietaries), the rules for characterizing debris, turbulence and threat, and the consequent possessory protection, are different when compared to the situation of third molester.

First, it should be noted that items VII and VIII of the caput of art. 1.358-J of the Brazilian Civil Code create the obligations of the multi-owner to use the property exclusively in its fraction of time and vacate it until the date fixed in the institution or in the condominium agreement.

Failure to comply with these duties, in addition to resulting in the payment of the agreed fine, will constitute an disseisin ("*esbulho*"), which consists of the act by which the possessor will be deprived of exercising possession. The origin of the disseisin may be in some act practiced through violence, clandestinity or precariousness (abuse of trust) (AVENDAÑO VALDEZ, 1986, p. 59-63) (GONÇALVES, 2008, p. 151 and next), pursuant to art. 1.200 of the Civil Code.

Therefore, for example, the owner who continues to use the property after the end of his time, threatening with physical violence (threat of injury or death) the other owner who wishes to exercise his possession and the faculties inherent to his property, practices disseisin ("*esbulho*"). This is because, at that moment, the owner who refuses to return the property does not have the legitimate possession of the thing, given that he remains illegally in the periodic unit of another co-owner. So having the first: unfair possession. (MACCORMACK, 1974, p. 71-80) (RICCOBONO, 2012, p. 1-10) (FERRETTI, 2020, p. 11-36).

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It should be emphasized that this disseisin will be practiced only against the owner who is entitled to use the property, since he will be the only possessor prevented from exercising his possession. The other multi-owners aren't legitimate to use the thing in the time fraction of another holder/owner, which means that this impediment doesn't directly affect all of them.

Despite this, the disseisin constitutes a threat to the possession of the next owners, since there is no guarantee that the disease will cease when the periodic unit in which it's occurring is closed. If it persists, making the threat come true, it will be characterized as a disseisin against the owner of the next fraction of time. Furthermore, it's still a disease against his indirect possession.

The owner of the multi-property/timeshares can also practice the disseisin when, realizing that another owner isn't using his corresponding time fraction, he invades the property to enjoy it (SIQUEIRA e SIQUEIRA, 2017, p. 65). The disease/molesty is characterized, in this hypothesis, therefore, by the existence of clandestinity.

Another example concerns the peaceful disseisin, resulting from the vice of precariousness. This case can be verified when the owner, having knowledge that the owner of the next unit will not use the property and abusing the trust deposited in it, remains using it as if he were the owner of that time fraction (that is, basically: doesn't deliver the thing to the next owner with the right to use).

As for the disturbance/turbidity, it's said of acts on the thing or actions that embarrass or hinder the free exercise of possession, so that the turbid continues to possess, however the extent of the factual power that he exercises remains limited by the practice of the disease/molesty (GONÇALVES, 2019, p. 151). The disease can occur directly, when it occurs immediately on the thing, or indirectly, when - although practiced externally - it affects the possessed thing (GONÇALVES, 2019, p. 151).

As an example of direct disturbance, there is the hypothesis that one of the multi-owners causes disturbance to the legitimate possessor of the current time fraction, by means of telephone calls or messages asking when he will leave the property; or, also hypothetically, makes unexpected visits that cause discomfort and imbalance in the established business relationship.

As for the indirect disturbance, it can be observed at the moment when the one who causes disturbance, knowing that another owner wants to rent the property in his respective time fraction, practices acts to prevent or hinder the disposition of the thing.

Well then. Still regarding the diseases of possession practiced by the multi-owner themselves, it should be noted that art. 1.358-J of the Brazilian Civil Code provides for a fine if the holder/owner exceeds the time established in the institution or in the condominium convention in time-sharing. But this fine will have an indemnity character. For this reason, it's also possible for the co-owner(s) to appeal to the possessory court for the protection of their possession(s). In this case, it should be noted that the condition of possessor, whether direct or indirect, is essential to obtain legitimacy *ad causam* (item I of art. 561 combined with art. 560, both of the Brazilian Civil Procedure Code). On the passive pole, on the other hand, there must be the subject responsible for the disseisin (*"esbulho"*), the disturbance/turbidity (*"turbação"*) or the threat.

In addition, just as in the case of the occurrence of disseisin or disturbance in possession in general situations, when there is violence or clandestinity, possessory self-protection will also be admitted, through the legitimate defense of possession and immediate effort. In this case, the possessor himself acts by his own force to defend his possession and ward off the disease/molesty to which he is being subjected, without the need to depend to the judicial process/lawsuit.

For this, §1º of art. 1.210 of the Civil Code provides that the defensive act of one's own strength must be practiced "soon". Thus, the possessor, in legitimate defense of possession, has the right to practice acts of violence against the robber (*"esbulhador"*) right at the moment the disease is occurring or, acting in immediate effort, right after it has occurred. However, this reactive violence must be proportional to that seen in the disease, that is, only what is necessary to prevent the disease.

Acting in circumstances different from these, such as at a time much later than the knowledge of the disease or with excessive violence, can constitute the crime of arbitrary exercise of the reasons (art. 345 of the Brazilian Penal Code) and cause compensation for the damages caused.

In addition, it's up to the administrator to inspect the interior of the unit to verify if there was no damage to the property and if it's in conditions of use by the legitimate owner of the next time fraction.

If the permanence of the owner is verified, even when the respective fraction of time has ended, it's also the responsibility of the administrator, immediately, to perform acts to recover possession, using self-protection to defend the common interests of the tenants (*"condôminos"*) (MENDO, 2009).

As for self-protection, it's worth remembering that most of the time, only in the case of violence against the thing, which authorizes the action of the possessor through his own force. However, it must keep in mind that preventing the legitimate possessor from entering the property is also a kind of violence.

Just possession presupposes, in addition to the absence of violence and clandestinity, that there is no precariousness (art. 1.200 of the Brazilian Civil Code). Precarious possession is one that starts out just, but becomes unfair due to an act of abuse of trust practiced by the possessor, who, after the possession that has been granted, refuses to return the thing, becoming a detainer and robber (*"esbulhador"*) *ipso facto* (COSTA, 1998, p. 113).

This hypothesis involves resistance from the "robber" (*"esbulhador"*) to vacate the property or intimidation by him to prevent the legitimate possessor from entering the property. It can be done by changing locks, verbal threats or even obstructing the passage, acting as a barrier to prevent the entry.

It is configured, then, by physical or moral violence, as well as by clandestine. Therefore, self-protection is also applicable in the case of precarious possession, since possession that was just and authorized becomes a disease against the possession of the legitimate possessor.

In this sense, both the administrator and the owner of the temporal fraction in which the disease/molesty is occurring can act in self-protection. However, it's necessary to analyze

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whether the other multi-owners, who will have future use of the property and maintain indirect possession over it, are legitimate to react in self-defense of possession.

The paragraph 1º of art. 1.210 of the Brazilian Civil Code doesn't specify whether the self-protection will be exercised by the direct or indirect possessor, generally stating that the possessor who suffered the disease in possession can maintain or restore himself by his own strength. As there is no legal restriction, it's permitted to be exercised by both possessors. It's also possible that whoever owns the thing - the servant of art. 1.198 or the authorized in art. 1.208, *ab ovo* - practice these acts of self-protection for the benefit of the possessor. (By the way, in the case of the servant, he is there for just that).

The indirect possessor, in this system, despite giving physical contact about the property to the direct possessor according to a legal business, remains the owner of the property, retaining legitimacy to defend his property when he observes that his domain is being molested.

In the real estate multiproperty regime or real estate timeshare property, however, holders own a fraction of time, and not just the physical space itself. There is, therefore, a limitation of the right to property as to its exercise, so that the disseisin (*"esbulho"*) practiced against one owner will not extend to the other multi-owners (TRANCHANT, 2014, p. 276) (SANDRI, 2014, p. 79). In relation to them, the disease in question constitutes a threat.

The normative formulation of §1º of art. 1.210 is clear in stating that only the possessor who suffered the disseisin or the disturbance (*"esbulho"* or *"turbação"*) will be able to defend his possession by his own strength, and the self-protection isn't allowed when the possessor is facing a threat. Therefore, we could imagine that: only the owner of the periodic unit that is suffering the disseisin could act in legitimate defense of possession or in immediate effort.

The other multi-property owners, who are waiting for their respective shifts to use the thing, would only be allowed to go to court, through the lawsuit of prohibitory interdiction (*"ação de interdito proibitório"*) in the possessory court, under penalty of violating civil law.

Then, when closing the time unit of the owner who was being molested and when starting the shift of the next owner, the one who was facing a threat would begin to see his possession in a situation of disseisin (*"esbulho"*). However, the §1º of art. 1.210 of the Civil Code is explicit in determining that the reaction is "soon", and it isn't possible to act in self-protection after a considerable period of time has elapsed.

Therefore, if the next owner's shift started at a time close to the occurrence of the disease, he could maintain or restore himself by his own strength. Otherwise, the only way out would be the "hetero guardianship possessory" ("*heterotutela possessória*"), through the action of the Judiciary.

If this understanding prevails, the indirect possesor should choose between observing an molesty occurring in his possession, without being able to do anything to prevent it, or resort to justice, and can wait for months or years for a judicial response.

If that were not enough, although the indirect possessor is facing a threat to his direct possession, it isn't just a fear, as is the case with traditional property. The disseisin is in fact taking place against possession, it isn't a mere possibility.

When the law created the deployment of possession, the objective was precisely to guarantee the legitimacy of the indirect possessor for his defense, either by *heterotutela* / hetero-protection or by self-protection. This is extremely necessary to ensure that the holder/owner exercises the powers arising from the property in a free and clear way.

As there is no legal restriction for the defense of possession through own strength by the indirect possessor, it isn't compatible to require the co-owner to watch a disseisin or the disturbance (*"esbulho"* or *"turbação"*) occurring in his possession and wait for his shift to act. Or, to demand that he take a possessory lawsuit and be exposed to the delay of justice, being able to see the thing damaged due to time, when he could prevent the damages.

As for *heterotutela*/hetero-protection, it could also be maintained that the effectiveness of the repossession would be realized by granting the preliminary injunction.

The *caput* of art. 562 of the Brazilian Civil Procedure Code prescribes that, if the initial petition is properly instructed, the judge will grant, without hearing the defendant, the issuance of the injunction for maintenance or reinstatement. For this, it's only required that the plaintiff has proved his possession, the disseisin or the disturbance (*"esbulho"* or *"turbação"*) practiced by the defendant, as well as the date of occurrence, and the continuation or loss of possession, depending on the disease (art. 561 of the Civil Procedure Code).

In addition, if the owner has proposed the repossession - because it is a threat to his future direct possession - and the disease will become concrete, becoming in fact a disseisin or disturbance, the interdital fungibility would be applied, transforming the lawsuit into reinstatement or maintenance of possession (art. 554 of the Civil Procedure Code) and, hypothetically, guaranteeing the efficiency of judicial protection.

Then, if the judge remains superficially convinced, based on an incomplete cognition, he will determine, on his own (*"de ofício"* or *ex officio*), the alteration of the prohibitory interdict (*"interdito proibitório"*) for maintenance or restitution of possession, depending on the molesty verified, granting the appropriate possessory injunction and proceeding with the rite ordinary (GONÇALVES, 2019, p. 159 e 173).

However, the injunction *inaudita altera pars* requires that the action be of new force, with possession resulting from an molesty that occurred in up to one year and one day from the date of the disseisin or disturbance. So, if the owner uses the thing only after this period has elapsed, he will lose the benefit of the special procedure and, consequently, the anticipation of the protection without the hearing of the opposing party.

In this sense, the fungibility of the possessory interdicts/repossession and the preliminary injunction will not always guarantee him the exercise of the faculties inherent to the property since the beginning of his shift, resulting, numerous times, in a judicial process that does not bring an effective outcome to the possessor.

The huge amount of lawsuits, constantly without adequate and definitive resolution, coupled with the slowness of justice, made the legal system search for alternative solutions for the resolution of controversies, such as mediation, conciliation and arbitration, as well as dejudicialization - phenomenon that displaces some activities that were attributed to the Judiciary Power to the scope of extrajudicial services (MARQUES, 2020).

Therefore, the objective is evident: whenever possible, to decide matters outside the judicial sphere, taking care to reduce the amount of litigation in the courts, which are increasingly crowded, and guarantee effectiveness in the sphere of material law.

In this logic, it's compatible that the possessor can defend his possession without having to turn to the Judiciary, appeal to Justice, considering that the effectiveness of justice must be sought not only in the scope of lawsuits, but also in extrajudicial solutions.

The most appropriate, timely, efficient and cost-effective result must be guaranteed to the Judiciary - aiming, also, to avoid the huge amount of lawsuits in courts and procedural economics.

Thus, a faster and more effective result is guaranteed to the possessor in the defense of possession, without prejudice to the other multi-owners or other subjects of the legal relationship.

Finally, the third disease/molesty of possession is the threat, provoked by acts that cause a just fear of coming out of a disseisin or disturbance, according to the *caput*, in fine, of art. 1.210 of the Civil Code combined with art. 567 of the Civil Procedure Code. Therefore, the act must be objectively considered, that is, be able to provoke fear in an ordinary person, due to conduct that indicates imminence and inevitability of the occurrence of the diseases or molesties (GONÇALVES, 2019, p. 170-171).

Exempli gratia, there is the case of the owner who states that he will not deliver the property on the date and time specified in the institution or condominium convention time-sharing. In this way, he practices threat, an act that can lead to the proposition of a preventive possessory lawsuit - that is, the the prohibitory interdict - in order to prevent the realization of such intimidation.

According to Carlos Roberto Gonçalves (2019, p. 172), the prohibitory interdict resembles the cominator lawsuit, as it provides for pecuniary condemnation to prevent the threat from being consummated. Based on the plaintiff's request and a reasonable amount set by the judge, the aim is to discourage the intimidating defendant from proceeding with the act. But if, even so, in the course of the lawsuit, the imminent threat materializes, this lawsuit will be transferred to the maintenance or repossession of possession (depending on the disease verified).

Thus, it's true that the owner is, in fact, the owner of the property at a certain time of the year, being able to use the thing freely in his respective periodic unit. However, once its time fraction is over, it will become as "molester" as a third party that has no relationship with the thing, since he prevents the next legitimate possessor of the periodic unit from exercising freely the faculties resulting from his property.

It should also be noted that, within the scope of the building condominium (*"condomínio edilício"*), lawsuites that indicate the occurrence of disseisin (*"esbulho"*), turbulence/disturbance (*"turbação"*) and threat (*"ameaça"*) practiced by the liquidator are recurrent in the appellate courts. As an example, the following judged: Rio de Janeiro Court of Justice (*TJRJ*), Civil Appeal nº 0032149-80.2015.8.19.0014, 22nd Civil Chamber, Rapporteur Judge Marcelo Lima Buhatem, judged on 08/06/2019; São Paulo Court of Justice (*TJSP*), Civil Appeal nº 1001933-25.2017.8.26.0477, 27th Chamber of Private Law, Judge Rapporteur Alfredo Attié, judged on 06/17/2019; Court of Justice of Rio Grande do Sul (*TJRS*), Civil Appeal nº 70080816424, 20th

Civil Chamber, Rapporteur Judge Glênio José Wasssserstein Hekman, judged on 4/10/2019 ("*Tribunal de Justiça do Rio de Janeiro (TJRJ), Apelação Cível nº 0032149-80.2015.8.19.0014, 22ª Câmara Civil, Relator Desembargador Marcelo Lima Buhatem, julgado em 06/08/2019; Tribunal de Justiça de São Paulo (TJSP), Apelação Civil nº 1001933-25.2017.8.26.0477, 27ª Câmara de Direito Privado, Relator Desembargador Alfredo Attié, julgado em 17/06/2019; Tribunal de Justiça do Rio Grande do Sul (TJRS), Apelação Civil nº 70080816424, 20ª Câmara Cível, Relator Desembargador Glênio José Wasssserstein Hekman, julgado em 10/04/2019*").

This occurs when, for example, he prevents the owner from entering the property due to the delay in paying the condominium expenses on a personal initiative. In this case, he acts in an arbitrary exercise of its own reasons, and not in obedience to any rule of the condominium or resolution of the assembly (which, even if it exists, will be illegal).

In an analogical interpretation, it appears that the molesties of possession can also be committed by the administrator of the property object of the multiproperty/timeshares.

As an example of acts that hinder the free and full exercise of possession, we mention the case where the administrator, as well as the building condominium manager, doesn't allow an owner to enter the property, despite being in front of his legitimate unit time, or else restrict the *in totum* use of the property. There is also the possibility that the administrator threatens to retain the thing if the holder/owner doesn't pay an expense related to its maintenance. The administrator can also change the lock on the property's entrance door and use the fraction of time corresponding to an owner.

Then, the time-sharing administrator, as well as third parties and the multi-owner themselves, can practice possession molesties and, consequently, figure in the passive pole of possessory lawsuits.

3. POSSESSORY INTERDITAL ACTIVE LEGITIMACY IN MOLESTED TIMESHARES: MOLESTRY FOR *PENITUS EXTRANEUS* AND CO-OWNER

The heterotutela of possession in the event of disseisin ("*esbulho*"), turbulence/disturbance ("*turbação*") and threat ("*ameaça*") occurs through possessory interdictions (or possessory lawsuits), that is, repossession, maintenance of possession and prohibitory interdiction (IHERING, 2007, p. 30 et seq.).

In this context, it is questionable who owns the legitimacy to propose these lawsuits in cases of time-sharing.

Articles 1.358-B to 1.358-N, included in the Brazilian Civil Code by Law nº 13.777/2018, didn't expressly deal with this matter. But, as article 1.358-B determines the subsidiary application of the condominium building legal regime ("*condomínio edilício*") (Law nº 4.591/1964) to time-sharing, and as in that type of property the handling of possessory lawsuits is common, it's possible to solve doubts about time-sharing interdictions from the daily forensic experience of the building condominium.

According to the item II of the caput of art. 1.348 of the Civil Code, in the building condominium the liquidator is responsible for representing the building condominium in extrajudicial and judicial acts, through the actions necessary to defend the common interest.

In an interpretation by analogy, as the administrator is responsible for the management of the multi-owner condominium and its facilities, equipment and furniture (art. 1,358-M), it's valid to equate him with the figure of the liquidator (OLIVEIRA, 2020a). Furthermore, this procedural legitimacy is repeated by item XI of the caput of art. 75 of the Civil Procedure Code.

In this perspective, it's up to the administrator, also, to represent the interests of the time-sharing condominium in or out of court, actively and passively, including in possessory lawsuits.

However, representation by the administrator will follow the same legal regime as the building condominium. The manager must be aware that he must not act on his own and in accordance with his personal desires, but in accordance with the common and legitimate claims of the multi-owners, in accordance with the condominium agreement or resolution of the assembly.

It's valid to conclude, then, that the administrator has, by itself, legitimacy *ad causam* to propose possessory interdicts and appear in the active pole of the demand, as well as to act in the direct protection of possession through self-protection.

And as for the multi-owners, do they retain active legitimacy for the possessory interdital heterotutela / "hetero-guardianship" (*"heterotutela interdital possessória"*)?

It stands out, first of all, as constitutive faculties of the right to property, the rights to use, enjoy, dispose and claim. In the real estate time-sharing, the faculties to use and enjoy are limited to the fraction of time of each buyer, however they don't only concern the physical structure of the property (PAIVA, 2020). The holder/owner of the periodic unit has broad powers over the space and any facilities, equipment and furniture that are part of it.

However, co-owners are prohibited from carrying out any activities that alter or deteriorate the unit, even improvements, as provided for in item IV of the *caput* of art. 1.358-J of the Civil Code. Otherwise, the intrusion into the property of the other property owners would remain evident.

In the same way, the right to dispose of the property is restricted to the fraction of time of the owner, giving ample freedom to the holder/owner to assign his right of use and enjoyment, as well as to transfer or dispose of the thing to another. Following this logic, Gustavo Tepedino (1993, p. 103) concludes that: "Therefore, the principle by which *nemo plus juris in alium transferre potest quam ipse habet*: the use, the enjoyment and the disposition of the thing are limited to the space-time extension of the object of the law, reduced to the ends of the housing unit in the determined shift and expressed unambiguously and visually in the calendar" (*"Vale, portanto, para a multipropriedade, o princípio pelo qual nemo plus juris in alium transferre potest quam ipse habet: o uso, o gozo e a disposição da coisa limitam-se à extensão espaço-temporal do objeto do direito, reduzido aos confins da unidade habitacional no turno determinado e expresso inequívoca e visualmente no calendário"*).

As for the power to claim the thing (*jus vindicandi*), it's the protection of property, that is, the right to claim it from anyone who unjustly owns or holds it, through the claiming lawsuit (GONÇALVES, 2019, p. 226).

According to Gustavo Tepedino (1993, p. 58-59 and 124), the real estate time-sharing presents itself as a legal relationship of economic use of the property, divided into fixed units of time, so that the multipropriators use the thing exclusively during your turn.

In this way, it becomes evident that this modality divides the thing into units of time in which the owner can use the property, and not the physical space itself.

By Law nº 13.777/2018 the multiproperty/time-sharing regime was introduced in the Brazilian Civil Code as a real right, confirming the understanding already applied by the Third Panel of the Superior Court of Justice (*Terceira Turma do Superior Tribunal de Justiça*) in the judgment of Special Appeal nº 1.546.165/SP (*Recurso Especial nº 1.546.165/SP*) (STJ, Special Appeal nº 1.546.165/SP, 3rd Panel, Rapporteur Minister Ricardo Villas Bôas Cueva, Rapporteur for the judgment of Minister João Otávio de Noronha, judged on 04/26/2016) (*STJ, Recurso Especial nº 1.546.165/SP, 3ª Turma, Relator Ministro Ricardo Villas Bôas Cueva, Relator para o acórdão Ministro João Otávio de Noronha, julgado em 26/04/2016*).

In this sense provides the caput of art. 1.358-C of the Civil Code, *in verbis*: "Art. 1.358-C. Time-sharing is the condominium regime in which each owner of the same property is entitled to a fraction of time, which corresponds to the faculty of use and enjoyment, exclusively, of the immovable property, to be exercised by the owners alternately. [...]" (*"Art. 1.358-C. Multipropriedade é o regime de condomínio em que cada um dos proprietários de um mesmo imóvel é titular de uma fração de tempo, à qual corresponde a faculdade de uso e gozo, com exclusividade, da propriedade imóvel, a ser exercida pelos proprietários de forma alternada. [...]"*).

Therefore, all the characteristics related to real rights must fall on time-sharing; including the right to get the thing back or right to recover the thing *("direito de sequela")*, which gives rise to the power to claim the thing of who unjustly holds it (ALARCÓN e ALARCÓN, 1995, p. 20).

Furthermore, perpetuity is understood as a right without maturity, that is, that it exists even if the holder/owner doesn't exercise it. In this line, Gustavo Tepedino highlights:

> From these considerations, the real character of real estate time-sharing arises. The legal bond that is established immediately adheres to the immovable property on which it relates, serving the contract, although essential, only to define the object of the right and to discipline the relationship between multi-owners, and between them and the promoting company, to which it's delegated the function of managing the property. However, the reciprocal limitation (space-time) of powers isn't a factor of intermediation, but of mere coordination and demarcation of legal spheres, thus not removing the real nature of multiproprietary right, with *erga omnes* prevalence [...]. If the right to property falls exclusively on the shift, the projection of the individual right on the whole is, on the contrary, universal, reaching all corners of the property, albeit in low intensity [...]. Co-ownership over the common parts ensures the joint possession of the land to the multi-owner, even though their possession is only indirect in those periods outside their shift (*De tais considerações decorre o caráter real da multipropriedade imobiliária. O vínculo jurídico que se instaura adere imediatamente ao bem imóvel sobre o qual incide, ser-*

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> *vindo o contrato, embora imprescindível, unicamente para definir o objeto do direito e disciplinar a relação entre os multiproprietários, e entre estes e a empresa promotora, à qual é delegada a função de gerir o imóvel. Entretanto, a recíproca limitação (espaço-temporal) de poderes não é fator de intermediação, senão de mera coordenação e demarcação de esferas jurídicas, não retirando, pois, a natureza real do direito do multiproprietário, com prevalência erga omnes. [...]. Se o direito de propriedade incide exclusivamente sobre o turno, a projeção do direito individual sobre o todo é, ao contrário, universal, atingindo todos os recantos do imóvel, ainda que em intensidade diminuta [...]. A co-titularidade sobre as partes comuns assegura ao multiproprietário a composse do solo, ainda que sua posse seja apenas indireta naqueles períodos estranhos ao seu turno*) (TEPEDINO, 1993, p. 58-9, 124).

Thus, the property right is perpetual as to duration, although temporary as to exercise. Perpetuity guarantees the permanence of this right regardless of whether it's put into practice or not, that is, it's imprescriptible due to the lack of exercise of the faculties.

So, the co-owner has the right to claim the thing even if it isn't included in the time unit assigned to him, especially if the possibility of loss of property by adverse possession is observed. However, obviously, this owner will not be able to claim the property of the owner who is legitimately enjoying his time fraction, being admitted only if proposed in the face of a third molester.

In addition to the claims lawsuits (petition court) arising from the property, it's necessary to analyze those resulting from possession, namely repossession, maintenance of possession or prohibitory interdict.

Possession is likely to have consequences/deployments, caused by the authorized distribution of the powers inherent in it to two or more possessors.

The direct possession over the temporal fractions occurs in an alternate way, that is, each owner will exercise it during a time lapse fixed in the institution instrument or in the time-sharing condominium agreement. Therefore, the exercise of all the powers arising from your ownership simultaneously will be restricted to this period.

However, considering that the possessor is "everyone who actually has the exercise, full or not, of any of the powers inherent in the property" ("*todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade*"), under the terms of art. 1.196 of the Civil Code, possession isn't restricted to those who are legitimately enjoying their time share.

The owner who isn't in direct possession of the thing remains as the possessor, since he continues to exercise the power to claim the thing - even if limited to the third molester.

The *ad causam* legitimacy of the owner who has no material contact with the property - the corpus, in the sense of Friedrich Karl von Savigny's subjective theory - is therefore justified by indirect possession, given that the act of delivering the thing to the holder/owner of the following time fraction doesn't imply loss of possession, only the indirect split/deployment indirect.

Therefore, the co-owner, although he doesn't have direct possession, may use the possessory judgment, since one possession will not nullify the other (art. 1.197 of the Brasilian Civil Code). Both start to coexist in time and space, so that both the direct and the indirect

possessors can invoke possessory protection against third parties, as well as use it against each other.

In this way, if the occurrence of an molesty of possession is verified in the periodic unit of one of the multi-owners, the others will also have legitimacy to propose possessory lawsuit. *Exempli gratia*, Bearing in mind that the disseisin (*"esbulho"*) verified in the current periodic unit becomes a threat to those who will occupy the property in the next period, as well as to the other multi-owners, there is legitimacy and interest from all holders/owners to propose possessory interdictions, in order to stop it this molesty of possession.

To understand the opposite would be to admit that the co-owner who will occupy the property in the next period of time has limited powers of use, enjoyment and disposition. Therefore, it's incompatible to require the holder/owner to wait weeks or months to guarantee the full exercise of the rights arising from his property.

However, the possesor who doesn't suffer any loss/disseisin will not be able to propose the action of restitution of possession, since he will not be able to return and take advantage of the temporal fraction of another owner. In the same sense, the owner who doesn't suffer from the turbidity in his possession, that is, during his shift/period, will not be able to file a maintenance action in possession, since it isn't possible for him to remain in possession that doesn't correspond to his unit periodic.

Thus, it's up to the other multi-owners only the prohibitory interdict, with the intention of interrupting the disseisin (*"esbulho"*) or turbulence (*"turbação"*) and, consequently, the threat over their possession.

However, as stated by Adroaldo Furtado Fabrício (GONÇALVES, 2019, p. 137), the possessor who goes to the Judiciary, in search of protection against the offensive act of his possession, intends to interrupt the action and stop the molesty. The request, then, will always be the same: possessory protection.

As an indirect possessor, therefore, the co-owner keeps the possessory protection of the caput and of §1º of art. 1.210 of the Civil Code against molesties that may suffer.

Therefore, it's necessary to recognize the legitimacy *ad causam* of the owner of the multi-property/time-sharing to bring actions in defense of property and possession, since he is both owner and possessor of the thing.

However, legitimacy must be differentiated from interest in acting. This must be examined from the perspective of the binomial necessity and usefulness of the jurisdictional provision. In other words, the process/lawsuit must be a means of providing the plaintiff with a more favorable result than that in which he finds himself and, at the same time, it must be seen as the last way to resolve the conflict.

It's possible that the owner, despite having ad causam legitimacy, doesn't fulfill the requirement of interest in acting, which is essential to posture in court (art. 17 of the Brazilian Civil Procedure Code).

The legal business that institutes the time-sharing regime aims at the division of property in the temporal sphere of the thing, among the subjects that celebrated it. The relationship between the multi-owners is based on the confidence that there will be mutual respect

between the owners, especially with regard to the conservation of the property and its use only within the agreed timeframe.

The third party who practices disseisin, turbulence or threat is foreign to the relationship established between the owners, there is no guarantee that the molesty of possession will be interrupted in the next fraction of time, a fact that causes a fair fear in all the owners.

Thus, even if the disease of possession isn't occurring in the periodic unit of the holder, it's imperative to recognize, in addition to the legitimacy ad causam inherent in his quality of owner and indirect possessor, his interest in acting.

In this context, the question arises: in the possessory lawsuits proposed by the owner of the time-sharing, there is or not a need to form an active litisconsortium, which is equivalent to asking, in procedural terms, if the proposition of the possessory lawsuit occurs through optional or necessary litisconsortium.

The necessary litisconsortium, unlike the optional, is directly linked to the indispensability of the presence of all subjects - in casu, all the multi-owners of the property - in the active pole of demand.

According to Fredie Didier Jr. (2017, p. 513), the litisconsortium will be necessary in two situations, according to art. 114 of the Brazilian Civil Procedure Code: if a passive unit (*"unitário passivo"*), or when the law so expressly provides.

This author states that, as a rule, there is no necessary active litisconsortium, since the right of access to justice, based on the faculty of going to court, cannot depend on the will of others.

From a different perspective, Nelson Nery Jr. and Rosa Maria Barreto Boriello de Andrade Nery (2017, p. 518) understand that there is a necessary active litisconsortium. However, they accept the possibility of a single person to sue, provided that in the passive pole of the legal relationship includes the person who should be their active litisconsorte (active lysconsorte) (*"litisconsorte ativo"*).

José Manoel de Arruda Alvim Neto (2016, p. 86) presents as a solution the summons of who should be a necessary active party (*"litisconsorte necessário ativo"*) to compose the dispute. In this way, the litisconsorte can: integrate the active pole; occupy the passive pole, if he wishes to defend an interest contrary to that of the author; or remain inert, a situation in which he will not participate in any of the poles of the demand, but will be affected by the res judicata in the same way.

In the context of time-sharing, it should be noted: all holders are in fact owners, direct possessors of the periodic unit and indirect possessors when they aren't taking advantage/ enjoying of the thing (ALARCÓN and ALARCÓN, 1995, p. 20). Therefore, the nature of the legal relationship could justify the existence of the necessary active litisconsortium or active necessary joinder (*"litisconsórcio necessário ativo"*), valuing the effectiveness of the sentence in relation to all the subjects that integrate it, according to art. 114, in fine, of the Brazilian Civil Procedure Code.

Well then. This property fractionation model, although also presupposing the existence of multiple owners for the same thing, is different when compared to the traditional exercise of possession by two or more people.

Under the joint possession regime (*"posse conjunta"* or *"composse"*), civil procedural law requires the agreement of the other holder to bring the claim. The caput of art. 73 of the Brazilian Civil Procedure Code prescribes that "the spouse will need the consent of the other to propose a lawsuit that deals with real estate right, except when married under the regime of absolute separation of assets" (*"o cônjuge necessitará do consentimento do outro para propor ação que verse sobre direito real imobiliário, salvo quando casados sob o regime de separação absoluta de bens"*), with the spouse's participation in possessory lawsuits being indispensable only in the hypothesis of joint possession regime (*"posse conjunta"* or *"com-posse"*) or act by both practiced, according to §2º of art. 73.

The spouses exercise possession over the same thing, that is, they spatially divide the property and the faculties inherent to the property in the same period of time, including the power to defend possession through possessory interdicts or self-protection.

It's forbidden to those who own the thing jointly, joint possession (*"compossuidor"*), then, to take actions that harm the exercise of possessory acts by the other owner, according to art. 1.199 of the Civil Code, including the filing of possessory lawsuits: "Art. 1.199. If two or more people have an undivided thing, each one can exercise possessory acts on it, as long as they don't exclude the acts of the other joint possessors" (*"Art. 1.199. Se duas ou mais pessoas possuírem coisa indivisa, poderá cada uma exercer sobre ela atos possessórios, contanto que não excluam os dos outros compossuidores"*).

On the other hand, in time-sharing, the thing is divided into periodic units: each holder/owner exercises exclusive possession over a temporal fraction of which he is the owner, so that there is no spatial division of the thing (FERNÁNDEZ, 2015).

While an owner is in direct possession of the property, exercising all the faculties inherent to the property, the others exercise indirect possession over the thing, in view of the deployments of possession resulting from art. 1.197 of the Brazilian Civil Code.

Unlike the joint possession of the thing (*"composse"*), there is a limitation on the exercise of possession by the holders, resulting from the institution instrument or the time-sharing condominium agreement signed by them. The faculties of using and enjoying are restricted to those who are legitimately exercising the effective control resulting from their period.

The direct possession, however, doesn't prevent the exercise of the indirect, in such a way that the possessors can defend their possession autonomously against the practiced molesties, independently of the other holders of the thing.

Thus, since they are different possession regimes, different rules are applied, so that in time-sharing, contrary to what occurs in the joint possession of the thing (*"composse"*), the litisconsortium will be optional.

In the case of the real estate time-sharing regime, the most appropriate is the positioning of José Manoel de Arruda Alvim Neto (2016, p. 86), since it leaves the discretion of the owner to ascertain whether there is interest in participating in the active pole of demand, or if he prefers to remain inert in the face of the dispute in question.

In this case, it cannot be admitted that the right of lawsuit of the other holders/owners, especially of those who are facing a current limitation of their powers resulting from owner-

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ship, is conditioned to the performance of those who preferred not to participate in the litigation.

Whatever the decision of the owner - whether or not to include the procedural relationship -, it's imperative to make your subpoena, in order to respect the adversary. In this way, the participation of the interested owner and his information is guaranteed, without obliging him to demand and, further, without conditioning the right of sue of the molested owner to the will and power of the others.

Therefore, the imposition of the necessary active litisconsortium (*"litisconsórcio ativo necessário"*) within the scope of time-sharing occurs only when there is the joint possession of the thing (*"composse"*) in the periodic unit, that is, when the spouses are owners and exercise possession over the same time fraction; or in hypothetical situations in which people without a marriage or cohabitation relationship are owners of the period; or, still, in situations of hereditary right of representation. Among them, the rule of §2º of art. 73 of the Civil Procedure Code, so that one cannot sue without the other's consent. Among the other multi-owners, however, there is no need to talk about the necessary active litisconsortium (*"litisconsórcio ativo necessário"*).

Another point of controversy is to ascertain whether the judge, in view of the real estate time-sharing, will be able to impose the introduction of the other multi-owners, if he deems their presence in the process as opportune.

Despite the sole paragraph of art. 115 of the Brazilian Civil Procedure Code deals only with the necessary passive litisconsortium (*"litisconsórcio passivo necessário"*), the determination by the judge may also affect the active modality, even if observed less frequently.

In the legal literature there are those who recognize that the intervention *iussu iudicis* is related to the order of mandatory integration, whether on the passive pole or on the active side of the demand. However, the position of Fredie Didier Jr. (2017, p. 594-597) is assumed here, according to which the necessary litisconsortium (*"litisconsórcio necessário"*) is a typical case of this type of intervention, but isn't limited to it.

The recognition of the possibility of intervention *iussu iudicis* in addition to the cases expressed in the legal provision - that is, in an atypical manner - is suitable for implementing the principles of adequacy, reasonable duration of the process, efficiency, contradictory and equality (DIDIER JR., 2017, p. 596), as well as legal certainty and procedural economics.

So, according to the Brazilian Superior Court of Justice (*Superior Tribunal de Justiça - STJ*) in Special Appeal nº 1.170.028/SP: it's given "the third party is aware of the existing demand, allowing him to enter the lawsuit under the condition he chooses, thus protecting himself of the effects of the sentence and ensuring the effectiveness of the judicial provision. Therefore, it isn't appropriate to impose on the third party the duty to demand" (Superior Court of Justice, Special Appeal nº 1.170.028/SP, 4th Panel, Rapporteur Minister Raul Araújo, judged on 08/15/2017) (*"ciência ao terceiro da demanda existente, permitindo-lhe o ingresso na lide na condição que escolher, resguardando-o, assim, dos efeitos da sentença e garantindo a efetividade do provimento judicial. Não se presta, pois, a impor ao terceiro o dever de demandar" (STJ, Recurso Especial nº 1.170.028/SP, 4ª Turma, Relator. Ministro Raul Araújo, julgado em 15/08/2017*)).

The time-sharing regime creates a material relationship between the multi-owners, so that the lawsuit and the res judicata will have consequences for all owners of the thing. In this sense, "third party" means the co-owners of the property who weren't aware of the demand.

Thus, the judge can determine the intervention of the owner who is likely to be affected by the res judicata even in cases in which there is no formation of a necessary litisconsortium, but the optional. The holder/owner is guaranteed, in this condition, the exercise of fundamental freedom of demand, without being obliged to integrate the procedural relationship/lawsuit. (DIDIER JR., 2017, p. 594-597).

The caput of art. 564 of the Civil Procedure Code prescribes that: whether or not the injunction for maintenance or reinstatement is granted, the plaintiff will promote the defendant's summons to, if he wishes, contest in the lawsuit. Thus, after this citation, the special procedure becomes common.

In the face of a common procedure, the same rules as for other lawsuits will be applied to possessory lawsuits. Thus, the judge has the duty to summon all the owners of the time-sharing condominium to assume a position in the process.

From that moment on, therefore, the intervention of the other multi-owners becomes mandatory, so that the judicial pronouncement, which will possibly have repercussions in the patrimonial sphere of all the holders, can also have effects in their face or before them.

Well then. Possessory lawsuits may also take place between multi-owners. Molesties of possession can be practiced both by third parties to the time-sharing business - the so-called *penitus extranei* - and by the multi-owner themselves and the administrator. In view of this, the holders/owners and the administrator are allowed to use the possessory hetero-guardianship or possessory self-protection, guaranteeing the broad defense of possession.

Gustavo Tepedino (1993, p. 125) states that "as an indirect possessor, the multi-owner can make use of possessory lawsuits for the protection of the soil on which his ideal fraction falls against possible injuries from third parties or other tenants" (*"na qualidade de possuidor indireto, pode o multiproprietário fazer recurso das ações possessórias para a proteção do solo sobre o qual incide sua fração ideal contra eventuais lesões de terceiros ou de outros condôminos"*).

Thus, *v.g.*, the owner who is prevented from exercising his possession by the action of another holder, who practices disseisin (*"esbulho"*), can be returned in his possession from the filing of a possessory lawsuit.

However, there is no deployment of ownership between the direct and indirect possessor if the occurrence of molesties is verified, since it is essential that the possession is authorized for the distribution of powers, that is, it must be derived from legal business, a requirement that is not fulfilled in the event of disseisin (*"esbulho"*), turbulence (*"turbação"*) or threat.

So, the holder/owner who practices the molesty doesn't have legitimate possession of the thing, allowing the possessory defense by the other multi-owners through the interdicts.

The filing of a possessory lawsuit may result in the arbitration of the fine, in addition to the author's possessory request being combined with the condemnation of losses and damages and indemnity of the "fruits" (goods or utilities), according to art. 555 of the Civil Procedure Code.

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A hypothesis of pecuniary condemnation occurs in lawsuits of prohibitory interdict, that is, lawsuits that aim to prevent the threat from materializing. In this situation, the penalty imposed is intended to alert the defendant of the consequences that the practice of disseisin (*"esbulho"*), turbulence (*"turbação"*) will cause to him, serving to discourage the act.

In addition, if the owner exceeds the time spent on the property provided for in the institution instrument or in the time-sharing condominium agreement, another fine must be applied to him. If this situation is recurrent, he may also temporarily lose the right to use the thing in the period corresponding to his fraction of time.

This is because the use of the property exclusively during the period corresponding to his fraction of time and the vacancy until the day and time set are obligations of the co-owners listed in items VII and VIII of art. 1.358-J of the Brazilian Civil Code.

Therefore, the person who commits acts that constitute disseisin (*"esbulho"*), turbulence (*"turbação"*) or threat is subject to the payment of two fines: one arbitrated in court and the other originating in the condominium agreement signed between the owners.

Since the rules for the use of the property and the corresponding fractions of time for each owner are provided in the institution or in the time-sharing condominium convention, it should be noted that the consequences listed in the legal provision consist of penalties of a contractual default nature or noncompliance contractual.

In other words, the fine is fixed in advance, in order to cover losses and damages in the event of non-compliance or non-observance with the duties established in the legal relationship.

In a different way, the fine fixed in the possessory court consists of an instrument of coercion or punishment, with the objective of complying with the judicial decision or preventing the molesty or the "disease" from being practiced.

All parties mentioned, both the third party, subject who has no relationship with the multi-owner condominium, and the administrator and the property owners, are subject to this pecuniary condemnation.

On the other hand, that fine resulting from the breach of contract is opposable only to the co-owners inserted in the time-sharing regime, who became responsible for the breach of the obligations established in the agreed agreement.

Then, finally, in the case of ownership molesties practiced by the multi-owner themselves, there will be the sum of the contractual and coercive fines. And considering that they have different natures, there is no need to talk about the existence of *bis in idem* due to this cumulation of fines.

4. CONCLUSION

This research was developed by investigating responses to the question of which co-owner would be a legitimate part of possessory protection in cases of molesties practiced by

another co-owner or by a third party. The doubt arose from the fact that the use of the property in the multiproperty/time-sharing occurred in predetermined periods.

Based on the deployment of possession, resulting from the legal business between the multi-owners, it was found that everyone keeps the quality of possessors, even if they aren't exercising the property, the uso of the proterty (hypothesis in which they will have indirect possessioin of the thing). As a result, all multi-owners can claim possessory protection, even if they aren't taking advantage of their time share of use.

As for the possibility of molesty between the multi-owners, it was found that there is a possibility of disseisin (*"esbulho"*), turbulence/disturbance (*"turbação"*) and threat (*"ameaça"*) among them. The investigation revealed that the co-owner who isn't in the exercise of his time share is only the holder/owner of indirect possession, and should refrain from harassing/molest to allow the other multi-owners to exercise direct possession of the thing. Hence, it was possible to confirm the hypothesis that the co-owner may impede the exercise of possession by another co-owner, if he practices any unlawful limitation.

In view of the deployment of possession, direct possession doesn't prevent the exercise of indirect, so that the possessors can defend their possession autonomously. It's, therefore, an "optional joint consortium" (*"litisconsórcio facultativo"*).

Thus, in the way it was proposed, from the premises constructed through the analysis of molesties and the deployment of possession, it was possible to confirm the hypothesis for the problem of temporal fractionation in the possession of multiproperty/timashare/time-sharing and to propose measures to face the problematic issues that surrounded the legitimacy ad causam to the exercise of interdict protection in multiproperty/time-sharing.

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THE IDEA OF PUBLIC INTERINSTITUTIONAL COOPERATION AS A LEVER OF ECONOMIC DEVELOPMENT

A IDEIA DE COOPERAÇÃO INTERINSTITUCIONAL PÚBLICA COMO ALAVANCA DO DESENVOLVIMENTO ECONÔMICO

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ABSTRACT

In describing public inter-institutional cooperation under a pragmatic theoretical framework, a case study is sought to demonstrate the possibility of an implicit constitutional principle, which is understood as one of the pillars of support for public tax policies aimed at federated entities. In view of this reality, it is sought to examine the relationship of interinstitutional cooperation that federal entities possess, as well as to envisage the possibility of emancipation of such implicit constitutional principle in the way of providing better results in tax matters, and consequently in the functions of State. In order to meet this objective, the following questions are asked: Does the implicit constitutional principle of public inter-institutional cooperation be analyzed under a pragmatic theoretical framework? And, if positive, is it capable of sustaining a specific model of public policy to be implemented in the federated entities? In order to examine the proposal, we chose a case study in which an analysis of an interpretative character was used in the verification of the data by means of the bibliographic research technique. It was therefore concluded that it is entirely possible to examine the subject in the light of the theoretical pragmatic matrix, which has made it possible to understand that the emancipatory goal of the principle of public interinstitutional cooperation is absolutely possible, so that it can in fact be used as base if support for the creation of public tax policies directed to the federated entities.

KEYWORDS: Cooperation. Interinstitutional. Public. Development. Economic.

RESUMO

Ao descrever a cooperação interinstitucional pública sob uma matriz teórica pragmática, busca-se, através de um estudo de caso, demonstrar a possibilidade de existência de um princípio constitucional implícito,

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o qual entende-se como um dos pilares de sustentação das políticas públicas tributárias destinadas aos entes federados. Diante dessa realidade, busca-se examinar a relação de cooperação interinstitucional que os entes federativos possuem, bem como vislumbrar a possibilidade de emancipação de tal princípio constitucional implícito em vias de proporcionar melhores resultados nas questões tributárias, e, consequentemente nas funções de Estado. Com o intuito de atender a essa finalidade, pretende-se responder as seguintes indagações: O princípio constitucional implícito da cooperação interinstitucional pública pode ser analisado sob uma matriz teórica pragmática? E, se positivo, é capaz de sustentar um modelo específico de política pública a ser implementada nos entes federados? Para exame do proposto, optou-se por um estudo de caso no qual utilizou-se na verificação dos dados uma análise de cunho interpretativo por meio da técnica de pesquisa bibliográfica. Concluiu-se, por conseguinte, que é plenamente possível o exame do tema à luz da matriz teórica pragmática, o que, permitiu compreender que a meta emancipatória do princípio da cooperação interinstitucional pública é absolutamente possível, de modo que pode de fato ser utilizado como base se sustentação para criação de políticas públicas tributárias voltadas aos entes federados.

PALAVRAS-CHAVE: *Cooperação. Interinstitucional. Pública. Desenvolvimento. Econômico.*

INTRODUCTION

After describing the hypothesis of what is denominated here public inter-institutional cooperation[3], elaborated from a case study, the present study intends to observe this possibility in accordance with the dictates of the pragmatic theoretical matrix.

With this, the construction of a specific profile, in the form of observing a set fact of life, is proposed, seeking at length a modification of the research results carried by the logic of observation, which would be standard in the comprehension and understanding of the referred theoretical matrix.

In another perspective, here is an exercise conducted in order to prove a new construction in the mind of the authors, as a point in understanding the topic, one hopes, apt to influence readers. Thus, the present shall not proceed with expertise and profundity sufficient to exhaust the subject.

This essay will present a case study, followed by a possibility, whereby this study permits a glimpse of the existence of an implicit constitutional principle. This, in turn, comes to justify a specific model of public policy to be implemented among the federated entities. After such constructions, the idea is submitted to the logic of the pragmatic matrix, with a view to possibly emancipating thought.

3 The terms “cooperation”, “cooperativism” and “cooperative” are used here as synonyms.

1 SITUATING THE PROBLEM CENTERED UPON A CASE STUDY

In 2006, by way of a joint undertaking lead by the public administration of the county of Cruz Alta[4], together with the milk-producing basin of the state of Rio Grande do Sul, multiple meetings between representatives of the respective counties, and these and the company "CCGL", took place, with an end to implementing public policy and an administrative model that benefitted all of the relevant public entities, in the sense of guaranteeing tax revenue generated by the advent of the referred company in that region, avoiding the so-called 'fiscal war' (a dispute between federal entities trying to attract a company) among them.

After these meetings, it was collectively discussed that there would be no such dispute between the counties regarding the said company setting up in their territories (a fact that could spark the so-called fiscal war, given the interest of each county in the resultant tax revenue).

Fiscal war is a factual and administrative situation, derived from the extrafiscal nature of taxation. About this we have already stated:

> The principle of extrafiscality in tax law finds itself diluted among multiple constitutional provisions, but is also found in the specific infra-constitutional legislation. Either way, universalized in this way, it permeates the legal code in all spheres of the Federation. This means that, by corollary logic, it is a rule that is found in every sphere of *tributary jurisdiction* established upon the Constitution. [...] But the guideline of extrafiscality is *the search for social development based upon, fundamentally, intervention in the economic and social domains* [...]. [...] Thus, beyond not representing, necessarily, an improvement in the quality of life for local populations, especially as regards *human development*, state activity institutes the so-called fiscal war between entities of the Federation. These develop in the bosom of public administrations the unwavering intention of conceding tax benefits to a variety of companies and industries, in a fierce local, regional and state-wide dispute, resulting in a mutual loss of force among the federal entities, giving in to sponsored economic exploration favourable only to private capital (RODRIGUES, 2009, p. 2687-2692).

In order to avoid a dispute over the installation of the company among the relevant counties, a solidary, harmonious and cooperative public policy was promoted, followed by a corresponding administrative model, to the end of benefiting all, locally and regionally, tax-wise.

The elaboration of deals between the so-called host-county and the other participating counties (covenanters) was agreed, for the return of financial investment derived from the commercialization of milk (sent by the producers of each county), relative to the so-called return of the ICMS, what is dubbed ICMS added to the host-county (Cruz Alta), and what would be returned to each one of the participators as a return on the taxation proportional to what they sent to the company installed in Cruz Alta.

4 Cruz Alta is located in Rio Grande do Sul, a state in the extreme south of Brazil, in a region called the Medium Plateau, with a median altitude of 452 metres above sea level. With a fair climate and hospitable people, Cruz Alta configures one of the chief points in the state's map. More precisely, the county of Cruz Alta is located in the mid-north of Rio Grande do Sul, in the micro region 322, composed by the counties of: Cruz Alta, Ibirubá, Júlio de Castilhos, Santa Bárbara do Sul, Santiago, São Francisco de Assis, Tupanciretã and Fortaleza dos Valos." Available at: http://www.culturagaucha.com.br. Accessed on: May 15th, 2020.

Having formalized these deals by way of a Cruz Alta county law, recognizing said possibility, the participating company assumed responsibility for informing the host-county the quantity of products sent by the others, permitting a proportional distribution of tax revenue among them.

The case under study permits multiple considerations and conclusions, among which emerges the possibile recognition of a model of public cooperation between federal entities, which transcends the concepts of solidarity and harmonization in favour of public policy.

Contrary to the other concepts, cooperation[5] embodies an attitude, that is, it establishes effective action so that two or more persons may carry out an action previously accepted by all. But on this, more will follow in the next topic.

As regards the example used here as a case study, and moreover, as a case study of a pilot case, one verifies its use for screening is adequate thanks to the presence of multiple characteristics susceptible to research.

In the words of Robert K. Yin, the use of a pilot case assumes the role of "laboratory" for this study, fulfilling its *desideratum*:

> The site used by the pilot-case can, consequently, assume the role of a "laboratory" for researchers, permitting their observation of different phenomena from many different angles and the testing of different approaches on an experimental base (YIN, 2005, p. 104).

For metholodogical purposes the case described above furnished the elements indispensable to the substantiation of the above described.

The researcher visited the public administration of Cruz Alta, in Rio Grande do Sul, garnering access to all the above-described events, such as the minutes of meetings, legislation, departments responsible for carrying out activities and other supporting pieces of information regarding the administration's operation.

Thus, it serves the present to configure and validate the case, in the terms in which it was investigated. The case of Cruz Alta fulfilled its role representing the model of interinstitutional public cooperation, that is, it demonstrated the practical application of a cooperative model among county-level federal entities, fulfilling the requisites for verifying theoretical-scientific circumstances capable of sustaining the model itself.

But from the scientific point of view, what would this be? In the context of the pragmatic matrix, what would cooperation in the form presented represent? One shall seek to answer these two questions in the following topics.

5 O cooperativismo tem o seu reconhecimento formal, de um sistema econômico e social, a partir da fundação da cooperativa matriz de Rochdale, em 1.844, na Inglaterra (BÜTTENBENDER, 1994, p. 99).

2 THE EMERGENCE OF THE IDEA OF INTERINSTITUTIONAL PUBLIC COOPERATION

Based upon the case study transcribed above summarily, a practical event was verified: the cooperation between the counties to the end that all belonging to the milk-producing basin of the north-west region of the state of Rio Grande do Sul would benefit from the return on the ICMS added to the host-county, that is, receive taxes proportionally to the product derived from their territory.

This case fulfils the function of an experimental base for scientific evaluation, which is to say, to consider the administrative attitudes that were adopted, as a type of cooperation occurring at county-level public administration, between the counties, whose end was to meet shared regional interests, to the detriment of the customary dispute between them, and liable to be repeated elsewhere despite what happens in the whole country.

In that moment, the involved counties abandoned the traditional dispute over the installation of the company in their territory, promoting a shared strategy that benefitted each one of them and thus, the whole region. From the pragmatic point of view they resorted to a method capable of answering their true aspirations.

But if their aspirations were based on the common good of the region, the existence of other foundations supporting this practical strategy (cooperation) must also be recognized, to whit: firstly, remembering universal moral fundamentals, such as, for example, the protection and development of human life; secondly, taking up an ethical strategy akin to such aspirations, abandoning betrayals and selfishness, taking up the will of the community, its own common good.

Making use of habermasian language, it must be stated that the idea of interinstitutional public cooperation incorporates the three kinds of argument for public deliberation, conforming itself to Jürgen Habermas's pragmatic matrix of communication.

Nevertheless, for methodological reasons, at this point it is valid to merely state that the scientific exercise done below will utilize the habermasian matrix to demonstrate that the practical cooperation studied leads to the notion that a principle of public (or special, that is, among federal entities) interinstitutional cooperation exists, and that said principle sustains a model of public policy and administration.

There is underlying concern that warrants mentioning, the question whether the legalization of the principle of public interinstitutional cooperation and the creation of a model of that nature are necessary for public action of this kind. In truth, no! But as to the decision to legalize, yes!

In sequence it will be demonstrated that this is possible, nevertheless, if prior to that the aforementioned habermasian postulates, which reside in the tense environment between factuality and validity, be found present, as aludes Habermas:

> Whatever sociology desirous of acquiring access to its field of objects, passing through the hermeneutical comprehension of meaning, must take into account this tension between factuality and validity. [...] Participants in the interaction must mutually attribute to the other consciousness of their acts,

> that is, they must suppose that they are capable of directing their action in accordance with pretensions of validity (HABERMAS, 1987, p. 38).

In other words, in a first reading of the problem, one may state that there will be no public interinstitutional cooperation, nor any derivative administrative model, even if legalized, without first encountering all those arguments for public deliberation and decision-making on the trodden path between the fact and the validity of the norm in people's consciousness. This would be the pragmatic reading of the case study.

3 THE CASE STUDY IN LIGHT OF THE THEORY OF COMMUNICATIVE ACTION: A DEMONSTRATION OF POSSIBILITY AND ACCEPTABILITY

A fundamental concern in the thinking of Habermas which can serve as a point of reference for this study, is his concern with the emancipatory process of the human being. From metaphysics to trascendental rationality clearly leaps the interest in unveiling human knowledge about the world and the fixation of the bases that direct (if not, determine) thought.

In this context the theory of communicative action assumes responsibility for a kind of paradigmatic shift in intersubjectivity. In the context of his own work, Habermas builds up the concepts of reason, truth, democracy and Law, by discursive intersubjectivity. Communication is, therefore, a determining factor in human decision-making.

And how can a decision birthed by communication form and conform public interinstitutional cooperation?

In order to answer this primary question, an aside is necessary. First, establishing communicative action as the cradle for the discovery of truth in the relationship between the knowing subject and knowable object, a situation in which a point of departure is fixed for what is called decision, more precisely right as decision. And then, by situating the notion of public interinstitutional cooperation in the context of the pragmatic matrix itself, demonstrate what really causes it and what can favour its most widespread usage.

In this context the aforementioned theoretical emancipation mentioned in the title of the present would be evidenced. It would be the recognition that public interinstitutional cooperation as an implicit constitutional legal principle and as a model to be used in other cases is not sustained by the normativity of the Law (that engenders obedience), that is, in the supposed essence of the Law; but sustains itself in the communicative decision that precedes it. And communicative reason supports the arguments for public deliberation.

In reality, it sustains the ethical, moral and pragmatic fundamentals, drawing from the (normative) Law content that would, presumably, belong to it. It would, moreover, stand before named deficits that impair the progress towards a new rationality (a communicative rationality).

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In *teoria de la acción comunicativa i, racionalidad de la acción y racionalización social*, Habermas begins the incursion of communicative reason as a basic foundation for communicative action. See:

> Podemos decidir, en resumen, que las acciones reguladas por normas, las autopresentaciones expresivas y las manifestaciones o emisiones evaluativas vienen a completar los actos de habla constatativos para configurar una práctica comunicativa que sobre el trasfondo de un mundo de la vida tiende a la consecución, mantenimiento y renovación de un consenso que descansa sobre el reconocimiento intersubjetivo de pretensiones de validez susceptibles de crítica. La racionalidad inmanente a esta práctica se pone de manifiesto en que el acuerdo alcanzado comunicativamente ha de apoyarse en última instancia en razones Y la racionalidad de aquellos que participan en esta práctica comunicativa se mide por su capacidad de fundamentar sus manifestaciones o emisiones *en las circunstancias apropiadas* La racionalidad inmanente a la práctica comunicativa cotidiana remite, pues, a la práctica de la argumentación como instancia de apelación que permite proseguir la acción comunicativa con otros medios cuando se produce un desacuerdo que ya no puede ser absorbido por las rutinas cotidianas y que, sin embargo, tampoco puede ser decidido por el empleo directo, o por el uso estratégico, del poder.
>
> Por eso pienso que el concepto de racionalidad comunicativa, que hace referida a una conexión sistemática, hasta hoy todavía no aclarada, de pretensiones universales de validez, tiene que ser adecuadamente desarrollado por medio de una teoría de la argumentación (HABERMAS, 1987, p. 36).

He states that actions regulated by rules come to complete spoken acts, configuring a communicative action over everything that is seen in the world, the very representation that each person has of the world, just as what a group (for example) assumes and communicates as such. From here emerges what is dubbed communicative rationality.

It deals with the construction of a matrix in the field of the phenomenology of knowledge that solves the problem of gnosiology. That which an object is, it is by effort of communication, more precisely of the communicative choices of people. Thus, it concerns a decision in the communicative sphere. On this account, the statement that Law is decision. And would that pilot case transcribed above preserve the same situation? This will be shown in sequence. Habermas's statements about the interpretation of the facts of life according to the communicative action model:

> En el caso de la acción comunicativa los rendimientos interpretativos de que se construyen los procesos cooperativos de interpretación representan el mecanismo de cooperativos de la acción; la *acción comunicativa* no se agota en el *acto de entendimiento* efectuado en términos de interpretación. Si escogemos como unidad de análisis un acto de habla sencillo realizado por H, frente al que por lo menos otro participante en la interacción puede tomar postura con un <<sí>> o con un <<no>>, podremos clarificar las condiciones de *la coordinación* comunicativa *de la acción* indicando qué quiere decir que un oyente entienda el significado de lo dicho. Pero la acción comunicativa designa un tipo de interacciones que vienen coordinadas mediante actos de habla, mas que no coinciden con ellos (HABERMAS, 1987, p. 136).

One notes here that Habermas transports the act of communication between the knowing subject and knowable object to the collective sphere, the occasion in which member or

members may adopt a stance regarding said communicating, accepting it or not, modifying it or not, arising thusly the idea of communicative concordance derived from the act. This would be the very meaning of the object.

He follows his reasoning in the linguistic ambit where he constructs the theory of communicative action. It concerns the linguistic construction of a fictitious reality.

> El *deslinde* lingüístico entre los *planos de realidad* que representan el <<juego>> y el <<ir en serio>>, la construcción lingüística de una realidad ficticia, el chiste y la ironía, el uso translaticio y paradójico del lenguaje, las alusiones, las revocaciones contradictorias de pretensiones de validez en el plano metalingüístico- todo ello se basa en una confusión intencionada de modalidades del ser. La pragmática formal puede aportar a la aclaración de los mecanismos que el hablante necesita para dominar todo ello, mucho más que lo que puede aportar una simples descripción empírica, por exacta que sea, de los fenómenos a explicar. El niño, al irse ejercitando en los modos fundamentales del uso del lenguaje, adquiere la capacidad de trazar los límites entre la subjetividad de sus propias vivencias, la objetividad de la realidad objetualizada, la normatividad de la sociedad y la inter-subjetividad de la comunicación lingüística. Al aprender a tratar hipotéticamente las correspondientes pretensiones de validez, se ejercita en las distinciones categoriales entre esencia y fenómeno, ser y apariencia, ser y deber, signo y significado. Y junto a estas modalidades entitativas, se hace también con la posibilidad de manipular esos fenómenos de engaño que inicialmente se deben a una confusión involuntaria entre la propia subjetividad, de un lado, y los ámbitos de lo objetivo, lo normativo y lo intersubjetivo, de otro. Ahora sabe cómo dominar las confusiones y cómo generar de propósito desdiferenciaciones que puede utilizar en la ficción, en el chiste, en la ironía, etc (HABERMAS, 1987, p. 424-425).

Despite the greatness of his work and, in equal measure, the density of Habermas' text, the above text may be used as an example of the great hermeneutical turn Habermas takes examining the problem of knowledge. By stating that man constructs a fictitious reality over a real reality (allowing for the redundancy) which he cannot access, in the linguistic aspect, the author promotes the model of communicative action as the fulcrum of the foundations of knowledge of the things of the world. What we know about reality is the product of communicative interaction. Having established communication between subject and object, the representation of the object will have to be decided on. This would be the path between fact and validity. The object finds a condition for validity, after the fact has been constructed in the complex realm of human perception.

It is possible to state, therefore, that the theory of communicative action implies a communicative concept about knowledge itself. Said effort is taken in the case here elected, public interinstitutional cooperation.

There is no space here for other digressions about morality (for example), as a factor influencing the subject's thought. It is merely intended to refer the meaning of knowledge about the object in accordance with the theory of communicative action. And from there apply it to the case study already in pragmatic overlap.

The case study seems to contain an absolutely peculiar circumstance, enough to demonstrate with absolute clarity, not only the idea of communicative action there present, but the appearance of a new belief about its object, different to what had previously taken place.

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And said attitude represents an emancipation in the way taxation policy and county jurisdiction are exercised.

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4 THE IDEA OF PUBLIC INTERINSTITUTIONAL COOPERATION ACCORDING TO THEORETICAL PRAGMATIC OBSERVATION: A VIABLE EMANCIPATION

Having underpinned the working hypotheses and the concepts orientating the background question of this work, it is time to examine what is called the idea of public interinstitutional cooperation, through the application of the pragmatic matrix. This means examining the problem of the legal and political decision which gave meaning to the studied case, that is, the application of the pragmatic matrix in the observation of this situation in particular, with a view to recognizing an almost paradigmatic administrative act-fact, which superseded the common standards of public service.

One would ask, thus, how the pragmatic matrix observes this service at county-level jurisdiction, in which the traditional fiscal war would be the touchstone in the relationship enjoyed by the counties involved in the deal?

Preliminarily, it is important to justify the present examination according to said theoretical option. The choice represents a challenge given the complexity of pragmatic theory.

As Janriê Rodrigues Reck stated, examining the philosophy of language, there is no thought disconnected from language. There is no content for a rule, if not a semantic pact grounded upon shared human definitions about things.

> One notes that the production of knowledge (and the production of Law) is a complex process which involves the interaction of people amongst themselves and with their culture, through language. This becomes a key concept, once more than mediation is also a condition of possibility of any livelihood and of access to the world. The theoretical matrixes most often employed are already in conformity with this philosophical paradigm (RECK, [S.I.: s.n], a).

Given the said circumstance of scientific analysis, a judgement about the object will be formed, and consciousness of this fact changes the very rationality developed. Access to the world, therefore, changes. The matrix here chosen is a language chosen in order to observe the case transcribed at the start, to verify if there are important underlying questions that might serve as references in legal and political practice.

The pragmatic matrix helps one comprehend the phenomenon that took place at Cruz Alta, not only unveiling the political and legal administrative decision taken, but disregarding that within it resides human knowledge and choice about the act-fact practiced in that community and in conflict with those traditionally adopted.

But evidently, one does not intend to identify "the best possible knowledge", but to demonstrate as a true theoretical exercise viability and reasonableness. For such, if the adequacy of this scientific proposal is accepted, it will - in some degree - necessarily diminish the anguish caused by coercion, as Reck indicates. And as the author says, it is the quality of

the argument employed that avoids imprisonment and constructs the emancipation of the person through knowledge of the object.

Thus, it is stated that the choice of the theoretical matrix is directly related to the emancipation of the individual. The better the matrix, the greater the emancipation, for more coercion will be avoided.

In the hypothesis of this scientific article the collaboration of multiple counties of a specific region in Rio Grande do Sul, in order to overcome a common and frequent problem, creates an opportunity for the construction of knowledge.

By applying the pragmatic-systemic model, Reck teaches that communication becomes juridical as it entwines with symbols of the system, which corresponds to being capable of equality and validity:

> Communication becomes juridical as it entwines with the symbols of the system, that is, it must be capable of equality and validity. Even if, for Luhmann, the symbols do not have content, being mere representation of the movement of the system, the connection creates a little more precision by demanding the production of new operations of redundancy (that is, justification as to why communication observed by the Law may remain juridical). Communication must be capable of intertwining with the idea that it would hold for a generality of cases and with the idea that it would agree with the whole system. (RECK, [S.I.: s.n.], b)

As he explains, the intertwining of symbols (as in the case of juridical letters) produces new operations of redundancy, equivalent to the replication of legal knowledge possessed about a specific legal device, for example. Thus an article of the law is to me, as to many others, due to this reproduction in which communication has installed itself, but all on account of us deciding that it would be so.

It was exactly this exercise that took place in Cruz Alta in the resolution of the question regarding the distribtuion of the added ICMS, derived from the counties belonging to the milk-producing basin. Instead of waging a fiscal war among themselves, fighting over the company "CCGL", offering it benefits in detriment of the county and others, action was chosen based upon a new level of morality.

Nothing imposed the attitude undertaken in the north-west region of Rio Grande do Sul. To the contrary, the rules that discipline the subject matter of county jurisdiction (particularly in the Constitution) do not prohibit a county from negotiating a company's arrival directly with the company; their set-up and the concession of tax benefits with a view to future local development, principally through financial contributions derived from the added ICMS, are completely common occurrences.

It must be considered that each county's mayor has the duty of protecting the development of his county, his community, without any duty or even concern for other counties. They are responsible for the defense of public interest condensed within the limits of the territorial base of each county unit.

But this is not what happened in that place. Communication was established between local leaders, creating a decision in the political-juridical sphere, captained by a new, higher standard of morality which expanded the notion of common good.

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Returning to the chief question regarding the application of communication pragmatics, communicative action (founded upon the processual dictates of communicative reason) formed and conformed the public cooperation between the counties. As shown by Habermas, the choice was actualized by a rule better for all, thanks to the maturity of the interpreters. Their level of moral development permitted communicative action based on a new standard, which resonated on a regional level, evidenced by how all relevant counties abandoned the idea of conflict (using the mechanisms furnished by the tributary fisc) in order to join the collective proposition.

In the specific case of Cruz Alta, effort would have been even less, had it opted for fiscal war. It is the biggest county in the region, certain to win the dispute given the already existing possibilities and preference. To use habermasian language, the path between "factual coercion and legitimate validity" (HABERMAS, 2003, p.47) was taken.

There is plenty of security in the recognition of this case as an example fitting the pragmatic of communication. This constitutes an acceptable view, for what happened was that the social validity of the rule in county law that regulamented the deals was determined by the degree of imposition, that is, factual acceptance among the county mayors in the region of the milk-producing basin of Cruz Alta.

> The social validity of legal rules is determined by the degree in which they can be imposed, that is, by their possible factual acceptance in the midst of legal members. Contrary to the conventional validity of uses and customs, standardized law is not supported by the factuality of consuetudinary and traditional ways of life, but rather upon the artificial factuality of the threat of sanctions established in Law and applicable in court. (HABERMAS, 2003, p. 50)

This is the recognition that the concept 'world of life' from the theory of communication also breaks with the model of a whole made up of parts, Habermas concluding that the world of life is configured as a branched network of communicative actions which spread in social spaces and historical periods. This is what happened in the case study, when communicative action fed upon cultural sources, the legitimate system and the identity of the participating, socialized individuals, whose defining trait in the end is that they experienced true emancipation. The same emancipation which delights the author of the present work when it comes to affirming the pertinence of the pragmatic theoretical matrix based upon the case study (HABERMAS, 2003, p. 50-52).

Thus, the chief conclusion sought in the present work is anticipated, which is to say, that the factual event - as in the simplified example of the case - incorporates the three types of arguments taken for public deliberation: ethical, moral and pragmatic.

The related fact demonstrates that the most adequate ethical content was taken back up in order to represent the common good. The legal definition of common good which reduced it to the defense of local community interests was expanded into a model of regional defence based on cooperation.

In this path the moral reference (universal propositions) sustained the conscience that the usual model was and is wrong or distorted, damaging the common good in its most original conception, incorporating that which is named universality.

Thus, the pragmatic of communication inserts itself into this context as a possible technique for conflict resolution. In the study of the case Cruz Alta & "CCGL" the reverse path was undertaken, demonstrating that its whole itinerary incorporated pragmatic definitions, fundamenting cooperative public policy.

In conclusion it is still necessary to demonstrate the minimal understanding of the matrix here used, at the cost of not understanding its entwinings and unwindings, despite the use of some of its fundamental precepts. This is necessary, because "if the theoretical matrix was understood, it modifies the result of the work", as Reck explains ([S.I.: s.n.], a).

In the present case study the matrix was satisfactorily applied, having been experienced once it was understood that its fundamental postulates had been unveiled in the case of Cruz Alta. There was no limitation unto one mode of presenting work, save as a foundation for theoretical emancipation. Effectively the pragmatism of communication facilitated understanding of the phenomenon taking place in that region of Rio Grande do Sul, specifically when the happenings there were considered in the light of the theoretical postulates of the matrix. This means to say that the meetings, deliberations, decisions and attitudes that actualized the public interinstitutional cooperation in the sphere of public taxation policy supported themselves upon the postulates of communicative pragmatism.

With Reck, the specific concept about the matrix here chosen, to the end of supporting further the propriety of the realized incursion:

> This matrix has this name because, among the dimensions of analysis possible of language, it concentrates its studies within the pragmatic field, that is, in what language may serve as an instrument of understanding, or how intention functions in the formation of meaning (remembering that, for Habermas, meaning is formed out of a consensus where the intention of the speaker, the hermeneutic of the listener and the fulfilment of the games of language interact) (RECK, [S.I.: s.n.], c).

The foundation of the matrix is in language as an instrument for understanding the things of the world. The pertinence of this seems to flow from the eternal problem presented by classical philosophy, by which access to the object, or rather, to the things of the world, does not occur as it really seems to occur. The relationship between subject and object is traduced into a mental exercise in which the knower builds and rebuilds the observed object (the things of the world).

Recalling relevant aspects of the matrix and applying them to the case study, it emerges - given the inexistence of thought disconnected from language - that that group of people who managed public interest locally and regionally, created a new semantic pact (new definitions) in order to reshape the problematic reality.

The subject of local tributary jurisdiction, as regards the concession of exemptions, tax benefits or other actions attractive to businesses, suffered a meaningful reformulation from a new way of doing things able to sustain the recognition of a legal principle which, in turn, can sustain a new and interesting model of administrative behaviour among federal entities. It is the public interinstitutional cooperative model.

It seems evident that the theoretical matrix elected in the present study fulfils satisfactorily the desired emancipation, more specifically by permitting the universalization of knowledge about this human fact.

In other words, it permeates all the foundations of the case study in a generously clear way, running through all those acts carried out by those public agents responsible for the new administrative practice, which is seen as a rational foundation that can sustain the cooperative model in the format here praised.

There is a relationship of exchanges “to the end of justifying the principles for a political organization of the public authority according to the views of the theory of discourse”, as Habermas teaches (2003, p.211).

The extrafiscal nature of the tributes permits fiscal warfare among federal entities. Despite the dispute having touched upon the frontiers of administrative practice, in the region of Cruz Alta, in Rio Grande do Sul, political leaders in the involved counties promoted the examination of controversial rules, according to the principle of universality, which enables the search for a benefit which affects the greatest number of people. In the words of the aforementioned author, this concerns the regulamentation of coexistence according to the symmetrical interest of all:

> In *moral quesetions,* the teleological point of view, which permits us to face problems by means of cooperation focused on a specific end, disappears behind the normative point of view, by which we examine the possibility of ruling our coexistence in the symmetrical interest of all. [...] The principle of universalization obliges all participants of the discourse to examine controversial rules, serving themselves of specific *predictably typical* cases, in order to find out if they are able to locate the reflected assent of all affected (HABERMAS, 2003, p. 203).

One sees the evidence of the referenced acts of communication, in the exact measure in which the Law preceding the case (taxation rules or county and tributary jurisdiction) did not suffer alteration, nor even mitigation. The communicative standard based upon the universality proposed to benefit the greatest possible number of people, was decisive as the pragmatic model for emancipation in the handling of the question.

CONCLUSION

In conclusion it is pertinent to note that the proposal met its objectives. It was possible to apply unto satiety the pragmatix matrix upon the case study, given how the idiosyncrasies that surrounded it allowed its complete submission to the chief postulates of the matrix.

Thus, it serves the present as proof that the study of the topic of public interinstitutional cooperation, based upon said theory, is absolutely possible, which permits and demands future studies in its defence.

The pragmatic scientific conception permitted the understanding of the phenomenon examined as the case study, in such a way as to delineate with greater clarity the self-limits sought by the phenomenology of knowledge, permitting the reexamination of various devices created by man, such as language, politics and law, an occasion in which its realities, positions and possibilities emerged abundantly clear, fulfilling the intended goal of emancipation.

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BLOCKCHAIN OF CRYPTOCURRENCY AS AN ECONOMIC-FINANCIAL TOOL IN THE SERVICE OF BIOPOWER

BLOCKCHAIN DAS CRIPTOMOEDAS COMO FERRAMENTA ECONÔMICO-FINANCEIRA A SERVIÇO DO BIOPODER

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ABSTRACT

The development of *blockchain technology* has *brought great challenges to the field of legal sciences, especially regarding the need to regulate its use. The objective of this study is to analyze how blockchain, specifically* used *in cryptocurrencies, can be instrumentalized by biopower to influence the economic-financial order. In the search to fulfill the general objective traced, from a documentary research, exploratory and analytical-descriptive, adopting the deductive method, the article will present brief notes on the functioning of the blockchain technology to, then discuss* its relationship to Foucault's governamentality and its regulation as security devices. In the end, it is argued that the regulation of the use of blockchain in cryptocurrencies may be the appropriate way for the full fulfillment of constitutional precepts related to the economic order.

Key words: Biopolitics. Economic Order. Technology. *Blockchain.* Cryptocurrencies.

RESUMO

O desenvolvimento da tecnologia de blockchain tem trazido grandes desafios para o campo das ciências jurídicas, em especial quanto à necessidade de regulamentação de seu uso. O objetivo do presente trabalho é analisar como o blockchain, utilizado especificamente nas criptomoedas, pode ser instrumentalizado pelo biopoder para influenciar na ordem econômico-financeira. Na busca de cumprir o objetivo geral traçado, a partir de uma pesquisa documental, de cunho exploratório e analítico-descritiva, adotando o método dedutivo, o artigo apresentará breves anotações sobre o funcionamento da tecnologia blockchain para, em seguida, discutir sobre a sua relação com a governamentalidade de Foucault e sua regulamentação como

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dispositivos de segurança. Ao final, defende-se que a regulamentação do uso de blockchain em criptomoedas pode ser o caminho adequado para o pleno cumprimento dos preceitos constitucionais relacionados à ordem econômica.

PALAVRAS-CHAVE: *Biopolítica. Ordem Econômica. Tecnologia. Blockchain. Criptomoedas.*

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1 INTRODUCTION

Technological developments and societal transformations have always brought great challenges to the legal sciences since, by innovating in the factual field, ultimately require legislators and enforcers of the deep right to examine what legal and normative treatment will be accorded to them. If in the past these factual innovations occurred in a spaced and relatively slow way, in recent years they have acquired an incredible speed, amplifying the challenges in the legal world.

Among such innovations, it is interesting for this article the emergence of blockchain*, which can* be conceptualized as a digital chain replicated blocks of public information and freely fed, successively encoded and decoded in cryptographic formulations that would be so complex as to ensure the data chained safe transit. It is P2P communication technology (peer to peer*), marked* by great reliability in the transmission of encrypted information. Among its many applications, one that has gained the most prominence is related to cryptocurrencies, such as bitcoin.

At first, the use of blockchain *in cryptocurrencies* conveys the feeling that a parallel financial system and economic order are *being created, independent of legal and official systems. This sensation is intensified in the face of the lack of information on the subject, because most people do not even have enough knowledge to understand the characteristics of the cryptographic technology, its functioning and applications. Moreover, blockchain* is *conceived, in a way that seems to us to be mistaken, as a kind of resistance to the neoliberal capitalist regime, as if it were something neutral. All these uncertainties in relation to the theme justify its analysis in a more detailed way, in particular to verify whether initial impressions about the use of blockchain in cryptocurrencies* can really be confirmed or should be reinterpreted.

In this sense, the problem that is intended to be analyzed in this article is whether the use of blockchain in *cryptocurrencies should* be regulated, either in a specific way or by the application, by analogy, of general rules applicable to other financial assets. The hypothesis that will be maintained is that the principles enshrined by the Federal Constitution of 1988 for the economic order do not allow the full adoption of a neoliberal economic model, which is why it would not be possible to use blockchain in unregulated cryptocurrencies.

Thus, from a documentary research, exploratory and analytical-descriptive, adopting the deductive method, the general objective is to analyze how the blockchain, used *specifically in* cryptocurrencies, may be instrumentalized by biopower to influence the economic-financial order.

To achieve its general objective, the work will start from a brief presentation of notes on the functioning of the *blockchain in order* to explain *how it is used by cryptocurrencies, to,*

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later, correlate it to Michel Foucault's liberal governmentality and biopower, demonstrating that, unlike being a tool of resistance, the use of blockchain by cryptocurrencies can be conceived as a new neoliberal prudencialism. Finally, the article is dedicated to demonstrating that both the blockchain and its regulation can be designed as security devices to influence the economic-financial order.

2 "BLOCKCHAIN": BRIEF NOTES ON HOW IT WORKS

At first, we should emphasize which characteristics draw the most attention to the paradigm that we propose from this very new mechanism and that are, in our view, capable of challenging social conformation. Currently there is great media hype projected on the theme, generating great conceptual confusion. The *blockchain,* "current block technology" or just "block technology" has been around for longer than anyone thinks, from a message signed and distributed by e-mail under the pseudonym Satoshi Nakamoto in 2009 (PIRES, 2016, p. 14).

However, since its inception, the use of the system has only become known when it served as the basis for the implementation of the so-called digital coins (unmistakable with the block being only the most famous means of its use). As revealed by Timoteo Pimenta Pires (2016, p. 26):[4]

> Blockchain is an immutable, public, and distributed chain of records. Jail because the records are carefully chained to each other through public keys, entrances and exits. Immutable because once the record is inserted into the string, it can no longer be changed. Public because the only condition necessary for a citizen to have access to blockchain records is that he has access to the internet, and distributed because this chain of record is not stored on a single central server, on the contrary, it is replicated on millions of machines distributed all over the world and no company or individual can claim ownership of these records

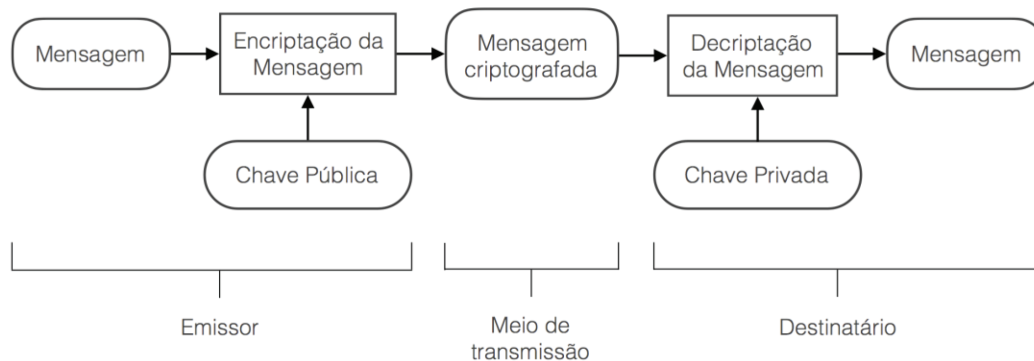
There are technical conditions to make the system viable in this way. The basic tool for its operationalization is already widely known in the legal practice: the digital signature. Despite all the complexity of the system, even so, the port of entry and exit of the information that are released in the system consists in the identification of its users through the electronic rubric Otabilizada, so common nowadays in forensic practice.

The mechanism is simple. The initial user, carrying a private key, launches an encrypted information, that is, written with unique data that can only be read (decrypted) by another key (usually public when it comes to information covered by the Brazilian Public Key Infrastructure). The information, in turn, when arriving at the public key can only be revealed by those who hold another private key that again decodes the public key, recovering then the signature

4 É muito comum confundir o *blockchain* com a tecnologia das moedas digitais, quando na realidade são coisas diversas. A moeda digital apenas adjunta o sistema *blockchain* como base eficiente para realizar suas operações *peer-to-peer* (P2P), ou seja: assegurar e tornar possível de forma segura que o portador da moeda realize seu câmbio, pessoa a pessoa, afastando-se da lógica distributiva tradicional servidor-terminais. Os usuários se conectam em nós (entre si) por um emaranhado de terminais eletrônicos.

released by the first user at the beginning of the process. The figure below demonstrates how public key cryptography works, the first step to blockchain development:

Figure 1: Public Key Cryptography



Source: PIRES, 2016, p. 17

As you can see, you can't release information into the system without authorship. And beyond authorship, what is desired is to verify the authenticity of the signature, a task that the digital signature fulfills satisfactorily, as already revealed in its forensic use and in other means. It does not matter, on the other hand, the secrecy or protection of the information circulating through the block. If the signature affixed by the issuer is authenticated, the information released is essentially public and can be accessed by all.

But here lies a relevant differentiation with the practice of digital signatures in conventional media. In the *blockchain universe*, *the use of digital signature is tremendously more complex. While in the common electronic media, the objective is to verify now the signature of the issuer, sometimes (optional and possibly) the signature of* the recipient, in *the* blockchain the *checks* of signatures occur in frenetic regime (typical of digital speed)making blockchain an even more reliable P2P (peer to peer) communication solution.

In order to allow the intercommunication and validation of the information in each block, the system is responsible for a continuous, cyclic and perennial verification of the set of signatures that validate the blocks in their *previous chains until arriving in the system's mobile system,* which *was intelligently designated by engineers* as the Genesis block *(evidently valid for* the most well-known system in the present-day blockchain bitcoin: mined on September 1, 2009). This is an essential task for the maintenance of system operations, as shown below:

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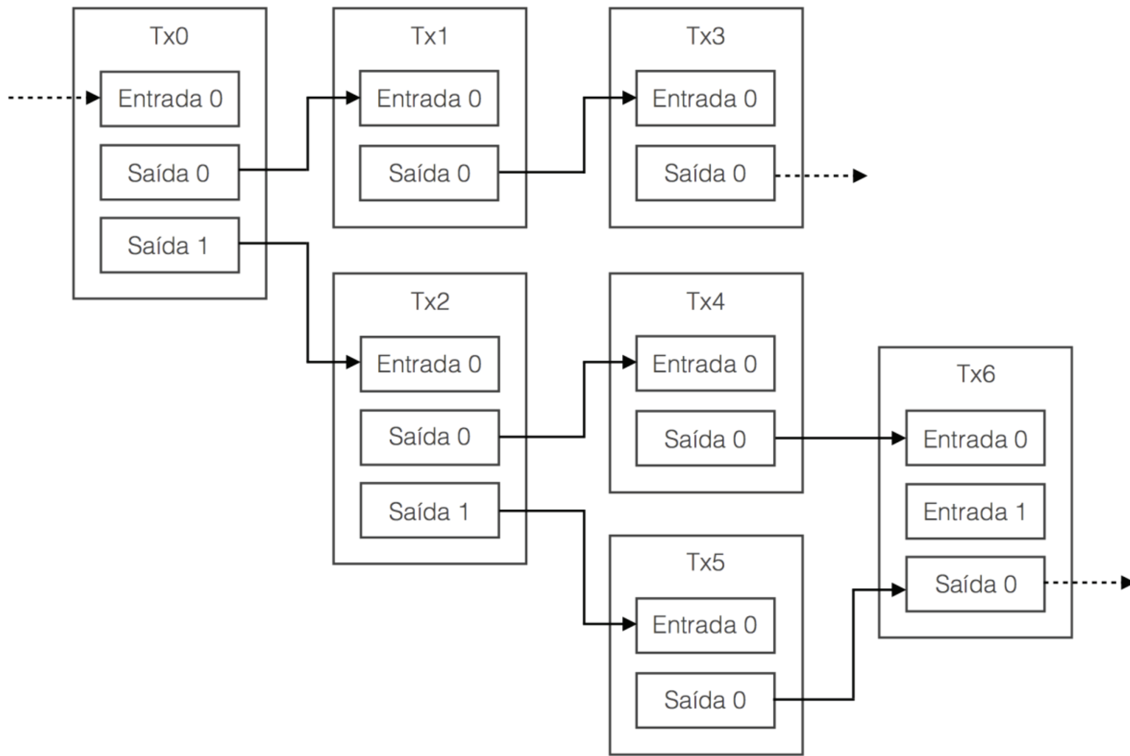
Figure 2: Chain transactions in the blockchain



Source: PIRES, 2016, p. 28

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Each operation finds resonance in the Genesis block, but the return task is only accomplished with the validation of the incoming and outgoing digital signatures:

> [...] when entering a public key on the exit of the transaction (or a hash of the transaction), only the holder of the corresponding private key will be allowed to use that output. In the transaction validation process, the public key reported in the Input field is compared to the public key previously entered in the output. If they are different, the transaction is considered invalid and is not propagated to the other network nodes. If they are equal, the signature entered in the Input field is checked with the previously confirmed public key. If the signature is authentic, that is, if the decryption with the public key reveals the hash of the transaction data, then the transaction is validated, replicated to the other network nodes and collected en bloc for mining. (PIRES, 2016, p. 29)

It is therefore apparent that all the substantial consistency of the so-called virtual currency is in reality tied to continuous encoding and decoding, whose lengthy and countless occurrences end up generating an increasingly sophisticated cryptography with an increasing capacity to hinder its mathematical solution. And this is where the main (and most nerve-wracking) begins, in our view, the system's touch on social reality: who operates the resolution of mathematical questions? who are the system operators? Always computers and only computers?

In reality, the *blockchain works* from a hidden operator who, having as a working instrument computers of high processing capacity, takes care to decrypt the information of the block, according to the schemes illustrated above. In advance, therefore, it is necessary to fix the premise contrary to the common observations in the media and even in brief academic

digressions that credit blockchain with an intriguing "*autopoietic*" ability, meaning that the block system would be an automaton organism, independent of intermediaries.

The understanding of the mechanism present in the blocs reveals, therefore, that the traditional monetary system does not dispense with an operator, nor does blockchain dispense with *operators*. Miners are the essence of the existential and economic viability of the blocks. The *blockchain,* therefore, closely sports an economic logic such as the traditional system, albeit of a peculiar nature.

3 FOUCAULT GOVERNANCE AND ITS RELATIONSHIP TO CRYPTOCURRENCY TECHNOLOGY

Through a lecture given at the Collége De France Course, on February 1, 1978, Foucault explained how one of the central tenets of his thought historically emerged: "governamentality" (FOUCAULT, 1979). He deduced the concept from an explanatory historical digression about the understanding of the mode of government of the States, between the sixteenth and eighteenth centuries, all linked to the conceptual tripod that involves security, population and government. For the author, in a certain period of the Middle Ages (before the sixteenth century), there were already treaties devoted to the teaching of the way of exercise of power by the prince, but it is from the sixteenth century that come to appear treatises on the art of governing (government techniques) (Foucault, 1979).

The ideas exposed are many and the text, although short, is extremely dense. An idea presented in the lecture draws attention, because it synthesizes the author's global thinking and demonstrates his philosophy of situating institutions, people and other social structures as means for the exercise, maintenance and control at the service of power. When talking about the variations in the role of family and population in the analyzed period, Foucault reveals an intelligent and intriguing finding. Before base and raw material, and confused with the very existence of the population, the family, with the emergence of new technologies to govern, begins to be perceived as also an instrument at the service of power. There are several causes for this displacement, all worked with precision throughout the text, but what matters most is that, without its members realizing it, the family structure became a stronghold of instrumentalization of power. Foucault reveals: "[...] insofar as, when one wants to get something from the population - as to social behaviour, democracy, consumption, etc. - it is for the family that one should pass. From model the family will become instrument" (FOUCAULT, 1979).

The same is true of the population that was previously only a fundamental constituent element for the existence of the state and the justification of a government. From Foucault's analysis, however, it is revealed that the population itself also, without the slightest awareness of this fact, became an instrument for the exercise of power. In an intelligent phrase, Foucault reveals the phenomenon, going on to indicate the population as "conscious, in front of the government, of what it wants and unconscious in relation to what it wants to do" (FOUCAULT, 1979). And as the phrase indicates - and therein is revealed the genius of the author:

the instrumentalization of the population takes place through movements of the population itself unconsciously, ie: “unconscious in relation to what you want it to do” (emphasis added).

Starting, therefore, from the research of this important period of transition from the absolutist state to the bourgeois state, Foucault identifies that power has ceased to be transcendent (as something immaterial and justified from the outside to the inside) to become immanent (something internal, concrete and with an end in itself). From this distinctive trait is born the classic differentiation made to observe that the immanent power controls the individual in much broader aspect than in the practice of transcendent power. While for the absolutist State the logic was to “let live and cause to die”, in the bourgeois liberal State the primordial was to “make live, let die”. (MÉDICI, 2011, p. 59):

> For Foucault, if it produces the novedad de la emergencia de la tecnología biopolítica del poder a partir del siglo XVII/XVIII. With regard to what, Istinción griega who celebrated himself through The Politics of Aristotle, between bios (la vida de la Polis, cualificada políticamente, del zoon politikon, como búsqueda del Buen vivir), y la Zoé la mera vida natural que es común al hombre y a otros animales, deja de tener sentido: bios y Zoé se entremezclan en la medida en que esta última es crecientemente objeto de políticas de Administración de la vida. La gubernamentalidad, a diferencia del poder soberano de carácter disciplinario que «hacía morir y dejaba vivir», teniendo en el ritual de exhibición sacrificial de la muerte infligida como castigo, el espectáculo por el que se afirmaba su soberanía, deja paso a la «biopolítica» en el que el principio se invierte: ahora el poder «hace vivir y deja morir»

This binary element is extremely important because it reveals ways of exercising power in a society which is still extremely useful today. It can be said, without fear, that the modern state follows the formula of “making live, letting die” to the letter. The curatorship and internment, prisons, public health campaigns and social sanitation are just some examples already decennial or centennial. The most important, however, is to note that very new technologies end up revealing the same content of the old microphysics of the Foucaultian power, although decorated with libertarian garments. For the sake of terminological coherence, we conclude that for the present work we use biopolitics and biopower as imbricated concepts, in the sense of constituting that environment necessary for the exercise of this. In this sense:

> It is true that today the first position has prevailed, with the adoption of biopolitics as a set of biopowers that are exercised over people in order to convince them to adopt this or that social practice, without concern for the emancipation of society or the development of people’s potentialities. By way of example, people are convinced to buy a particular product and exchange it as soon as a new version is released, as if the ownership of such a good is the only way to ensure personal satisfaction. (SERVA; DIAS, 2016)

In spite of the position of authors who admit biopower and biopolitics as hypothetically separable concepts, there seems to be no reason to think this way in relation to blockchain. From such premises, it is possible to begin to determine that in Xsxs cryptocurrencies there is a clear component of what we can call “liberal governmentality” and later “neoliberal governmentality”. Médici (2011, p. 67) situates this kind of “governamentality” in the economic context, with clarity and precision:

> El laissez faire del liberalismo clásico no equivale a un abstencionismo gubernamental: el estado debe adoptar las medidas necesarias para permitir que economía, población y sociedad se autogobiernen a partir de su propia

> dinámica interna. Aquí se emplazan todas las reflexiones que enfatizan el nexo entre población, producción y riqueza de Adam Smith, David Ricardo hasta Bentham y Malthus.

Foucault's thought in the liberal context is intriguing and revealing, because it is characteristic of the laissez faire economic model contrary to its own founding reasons, originally conceived in the thinking of Adam Smith. In reality, the reasons that liberalism so strongly supports the freedom of individuals about their choices is nothing more than a reinforcement for the even more sophisticated exercise of biopower:

> De ahí que las técnicas de la gubernamentalidad liberal, insisten en coordinar indirectamente la autonomía de los gobernados, en sus procesos de subjetivación y en las tecnologías del yo. La supervisión directa del estado es substituída por la "acción a distancia" que se apoya en el «cuidado de sí» de individuos autoresponsabilizados. (MÉDICI, 2011, p. 67)

Liberalism is therefore born as a project of strengthening the subjectivity and self-responsibility of individuals, founding even more complex mechanisms of activation and maintenance of the biopolitical network conceived by Foucault. And the nature of this process is, as it turns out, primarily economic in nature and continues to be, although now with the aid of power devices reinforced by technology. And it is important to say: the sophistication and power-spraying capacity are not exhausted in the liberal moment. Historical events are especially interesting because they led, at the same time, to the emergence of a radically reformulated liberal model, commonly called neoliberalism.

The liberal economic failure - symbolized maximally by the crash of the New York Stock Exchange in 1929 - created the propitious moment for the diffusion of interventionist economic concepts of socializing aspiration (DIAS; DUE, 2018, p. 214). John Keynes built the foundations of a new mode of government with his paradigmatic work "General Theory", weaving considerations on the need for state action to create ideal conditions of income, consumption and, consequently, foster investments (HUNT; LAUTZENHEISER, 2005). It occurs, however, that even the Keynesian-inspired social model experienced structural economic difficulties for the governments that adopted it, creating the ideal climax for the return of liberal thinking now heightened and even more encampador of biopower mechanisms:

> In the early 1970s, the capitalist economic model began to show signs of economic instability and an accelerated inflationary process. These factors led to the rise of the neoliberal theoretical model, because, according to its conception, the origins of the crisis were the excessive control of the state in the economy. [...] an ideological movement has been conquering space worldwide, neoliberalism. This model of political and economic orientation, which constitutes the political expression of globalization, is characterized by an opposition to the interventionist state and social welfare. (FERRER, 2001)

The adoption of the neoliberal model was even so striking that it brought with it a marked difference from classical liberalism. Now much more than ensuring a free environment for subjectivation and self-deception, it is up to "governamentality" to fabricate realities. As noted by Medici (2011, p. 70):

> Pero a diferencia del liberalismo clásico, que consideraba que simplemente había que liberar la realidad natural del homo oeconomicus y del mercado, la gubernamentalidad neoliberal es constructivista: se trata de una realidad

> que hay que fabricar. Para los sujetos del neoliberalismo el interés en la propia realización personal, su capacidad de elección, sólo pueden brotar en un entorno adecuadamente construido y programado.

The main idea is to promote conditions for the development of a self oriented individual for individual entrepreneurship. Among other factors, it lies on the human being and demands from him - in these new spaces - the foundation of an entrepreneurial being. As noted by Medici (2011, p. 71):

> En primer lugar, la empresa se transforma en un modelo que se expande a la gestión de la propia vida. Este dispositivo no aparece justificado solamente en logros materiales como la ganancia y la riqueza, sino también a partir de valores «espirituales» [...] Para enriquecer espiritualmente el propio yo, para obtener beneficio y equilibrio afectivos en la familia o en el trabajo, para dar forma a un estilo de vida auténticamente personal, es necesario hacer de la propia vida una vida de empresa.

Blockchain, by the manifestation of cryptocurrency, brings together the essential characteristics of "neoliberal governance". In our view, the blocks embody in individuals a clear idea of "being entrepreneurial". The operative subjects of the block, whether in the condition of brokers, investors or miners, undoubtedly act in order to become production plants of themselves. In this first aspect, in fact, we cannot fail to mention the energy factor involved in the processing of data in the blockchain's encrypted information chain. Electricity consumption for data processing by miners is very high (UMLAUF, 2019), to the point of making mining impossible in countries with scarce sources of electricity or whose final cost of the "kilo" or "terawatt" is prohibitive in relation to the economic advantages provided in mining (JAKITAS, 2017). Some reports point out that the average consumption of all computers connected in mining activity easily reaches 30 terawatts/hour, equivalent energy to put into operation, for a year, a country like Ireland, for example (JAKITAS, 2017) Medici also presents as the second element present in the "neoliberal governance" the creation of new artificial markets. The goal would be to "foster individual self-responsibility". This creative process would, in turn, be due to the privatization or decentralization of markets or processes that would lead to the use of the market. According to Medici (2011, p. 71): "When public services are not privatized if they are decentralized and if they require economic sustainability and functioning according to criteria of efficiency, efficiency and profitability".

Here again is the technology of digital coins. Note that it is from the creative genesis of the "blockchain" in its "monetary" representation, at one time, if possible, decentralize and privatize. The exchange rate of the values transmitted by the blocs does not depend on any sovereign government either in terms of their operation or in terms of regulation. Medici also advances to a third characteristic of the "neoliberal governance" which, in our view, correlates very much with the genesis of cryptocurrencies. It is what the author calls "a new prudencialism". The primary idea is to detach the needs of the individual through the State. The new "prudencialism" clearly represents the neoliberal nature of this new "governamentality", which now demands a clear divorce mechanism with the classic vertical welfare relationship of the Welfare State. Primarily, the prudence of the neoliberal subject must focus on obtaining, in the artificially created "free" spaces, the necessary foresight for the satisfaction of all their present and future needs. In the face of this implacable need, how would it sound to enable these new "subjects of self-management" to compose a completely free monetary order? In

response to the reflection, it seems that the "cryptonetic" environment more properly represents the ideal aspiration of a "bioempowered" citizen.

4 BLOCKCHAIN AND ITS REGULATION AS SAFETY DEVICES

All the cynical and maximally invisible power of the Modern State - seen from the historical disruption we present - is only possible, of course, because efficiency mechanisms authorize it. Foucault calls "safety devices" the set of technologies that enable micro-physical power. According to Medici (2011, p. 60), the devices would be:

> [...] una retícula de saberes, poderes, disciplinas, normas morales y jurídicas, reglas, trozos y retazos de discursos de distintos géneros, articulados de forma estratégica y flexible para responder a la necesidad de producir efectos de poder.

For the universe of law, moral and legal norms are of particular interest as relevant devices for the identification of the framework of real interests of the State. For example: for those who pay attention to interdiction and curation, many of the concepts, from Foucault's criticism, can help to deeply revolve dogmatic categories of civil law (e.g. it is enough to observe how the new paradigm of the person with disabilities changed the legal panorama of the private codification). But not only through standards is a safety feature manifested. Other knowledge also fulfills this role, such as statistics, research and campaigns, especially nowadays with the massive spread of new technologies. Blockchain technology and its primary application by virtual currencies is new, but the concept of its operating structure is not so much. Its organization, as we have seen, has great similarity with the founding ideas of the liberal economic system, bringing cryptocurrencies closer to the ideological motto of the so-called Austrian School (VAN DER LAN, 2014, p. 05) which, in turn, constitutes a line of thought strongly identified with the current neoliberal policy (GROS, 2002, p. 75). Observed the identification of blockchain technology with the historical moment of the emergence of "neoliberal governamentality", we begin to demonstrate how, through it, biopower is effectively exercised. First, in the intriguing idea of qualifying the individual in the measure of the spiritual transformation of his "self" into an entity of business production, in the sense of Medici (2011), a renewed security device manifests itself. In reality, at the heart of Bitcoins production, the value estimation of each unit of currency is transformed into a serious speculative mechanism that, like any other, finds behind its scenes the cunning cynicism of biopower. The great difference that the Foucault reference reveals is that the active participants of the block do not realize it. They would be engrossed by the idea that they control their own destinies as entrepreneurs of themselves when, in fact, they are serial mechanisms of a cynical "governmentality" by nature.

Still, regarding the "governamentalist" characteristic of the creation of fictional markets (MEDICI, 2011), the empirical structure of the block itself fits the concept. Now, the essence of the "cryptocurrency blockchain" is in fact the creation of an alternative financial path parallel to the traditional economic domain. Moreover, the entire essentially private and decentralized network of the bloc would support the opposite of its

purposes. At the reversal of freedom and the emancipation of virtual currency in relation to power, deregulation would mean the facilitation of the influxes of biopower. Again the idea is to make believe in the independence and emancipation of technology so that its users keep it active and serving the purposes of reproduction of a "Biocapital". In the new prudencialismo that we point out as being one of the elements of the "neoliberal governamentality" (MEDICI, 2011) - very present in the "blockchain" - we see once again the classic elements of biopolitics and biopower of Foucault. From all this it follows that by the operational exercise of the Xs cryptocurrencies the serious effect of making unnecessary, in the intimate of each individual, to debate other possible forms of rupture with the circulating biopolitics, especially those of economic-financial character. In the "cryptomonetary blockchain", therefore, the dialectical soul of the subject is completely absorbed by the convictions of his "corporate self", busy in unraveling the technological wonders of these new virtual fields and with serious concerns about his new prudential role. Not by chance, the identification of cryptocurrencies with this clear biopolitical profile amplifies the reflection, and the relationship "biopower-regulation" assumes importance even in the reflection of economists like Chemalle (2017, p. 4-5) for whom:

> In other words, while the practices of freedom evolved along with technology, the effectiveness of the power of control also did. Michel Foucault reminds us in his work "Watch and Punish" (2013) that the same lights and clarifications that brought technological advances, and consequently freedom, also invented the forces of discipline and control. Even with the initial purpose of horizontalizing the relations around the use of currency, Bitcoin, to become widely accepted as a de facto currency, will continue to be subject to constant forms of supervision and regulation. Perhaps the ideal of a coin entirely detached from the central authorities is nothing more than a platonic love, or a libertarian dream.

Emancipation by virtual monetary practice is therefore not assumed but only assumed. The visit to the modern and quality references reveals that alongside the propagated freedom and disruption of virtual coins emerge parallel and necessarily formidable serviceable elements to biopower, because, as observed, blockchain resembles many other technologies boasted as disruptive and liberating. As we have seen, the bloc is attributed an ability to unite people directly by the logic P2P (peer to peer) being apparently absent from the chain, therefore, the representation of any institutional power, and one of its main uses is related to cryptocurrencies, especially bitcoin. The monetary expression circulating through the mathematical logic of the successively "mined" information chains would also forego any regulations and fluctuations in the course of the "virtual currency" would, in turn, be corrected naturally by the natural interest of their possessors. Playing with words, the system would be a "crypto-mythical laissez faire" and all these features make the technology touch the legal system. However, Bitcoins challenge the economic order (article 170 and following of the Federal Constitution) as well as the financial-monetary system (article 163 and 164 of the Federal Constitution), directly affecting constitutional principles and precepts instituted there and reason for being normative that discipline an already series of strained relations and social expectations.

As for the legal feasibility, it is necessary to question, first, the scope of cryptocurrencies, fitting a small digression. Decentralized and deregulated monetary systems, contrary to what

can be imagined, are nothing new and have no historical advantages compared to regulated monetary models. Van Der Lan notes that, at certain historical moments, non-institutional models provisionally prevailed:

> Indeed, centralized issuance has been the rule of contemporary societies, with economic history showing to have supplanted earlier deregulated systems of multiple monetary issuance by private banks - the free banking model. The very social demands of the post-1929 period proved necessary to prevent the continuation of totally free and unregulated banking systems, leading to the creation of central banks as a rule in modern economies from then on. The government guarantee to the banks has become crucial for the monetary systems to operate at lower risk than the banking counterparty (VAN DER LAN, 2014, p. 09)

Still in this line, the essentially neoliberal character, identified not only by deregulation but by the fluid nature of the virtual environment of cryptocurrencies, at least in the Brazilian context, demonstrates, contrary to what its advertisers defend, more potential problems than durable solutions:

> Risks inherent in new monetary arrangements, outside the regulation of the state, make the broad use of new currencies a difficult task. By definition, the existence of a competitive market for virtual currencies, in place of a single sovereign currency, presupposes that there is no predominant currency, which compromises per se your life expectancy - and the very ability to universalize only one as a monetary standard. (VAN DER LAN, 2014, p. 10)

Especially in the virtual environment, the expected competitive effects of this new fictional universe charged by the expectations of governamentality suggest a number of immediate to medium- and long-term problems. Still telling us about Van Der Lan (2014, p. 10):

> This is most true in the virtual sphere, where competition is implicit, for the freedom and decentralization of communication through the Internet itself. Nothing guarantees that one very liquid currency at a given time and place will not be replaced by another, in a competitive process, and may even be disregarded, in the future, as a currency per se. It is entirely plausible to assume that a new virtual currency will emerge with more technological advantage than bitcoin. From there it would become just another unit that, as in the past, has already been used as a monetary asset.

It is difficult to maintain, therefore, that virtual currencies would boast any elements of superiority as an economic and financial model differentiated from what currently regulates the Federal Constitution. Moreover, the similarity of the bitcoin system with the extremes of the neoliberal system reveals a situation of difficult conciliation with the economic and financial constitutional system. This is because, although it has adopted the capitalist economic model, at the same time our Constitution has raised to the first greatness so many other values transcendent to Capital, which prestige the development of life in the social environment. Stresses Eros Grau:

> Can this economic order be the object of dynamic interpretation, which allows its adaptation to the changes of social life - and so that, configuring itself as a dynamism, in the future, of real life taking the forces on which it depends so that it is alive, it is adequate to social reality? (GRAU, 2011)

In no way does the Constitution encompass a pure neoliberal economic model. As Eros Grau explains: "[...] the Constitution being a system endowed with coherence, one does not presume

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contradiction between its norms" being absurd to assume "[...] that there are, in the 1988 Constitution, two economic orders, one neoliberal, another interventionist and dirigista." (GRAU, 2011). It is, therefore, of the semantic essence of the text that not only norms, but any economic practice that conflicts with this principle apparatus, ends up challenging the constitutional order (GRAU, 2011). Thus, the constitutional text, while admitting the capitalist order and some principles aligned with neoliberalism, does not seem generally compatible with a neoliberal agenda. It seems incompatible, therefore, the existence of a mechanism of apparent reflux of the "neoliberal governamentality" with the prospections of the constituent. In this sense, the lack of regulation of the theme has already led the Superior Court of Justice to judge legitimate the conduct of financial institution in closing current account maintained by cryptocurrency brokerage (BRAZIL, 2018):

> SPECIAL REMEDY. OBLIGATION TO DO ACTION. THE CLAIM DRAWN UP BY AN INTERMEDIARY UNDERTAKING BUYING AND SELLING VIRTUAL CURRENCY (IN THE CASE OF BITCOIN) TO OBLIGE THE FINANCIAL INSTITUTION TO MAINTAIN A CURRENT ACCOUNT CONTRACT. TERMINATION OF CONTRACT, PRECEDED BY REGULAR NOTIFICATION. LAWFULNESS. IMPROMPTU SPECIAL APPEAL. [...] 4.1 Far from being abusive, the refusal of the financial institution to maintain the current account contract, used as an input, in the development of the business activity carried out by the applicant, is legitimate from an institutional point of view, intermediation of buying and selling virtual currency, which does not have any regulation of the National Monetary Council [...]

This decision was eventually adopted as a parameter by other banking institutions to carry out the closure of accounts maintained by cryptocurrency brokers, in a practice that can be considered discriminatory (MOURA; OLIVEIRA, 2019). One of the solutions to these problems generated by the lack of regulation would be the possibility of framing cryptocurrencies as a unit of speculative value, categorizing them, perhaps, as one of the kinds of securities contained in Law 6,385/76 or even regulating themby specific law. However, there is no indication that regulation (even by subsumption to a legal type already in force) will do anything other than "cryptocurrencies" to capture them for use and hegemony of traditional biopowers.

And if it is true that the legal framework of bitcoin would make cryptocurrency a certain instance of biopower concentration, it remains difficult, on the other hand, to assess whether a given autonomous framework or regulation would make it more or less susceptible to the exercise of biopower. In any case, through the adopted framework, it seems more consistent to admit that the path towards a regulation attentive to the observance of the principles circumscribed in Articles 163,164 and 170 of the Federal Constitution has a greater advantage. Regulated, the "cryptocurrency blockchain", although captured in part by traditional biopolitics, would at least enable the rediscussion of its assumptions through the consensual channels that the democratic state itself typifies. On the other hand, the complete lack of regulation seems to us more worrying, because, without parallel control mechanisms, the system would be irreversibly subject to biopolitical influence.

7 FINAL REMARKS

The blockchain, in the modality that materializes cryptocurrencies, seems to realize a well-defined plan of "neoliberal governance" authorizing the fluidity of biopolitics, because, internally: a) it fosters the idea of the individual as a centered ego production plant, a "corporate being" quite in itself; b) structurally represents the creation of a new virtual and, so to speak, artificial market; an extra space for the reproduction of biopower in the conception of its enlargement by the neoliberal biopolitical strategy; and, finally c) reveals the face of a new "prudentialism" by the search for individuals who automatically and docilely are sufficient or responsible in themselves as regards both the current and sufficiently far-sighted means of survival as to the future. It reveals, therefore, the blockchain system, in what concerns cryptocurrencies, as well as other new technologies, a means for the exercise of a very sophisticated, subtle and capillarized economic-financial biopolicy. The pillars on which the system was built (whose authorship is anonymous) play the role of channeling the energy of individuals to an eminently speculative base gain, with the aggravating belief that without the usual intermediaries, represents the system a form of disruptive emancipation. As such, by announcing a general idea of utility, it ends up making real discussions about effective emancipation in relation to traditional biopolitics and biopower, especially those of a financial nature, unnecessary. Without ballast, what seems to price the currency is the disposition of those who, in the next operation, will be willing to pay more for it. Pricing becomes an economic mechanism of gain and loss even more focused on neoliberal extremes than the traditionally known stock market, for example. Finally, for the economic-financial legal scenario, the following findings result: a) as a currency there seems to be no legal basis that accommodates "bitcoin" among the constituent's prescriptions; b) the existence or not of regulation does not remove the intimate link that exists between the "crypto-criminal blochchain" and the biopower, which may vary only, in one case and another, in intensity; c) the framework in current securities legislation or its specific regulation, on the other hand, seems at least to allow the system, although partly captured by traditional biopolicy, can still be rediscovered by the consensual channels that the democratic state itself typifies.

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LAW, INNOVATION AND TECHNOLOGY: ECONOMIC ANALYSIS OF FINTECHS

DIREITO, INOVAÇÃO E TECNOLOGIA: ANÁLISE ECONÔMICA DAS FINTECHS

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ABSTRACT

This article makes a legal and economic study of fintechs, which are entrepreneurial companies, usually startups, that operate in the financial market, through the methodological tools of the Economic Analysis of Law. The overall objective is to demonstrate the interaction between fintechs and economic analysis of law. The specific objective is to demonstrate the usefulness of fintechs to reduce transaction costs for their users, from the perspective of Economic Law Analysis. In this sense, the problem to be answered is how the use of fintechs can specifically contribute also to reduce transaction costs, making financial operations faster and more efficient. To arrive at the hypothesis of answer to the problem, the methodology to be used is the purpose of applied research, with exploratory research, in qualitative approach, by inductive method, through bibliographic research, all specialized on the subject.

KEYWORDS: Economic Analysis of Law. Transaction Costs. Fintechs.

RESUMO

O presente artigo faz um estudo jurídico e econômico das fintechs, que são sociedades empresárias, geralmente startups, que atuam no mercado financeiro, mediante as ferramentas metodológicas da Análise Econômica do Direito. O objetivo geral é demonstrar a inteiração entre fintechs e análise econômica do direito. O objetivo específico é demonstrar a utilidade das fintechs para reduzir os custos de transação para os seus usuários, sob a ótica da Análise Econômica do Direito. Neste sentido, o problema a ser respondido é saber como o uso de fintechs pode contribuir, especificamente, também, para reduzir os custos de transação, tornando as operações financeiras mais céleres e mais eficientes. Para chegar-se a hipótese de resposta ao problema, a metodologia a ser utilizada é a da finalidade de pesquisa aplicada, com pesquisa exploratória, em abordagem qualitativa, por método indutivo, mediante pesquisa bibliográfica, toda ela especializada sobre o tema.

PALAVRAS-CHAVE: *Análise Econômica do Direito. Custos de transação. Fintechs.*

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1 INTRODUCTION

The digital world is constantly evolving. Increasingly, we are faced with new technological inventions that, until then, many believed to be impossible. Smartphones and computers increasingly modern and that fit in the palm of your hand. Day after day, the digital market innovates and surprises everyone.

Everything around us is constantly evolving. And, with the financial sector it could not be different. The financial sector has a wave of new agents that have also evolved, initiating an era of technology, innovation and growth potential.

Among the new agents, there are the so-called fintechs, which, in a tight synthesis, are business companies, usually startups, that use technology to innovate and improve the financial sector.

In a survey carried out in 2018 by Finnovation, in conjunction with Finnovista and the Inter-American Development Bank (*Banco Interamericano de Desenvolvimento – BID*), it was found that there are 377 fintechs in Brazil, a 40% increase compared to 2017[3].

Internationally, according to data from the report Fintech Trends to Watch in 2018, authored by CB Insights, 1128 fintechs moved US$16,6 billion in investments and negotiations in 2017. These financial market startups have already entered the year 2018 with the 'right foot' and are gaining more and more space and bringing innovation[4].

And, still on the international stage in terms of fintechs, Europe is the most heated market - it grew 121% in investments in 2017 compared to 2016. However, in Asia this market has shrunk 10%; while North America continued to lead, winning 47% of total capital.[5]

3 Available in: http://finnovation.com.br/mapa-de-fintechs-brasil-maio-de-2018/. Accessed on: June 08, 2019.

4 Available in: https://fintech.com.br/blog/fintech/fintech-internacional/:. Accessed on: June 01, 2020.

5 Here are some fintechs that stand out in the international market: Regarding the means of payment, there are: ***1) Ant Financial***: Ant Financial ranks 1st on the list of the "100 most innovative fintechs in the world". The ranking was based on the 2017 Fintech100 study, prepared by KPMG and H2 Ventures. The Chinese startup is the most valuable startup in the world, valued at an incredible US$ 150 billion. Controlled by Alibaba, the Ant Financial is focused on means of payment. Its facial recognition technology allows customers to pay with a smile in stores in China; ***2) Square:*** Founded by the creator of Twitter, Jack Dorsey, the North American 'Square' is an international fintech specializing in payment methods. Square is currently valued at US$ 5,1 billion, against US$ 12,2 billion for Twitter, but the startup has great profitable potential in the short term; ***3) Adyen***: Dutch Fintech is an online payment platform and marketplaces. Adyen allows you to connect payments around the world, optimize revenues and manage risks. Since it was created in 2006, fintech has raised US$ 266 million in venture capital investments, according to the Venture Beat. The newly valuation reached US$ 14 billion at positions just behind the Spotify. Adyen processes payments from brands such as Uber, Cabify, Netflix, Magazine Luiza and Spotify. Em relação a empréstimos, há: ***4) SoFi***: This North American fintech is focused on an online lending platform. SoFi, which made a lot of noise by being one of the advertisers of the last edition of the Super Bowl, has a credit portfolio with more than US$ 5 billion, divided among more than 170 thousand account holders. The startup offers several types of personal loans, such as university loans and mortgages. Created in 2011, SoFi has already raised US$ 2,1 billion in investments and has a valuation of US$ 415 billion; ***5) Kabbage:*** Kabbage is a startup that assists smaller companies in obtaining loans, with values generally ranging from US$ 2,000 to US$ 100,000. Fintech does the process in a very automated way and takes seconds to approve the credit. The request is made online through a registration on the platform and can be paid from 6 to 12 months. Created in 2009, the startup has a valuation of US$ 1 billion and has already received a total of US$ 116 billion in contributions; ***6) Funding Circle:*** The British startup is a marketplace for loans to finance businesses. Entrepreneurs sign up on a platform, receive loan offers from investors and can pay the amount of 6 months to 5 years. Funding Circle offers loans of up to £ 1 million to companies that want to raise capital quickly or have credit declined by a bank. Its model is based on data analysis and has issued over £ 5 billion in loans since 2010, directly connecting 50,000 businesses with 80,000 investors. Funding Circle is one of the unicorns (startups valued at US$ 1 billion or more) in the world of credit fintechs. Regarding life insurance: ***7) Clover Health:*** This North American fintech offers affordable health insurance, created based on how much the user can pay per year. Created in 2013, Clover Health has already received US$ 425 million in contributions and has a valuation of US$ 1,2 billion; ***8) Oscar:*** Oscar brings the experience of going to the doctor to the digital world. In addition to enabling health plans, consultations are made online and are free for patients. The North American startup became a unicorn 16 months after being created in 2013. Currently, it has a valuation of US$ 3,2 billion, after raising US$ 892 million in investments. In relation to the purchase and sale of shares: ***9) Robinhood:*** Created in 2013, the free app called Robinhood transformed the

Thus, the purpose of this article is to carry out an economic and legal analysis of fintech, to demonstrate that its use can facilitate transactions, reduce transaction costs, maximize results and induce behaviors, increasing the efficiency in the legal transactions concluded, according to the Economic Analysis of Law.

To this end, a brief introduction to the study of Economic Analysis of Law will be carried out, moving on to an overview of startups and then making an analysis of fintech, aiming, in a constructive and academic way, to reflect if its use may or may not reduce transaction costs.

2 BRIEF WEIGHTINGS ON ECONOMIC ANALYSIS OF LAW

As noted above, the main objective of this article is to demonstrate whether the use of fintechs can facilitate transactions, reduce transaction costs, maximize results and induce behavior, increasing efficiency in the legal transactions concluded.

However, in order to reach the best conclusion, it is necessary to make a brief explanation about the Economic Analysis of Law, as well as the way it applies to Business Law[6].

Economic Analysis of Law (*Análise Econômica do Direito – AED*), also known as Law and Economics, is a method of legal-economic study with regard to the structuring, formation, impact and consequences of the application of the principles of Economic Science to Law. It can be defined as the application of economic theory, in particular, its method, for examining the formation, structuring and impact of the application of legal rules and institutions (RIBEIRO; GALESKI JÚNIOR, 2009, p. 53).

The Economic Analysis of Law invokes the methodology of economic science with the factual reality of the legal world.

way Americans invest in the stock market. The rapid growth in the number of users of the Robinhood application shows a demand that was not previously met: users looking for easier ways to invest in the stock market without paying transaction fees. Robinhood is now a consolidated wealthtech, valued at US$ 5,6 billion and one of the most valuable fintechs in the world. In May this year, it negotiated a round of series D investments worth US$ 363 million. Today, it accounts for its 4 million users and more than US$ 150 billion in transaction volume. But if it doesn't charge a fee, how does it make money? Moving amounts transferred to the platform but not invested, in addition to charging US$ 6 for a premium plan. And now the app has decided to expand its operations to cryptocurrencies. Starting in February, users will be able to trade Bitcoins, Ethereum, Litecoin, Ripple, among others, without fees. For now, they operate in the USA and Australia. Regarding international transfers: ***10) Revolut:*** British Revolut brings banking services without being a bank. The startup promotes free money transfer between countries, in addition to allowing cryptocurrency buying and selling transactions without fees. The startup reached the unicorn level just 33 months after it was created. Founded in 2015, it has already received US$ 336 million in investments and today has a valuation of US$ 1,7 billion. Fintech Revolut predicted that its revenues would increase fourfold in 2018. Last year, this fintech had revenue of 14.3 million euros. The forecast is that the company will close 2018 with revenue of 57 million euros, supported by the strong increase in the number of customers and new products. Despite the growth in revenues and number of customers, Revolut posted a loss of 16,5 million euros, as it doubled its number of employees, applied for a bank license and expanded to 10 markets. Regarding risk analysis and financial market trends: ***11) Kensho***: This artificial intelligence software proposes a Herculean task: analyzing important events for the financial market, answering questions from investors and preparing reports trying to predict new trends. Kensho is almost the Siri of the stock exchanges; ***12) Black Swan:*** The term Black Swan became popular in the economic crisis of 2007, in the United States, to classify events not foreseen by the market. Not for nothing, the goal of this Israeli startup is, based on Big Data and cognitive computing: to carry out risk analyzes for governments and financial institutions. Available in: https://fintech.com.br/blog/fintech/fintech-internacional/: Accessed on June 1, 2020.

6 The Constitution of the Federative Republic of Brazil of 1988 uses the term Commercial Law (art. 22, I). However, the Civil Code of 2002 brought the so-called Theory of the Company, which is why the expression Business Law, or Company Law, started to be adopted.

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Although EAL has already been mentioned and studied by other scholars of Economic Sciences, such as Adam Smith, when studying the economic effects resulting from the formulation of legal norms, and Jeremy Bentham, when associating legislation and utilitarianism, both in the 18th century (ZYLBERSZTAJN; SZTAJN, 2005, p. 74), it was only from the 1960s that EAL gained strength to unify Law and Economics (PIMENTA; LANA, 2010, p. 92). This, therefore, in 1960, Ronald Coase published the work The Problem of Social Cost, initiating the so-called Theory of Transaction Costs, a work that, in 1991, led him to be awarded with the Nobel Prize in Economics. As for the subject, Pimenta and Boglione discourse:

> The Nobel winner explained how the introduction of transaction costs in economic analysis determines what organizational forms and institutions in the social environment will look like. The insertion of transaction costs in economy shows the importance of law in determining economic results (PIMENTA; BOGLIONE, 2013, p. 268) (Our translation into english).

It is important to mention that, in addition to the work of Ronald Coase, mentioned above, it should also be noted that Guido Calabresi, professor at Yale University, when developing his work Some Thoughts on Risk Distribution And Law of Torts, contributed strongly to the advancement of EAL. This, therefore, Calabresi demonstrated the importance of analyzing the economic impacts of the allocation of resources for the regulation of civil liability, whether in the legislative or judicial sphere. Thus, his work inserted economic analysis into legal issues, pointing out that an adequate legal analysis does not dispense with the economic treatment of issues (ZYLBERSZTAJN; SZTAJN, 2005, p. 1-2). In addition to Ronald Coase and Guido Calabresi, it should be noted that Richard Posner, with his work Economic Analysis of Law, as well as Henry Manne, George Stigler, Armen Alchian, Steven Medema, Oliver Wiliamson, among others, also contributed to the strengthening of academic research on Economic Analysis of Law (ZYLBERSZTAJN; SZTAJN, 2005, p. 74).

Economics can be used to predict the consequences of different legal rules. It's about trying to identify the likely effects of legal rules on the behavior of the relevant social actors in each case (COOTER, 1982, p. 1260). It's possible to model human behavior in such a way that it is possible for the legal professional to understand the likely effects that will arise as a consequence of different legal positions (SALAMA, 2008). In fact, scholars of Economic Analysis of Law come together in the same classification, which belongs to the same denomination, as it has a consensus in relation to the concepts and institutes that are essential to them, which does not prevent constructive debates from being seen, often, pertinent, specific and doctrinal about its possible applicability. Along this path, the study of EAL seeks to develop, interpret and apply the methodology of economic science to legal relations, in order to reduce transaction costs and achieve economic efficiency. Therefore, it can be said that the purpose of EAL is the search for economic efficiency.

In this sense, efficiency, in the words of Bruno Salama: "it's about maximizing gains and minimizing costs. From this perspective, a process will be considered efficient if it is not possible to increase the benefits without also increasing the costs" (SALAMA, 2008, p. 55).

In Business Law, the transaction cost is extremely important, as it's fundamental to the success of the entrepreneur, since it is represented by the monetary value and the time spent to enter into legal transactions, either to plan them or to carry them out in its effects. It can be said, therefore, that the transaction cost is what you need to give up, pay for, or spend time and money on, for effectuation, maintenance, precaution, disposal or assignment of the

legal effects of a contractual relationship (LANA, 2017, p. 75). According to Eduardo Goulart Pimenta (2010, p. 22-23), “transaction costs consist of what you need to pay or which you must give up to establish, maintain, protect or transfer the rights and duties arising from a contractual relationship”.

Therefore, efficiency consists in reducing transaction costs as much as possible, so that, more and more, contracts are signed and, more and more, there is organization and accumulation of production factors, resulting in maximization of riches, which is represented by profit.

As taught by Eduardo Goulart Pimenta:

> The efficiency of the Law consists of minimizing (or hypothetically ending) transaction costs - by reducing or eliminating difficulties and expenses for hiring - so that, in the exercise of the company, there is a greater quantity and quality of exchanges and legal relationships for the organization of factors of production. From an economic point of view, the legal discipline of the company must be concerned with seeking to reduce as much as possible the costs that entrepreneurs face in order to achieve the legal relations aimed at the organization of factors of production (PIMENTA, 2010, p. 33) (Our translation into english).

There are two important connotations of efficiency known and used in EAL: the Pareto efficiency, the one in which the position of A improves without prejudice to the position of B, as well as the so-called Kaldor-Hicks efficiency, in which the product of A's victory exceeds the losses of B's defeat, thus increasing the total surplus (PINHEIRO; SADDI, 2005, p. 88).

Pareto's efficiency means that goods must be transferred from those who value them little, in favor of those who value them most (SZTAJN, 2005, p. 76). In other words, in Pareto, efficiency occurs in transactions that improve the situation of an economic agent, without worsening the situation of others.

According to Eduardo Goulart Pimenta and Stefano Boglione, “the optimal standard of efficiency occurs when economic agents have access to the goods that they value most, through a system of exchanges or allocation of resources” (PIMENTA; BOGLIONE, 2013, p. 268).

Still on efficiency in Pareto, Armando Castelar Pinheiro and Jairo Saddi explain that an allocation of resources will be ‘efficient Pareto’ when “there is no change that improves the situation of an agent without making the situation of at least one other agent worse”. (PINHEIRO; SADDI, 2005, p. 120). The main point of efficiency in Pareto is to demonstrate that transactions can be so efficient that it would be impossible to carry out any transaction in which the parties would suffer losses. In contrast, Kaldor Hicks' efficiency means that positive laws “must be used to cause maximum welfare, in relation to the largest number of individuals, insofar as the general gains outweigh the possible losses suffered individually by some” (PIMENTA; LANA, 2010, p. 107). In the words of Eduardo Goulart Pimenta and Stefano Boglione:

> There is the Kaldor-Hicks Efficiency, therefore, when the product of A's victory exceeds the losses of B's defeat, thus increasing the total surplus. There will be a real gain in the welfare of society when the redistribution of riches means that economic agents do not wish to return to their original position, although they still receive, in cash, the amount corresponding to the increase

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> in their goods and services (PIMENTA; BOGLIONE, 2013, p. 268) (Our translation into english).

Therefore, according to the Economic Analysis of Law, the parties must make decisions that lead to greater welfare, that is, they must act in favor of efficiency, in line with Pareto efficiency or Kaldor Hicks efficiency.

Following this line of reasoning, Irineu Galeski Junior and Márcia Carla Pereira Ribeiro emphasize that the individual must apply the decision that causes the greatest welfare, considering that EAL focuses on the search for better welfare, better allocation possible of goods, leading to welfare within the limits (RIBEIRO; GALESKI JÚNIOR, 2009, p. 89). In the words of the authors:

> Among two possible decisions, the one that causes the greatest welfare is the one that must be applied, having to be observed if the parties involved are in a relatively homogeneous initial situation. The Law & Economics school, for all intents and purposes, focuses on the search for the best welfare, the best possible allocation of assets, leading to welfare within moral limits (RIBEIRO; GALESKI JÚNIOR, 2009, p. 89) (Our translation into english).

Bruno Salama (2008, p. 54-55) well synthesizes the methodological tools that can be used in the study of Law and Economics, namely: scarcity, rational maximization, balance, incentives and efficiency. As for scarcity, the author understands that, if the resources were infinite, it would not be necessary to consider their allocation. Soon, everyone could have everything they wanted, in the amount they wanted.

In relation to rational maximization, the author argues that it refers to the option for choices that meet the personal interests of individuals. Thus, individuals calculate to achieve the greatest benefits at the lowest costs, leading to the marginalist decision process, which means that, in the decision-making and choice-making processes, individuals will only carry out the next step in an activity if benefits outweigh its costs. As for balance, he goes on to say that this is the ‘interactive behavioral pattern’ that is achieved when all actors are simultaneously maximizing their own interests. As for incentives, these are implicit prices, given that individuals seek to make choices that maximize their benefits with the consequent reduction in costs.

Regarding efficiency, which, as already mentioned, refers to maximizing gains and minimizing costs. Thus, the author concludes by saying that a process will be efficient if it's possible to increase the benefits without increasing the costs.

As can be seen, considering the dynamic aspect of the company, this is a coordinated bundle of legal relationships established by contracts and, therefore, by an economic approach, efficiency consists in reducing transaction costs as much as possible, aiming that each more and more, contracts are signed and, increasingly, there is organization, accumulation of factors of production, resulting in maximization of riches represented by profit (LANA, 2017, p. 78).

Especially in relation to the contracts signed by the entrepreneur or company, EAL should always be used, seeking to reduce the scarcity of resources, opting the company for choices that meet its interests, in order to achieve greater benefit at the lowest cost, as well as efficiency in what to hire, with who to hire, when to hire and how to hire, that is, these acts must be practiced in order to seek efficiency.

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Thus, advances are made in the rationale for knowing how fintechs can be advantageous in transactions carried out by the company in order to contribute to reduce transaction costs and speed up and efficiency.

3 STARTUP: A MIXTURE OF INNOVATION, TECHNOLOGY AND UNCERTAINTIES

The term startup is increasingly used and is highlighted in the technological and entrepreneurial world, having gained greater notoriety in the late 1990s, with the so-called '.com' companies (OIOLI, 2019, p. 11). But, after all, what would a startup be? What are its characteristics?

Eric Ries (2012, p. 26) defines the startup as "a human institution designed to create new products and services under conditions of extreme uncertainty". The Author discusses this concept, arguing that the most important part of this definition is what it omits, considering that the concept of startup does not concern the size of the company, its activity or its sector of the economy.

> I came to realize that the most important part of that definition is what it omits. It says nothing about the size of the company, the activity or the sector of the economy. Anyone who is creating a new product or business under conditions of extreme uncertainty is an entrepreneur, whether they know it or not, and whether they work for a government entity, a venture-backed company, a non-profit organization or a company with financial investors decidedly focused on profit (RIES, 2012, p. 26) (Our translation into english).

From this concept, the terms highlighted are: institution, product, innovation and extreme uncertainty, as characteristics of a startup.

> Let us consider each of the parties. The word institution connotes bureaucracy, process, even lethargy. How can this be part of a startup? However, successful startups are full of activities associated with institution building: hiring creative employees, coordinating their activities, and creating a business culture that generates results.
>
> We often lose sight of the fact that a startup is not about a product, a technological innovation or even a brilliant idea. A startup is bigger than the sum of its parts; it is an intensely human initiative.
>
> The fact that the startup's product or service is a new innovation is also an essential part of the definition, and also a delicate part. I prefer to use the broader definition of product, one that encompasses any source of value for people who become customers.
>
> Anything that customers experience from interacting with a company should be considered part of that company's product. This is true of a grocery store, an e-commerce site, a consultancy service and a non-profit social service entity. In all cases, the organization is dedicated to revealing a new source of value for customers and is concerned with the impact of its product on those customers.

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> It's also important that the word innovation is understood widely. Startups use many types of innovation: original scientific discoveries, a new use for an existing technology, creation of a new business model that releases a hidden value, or the simple availability of the product or service in a new location or for a group of previously poorly served customers. In all of these cases, innovation is at the heart of the company's success.
>
> There is one more important part of that definition: the context in which innovation takes place. Most companies - large and small - are excluded from these contexts. Startups are designed to face situations of extreme uncertainty. Opening a new company, which is an exact clone of an existing business, copying business model, pricing, target customer and product, may even be an attractive economic investment, but it's not a startup, as its success depends only on execution - so much so that this success can be modeled with great accuracy. (This is why so many small businesses can be financed with simple bank loans; the level of risk and uncertainty is so well understood that a credit analyst can assess their future prospects.)
>
> Most general management tools are not designed to flourish in the adverse soil of extreme uncertainty, in which startups thrive. The future is unpredictable, customers are witnessing a growing set of alternatives, and the pace of change is always increasing. However, most startups - in garages and businesses - are still managed through standard forecasts, product milestones and detailed business plans. (RIES, 2012, p. 26-27) (Our translation into english).

Bruno Feigelson, Erik Fontenele Nybø and Victor Cabral Fonseca give a broader concept of what a startup is; for the authors, a startup is "a group of people looking for a business model, based on technology, repeatable and scalable, working in conditions of extreme uncertainty" (FEIGELSON; NYBØ; FONSECA, 2018, p. 31).

A great advantage of the business model adopted by startups is the effective ability of the product to be replicable and scalable due to the use of technology, where being replicable means that "it's possible to deliver the product or service on a potentially unlimited scale, without the need for adaptation or customization for the clientwhile being scalable means that the startup "has the capacity to grow more and more through the sale of a product or service that can be produced or distributed in large quantities, resulting in an economy of scale, without the necessary change of the business model or significant increase in your costs" (FEIGELSON; NYBØ; FONSECA, 2018, p. 34-35).

In addition to the above characteristics, Bruno Feigelson, Erik Fontenele Nybø and Victor Cabral Fonseca (2018, p. 24-26) also bring the following characteristics of a startup:

- It's in an initial stage, notably lacking internal processes and organization, often without a clear business model;
- It has an innovative profile, which is one of the most important characteristics;
- Has significant control over expenses and costs, in order to focus investments on the development of your main product or service;
- Your product or service is operationalized through a minimum viable product (MVP), which is the development of the product or service in a simple way, just to make it possible to check if really there is a demand and to keep initial costs low;
- The product or idea explored is scalable, that is, it can be easily expanded to other markets and at different levels of capillarity and distribution, in order to achieve

economies of scale through replication of the same product to countless customers;

- Shows the necessity for third-party capital for the initial operation, which is why it is common to search for external investors to finance the operations;
- Uses technology in favor of your business model, to develop scalable and innovative businesses;
- They operate in a market of extreme uncertainty, due to the high risk.

The fact is that, despite the strong link with technology, a startup does not necessarily, absolutely, need to work with digital products or services. Startups are the big bet of the market and form a true ecosystems worldwide.

They are of low initial capital and fast growth, with young DNA and a promising business model. To enter the universe of startups, it's not enough to have a great idea. It's necessary to work hard, get to know the client thoroughly and have the courage to take risks in search of ambitious dreams.

Startups are beginning activities, with a young approach and adapted to the digital model, so important nowadays. Although they are small, they provide innovative proposals for services to be provided or products to be produced and manufactured.

It aims to generate an impact through something that proves to be new and has enormous possibilities for development. They stem from ideas with good chances of success to be leaders and major players in their markets.

The startup is in an embryonic phase and seeks a repeatable, scalable and highly profitable business model, prioritizing innovation in a high risk environment.

The potential to reach large markets with a lean structure is one of the main traits of startups. With a very low starting capital, the company can reach millions of consumers.

Startups are strongly related to technology. Even if the focus is not a solution specifically aimed at the area, hardly anything will have a positive result if its creators do not use this technological tool to their advantage. If we also consider that a startup is a company that explores innovative activities, this concept of applying new technologies becomes even more evident and justified.

The main characteristics of a startup are innovation, scalability, repeatability, flexibility and speed. That is, very similar concepts and close to technological news.

Currently, rarely something is done without the influence of technology, especially when we are talking about innovations.

In fact, the concept of the "new" brings a futuristic idea, as a way of performing tasks or resolving issues that have not yet been created. It should be noted that innovation is the main characteristic of startups. Innovating is the first step of a company that wants to launch itself as a startup.

The main foundation of a startup is to present and develop solutions to problems in an innovative way, which has never been tested before, but which has great chances of succeeding and becoming an excellent business.

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Thus, they bring services that have always been necessary, but that have never been thought of before. Equally, it happens with products, as they serve as sure solutions for the countless and different demands of society.

They are disruptive. This is because startups break out or burst patterns in relation to other companies in the same segment, usually already consolidated. This characteristic is shown through forms of assistance, exemption or reduction of fees and even in the way how the services are provided or made available.

In other words, the purpose is to escape from what the market offers, standing out and gaining the necessary competitiveness. In addition, they are scalable, that is, they have a great possibility of growth, vertiginous, doing this without consequences or limits in their operations. Such scalability occurs mainly because they are generally linked to the digital environment. Consequently, its products and services can be delivered to an increasing number of customers, without requiring further efforts, investments, expenses or expenses. A scalable business is one that can grow at a very fast pace without changing the proposed model. In other words, the company's revenue increases exponentially, but the costs remain practically the same.

A startup is repeatable, because the same product or service can be offered on a large scale, without any limitations. Therefore, it must be little flexible or customizable. To be repeatable is to deliver the same products and services in a reproductive way, without the need to over-customize. The proposal is to multiply and reach more customers and adaptations would hinder these goals.

Another inherent characteristic is the uncertainty. This is because a startup does not have a well-defined direction with regard to success and there is a high risk of failure. Therefore, despite being solid proposals and with a great chance of having good results, they have no precedents that authorize it and that help to hold clear and absolute perspectives over the future time.

It is worth mentioning that, as a rule, activities inserted in the context of digital entrepreneurship have their performance on the world wide web, dispensing physical locations and also the need to move to make appointments, consultations, meetings, etc. Generally, they are almost 100% digital businesses.

Startups hover around really innovative products and services. Therefore, by having good thoughts and being attentive to services that can be successful and achievement, sooner or later, totally incredible ideas tend to arise. In the same sense, any startup stems from a prototype phase, by which the business model will be tested before its target audience, in a small and small sample.

It's important to start with a basic version, understand and observe the results it obtains, evaluating the public's reaction. After the tests, it will also be possible and relevant to focus on the adaptations to arrive at the final model. To create one, good partners are essential, because starting alone is always very difficult. They need different skills to be exercised by people they trust within their networking, who have skills complementary to theirs.

Therefore, a startup is a mixture of innovation, technology, uncertainties and risks, in which a group of people work together for the development of a product or service, replicable and scalable. Now, we are going to delve into a specific startup segment, namely, fintechs.

3.1 DEFINITION OF STARTUP ACCORDING TO COMPLEMENTARY LAW Nº 167/2019

In spite of the exponential growth of startups in the entrepreneurial ecosystem, it was only in the year 2019 that the national legislation expressly and unequivocally regulated the startups. Thus, was published the Complementary Law nº 167/2019, which amends Complementary Law nº 123/2016, and brought the concept of startup, as well as a specific tax regime for the entrepreneur who wishes to follow the business model.

In accordance with article 13 of LC nº 167/19, article 65-A was included in LC nº 123/16, accompanied by 13 paragraphs, which created 'Inova Simples', which consists of a special simplified regime, which allows different treatment to business initiatives that declare themselves as startups or innovation companies.

This differentiated regime is a summary rite for opening and closing companies under the 'Inova Simples' regime, which will take place in a simplified and automatic way, digitally, through a National Network for the Simplification of Registration and Legalization of Companies and Businesses (*Redesim – Rede Nacional para a Simplificação do Registro e da Legalização de Empresas e Negócios*) (Art. 65-A, §3º, LC 123/16).

Also according to the provision, the objective of Inova Simples is to stimulate the creation, formalization, development and consolidation of these business initiatives as agents that induce technological advances, as well as to promote the generation of employment and income.

In this vein, article 65-A, §§ 1º and 2º, of LC nº 123/16, expressly conceptualizes what a startup would be. According to the referred Law, it is considered as a startup: an innovative company that aims to improve systems, methods or business models, production, services or products, existing or totally new.

It is important to point out that the activity developed by the startup can aim at: improving systems, methods or business models, production, services, including existing products, when the so-called startups of an incremental nature are characterized, or even be related the creation of something totally new, featuring startups of a disruptive nature.

In addition, startups are also characterized by the development of their innovations in conditions of uncertainty, which require constant experiments and validations, including through provisional experimental marketing, before proceeding to full complementation and obtaining obtaining revenue/return.

Unraveling the concept brought by paragraphs 1º and 2º, of article 65-A, of LC nº 123/16, it's clear that the legislator faithfully followed the characteristics of startups used worldwide, considering that, to be considered a startup, it is necessary, mainly, but not only: ***(i)*** have/has an innovative character and ***(ii)*** development of the activity in conditions of uncertainty.

The article 65-A, § 4º, of LC 123/16 provides the information that must be provided, by completing the registration form for the entrepreneurs who will adopt Inova Simples. Among this information, it can be highlighted if what appears in item II, which states that the 'corporate name' of the startup that adopts this simplified special regime must contain the expression "Inova Simples (I.S.)", obligatorily.

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Also, the funds capitalized by the startup that adopts this regime, will not constitute income and will be destined, exclusively, to fund the development of its projects. In addition, the Law allows the experimental sale, by the startup, of the service or product, up to the limit set for the individual microentrepreneur.

Therefore, the change brought by LC nº 167/19, is strongly focused on the startup in its initial stage. However, Brazilian legislation has made progress in characterizing and conceptualizing a startup. However, it's clear that these changes need further regulation and clarification, given that there are still gaps to be filled.

4 FINTECHS: TECHNOLOGY AND INNOVATION OF FINANCIAL SERVICES

The term fintech combines the activity of finance with technology (financial technology), and can be used to refer to companies and businesses that apply technology to provide financial services or services related to financial services (OIOLI; SILVA; ZILIOTI, 2019, p. 187).

According to Rébecca Menat, communications director for The Assets (2017, p. 10), fintech means financial technology and “encompasses a new wave of companies changing the way how people pay, send money, lend and invest”.

Examples of fintechs are: NuBank, Creditas, GuiaBolso, PayPal, Bidu, PicPay, Toro Investimentos, Neon, QuintoAndar, Méliuz, among others.

The Central Bank defines fintechs as follows:

> Fintechs are companies that promote innovations in the financial markets through the intense use of technology, with the potential to create new business models. Internationally, fintechs are classified as follows: payment, compensation and settlement, deposit, loan and capital raising, financing, and investment management. In Brazil, we can identify the following categories of fintechs: payment, financial management, loan, investment, financing, insurance, debt negotiation, crypto and Distributed Ledger Technologies (DLTs), foreign exchange, and multiservices (BRASIL, 2018) (Our translation into english).

According to Mariana Congo (2017), fintech is the term used to describe companies that provide services of a financial nature, with the use of technology as their differential, and all their customers are served only by computer or smartphone.

The Nubank Team (2019), defines fintechs as: “startups or companies that develop fully digital financial products, less bureaucratic, more transparent and that challenge the market dominated by large banks”.

This terminology originated in New York City, in a startup acceleration program developed by Accenture, in partnership with the New York City Hall. Over time, fintech started to designate or follow startups that innovate financial services, based on technology and, thus, creating new business models in areas such as current account, credit card, personal and

corporate payments, payments in general, investments, insurance, among others (GANZER, et al., 2017)

In this sense, fintechs use technology to be able to innovate and improve the financial services provided by banks, that is, "companies in the sector use technological resources widely disseminated to create methodologies, processes and tools that facilitate access to financial services" (ALECRIM, 2018).

Ganzer, citing the OECD Manual (GANZER, et al., p. 5, apud OECD, 2005), says that innovating does not necessarily mean creating something that never existed, but it also consists of improving production techniques that can affect from quality to the physical characteristics of the product or service, or even the development of economic business models.

In this tuning fork, fintechs offer the most diverse financial services, such as: financing, alternative financing, insurance, asset management, finance management, personnel, payments, investments, corporate finance management and digital banks, and these services are offered by cell phone or internet banking without the need for physical movement to the institution (BIGNARDI; PIACENTE, 2018, p. 569).

4.1 FINTECHS REGULATION BY THE NATIONAL MONETARY COUNCIL

Currently, there is no law that directly regulates fintechs. However, in 2018, the National Monetary Council (*Conselho Monetário Nacional – CMN*) issued Resolution nº 4.656, dated April 26, 2018, which provides for fintech exclusively of credit.

According to the Central Bank, credit fintechs are financial institutions that grant and mediate credit operations (BRASIL, 2018).

In this vein, according to article 1º, of Resolution nº 4.656/18 which created the Direct Credit Society and the Loan Society Between People (*Sociedade de Crédito Direto – SCD and Empréstimo Entre Pessoas – SEP*), disciplined the carrying out of loan and financing operations between people through an electronic platform and establishes the requirements and procedures for authorization to operate, transfer of corporate control, corporate reorganization and cancellation of the authorization of these institutions.

According to this Resolution, both *SCD* and *SEP* are considered financial institutions, being able to operate exclusively through digital platforms, that is, through the internet or applications (OIOLI; SILVA; ZILIOTI, 2019, p. 190).

Article 3 of this Resolution provides that the *SCD* is a financial institution whose object is to carry out loan, financing and acquisition of credit rights operations exclusively through an electronic platform, using financial resources that have as their sole ource the own capital/ equity.

The *SEP* is provided for in article 7º of Resolution nº 4.656/18, which states that *SEP* is a financial institution, whose object is to carry out loan and financing transactions between people exclusively through an electronic platform.

Oioli, Silva e Zilioti (2019, p. 191), clarify that the main difference between *SCD* and *SEP* is that the first will only be able to act using equity (own capital), while the second will be able to

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raise funds from the parties involved in the operation, acting as an intermediary of traditional financial institutions, without retaining credit risk.

Below, see the comparative table of *SCD* and *SEP*, created by Oioli, Silva and Zilioti (2019, p. 190-191):

	SCD	SEP
Object	Loans; Financing; and Acquisition of Credit Rights	Loans and Financing
Origin of Capital	Own	Creditors and debtors
Form of performance	Exclusively by electronic platform	Exclusively by electronic platform
Other services	Credit analysis for third parties; Credit collection for third parties; Acting as an insurance representative through an electronic platform; and Electronic currency issuance	Credit analysis for customers and third parties; Credit collection for customers and third parties; Acting as an insurance representative; and Electronic currency issuance
Denomination	"Direct Credit Society" "Sociedade de Crédito Direto"	"Loan Society Between People" "Sociedade de Empréstimo entre Pessoas"
Prohibition	To raise public funds, except by issuing shares; and, Participate in the capital of financial institutions	Carry out loan and financing operations with its own resources; Participate in the capital of financial institutions; Co-obliging/collecting or providing any type of guarantee in loan or financing operations, except in some cases; Remunerate or use to your advantage the funds raised by loan or financing operations; Transfer funds to debtors before they are made available by creditors; Transfer funds to creditors before payment by debtors; Maintain resources of creditors and debtors in account of their ownership not linked to loan or financing operations; and, Link the performance of the credit operation to the efforts of third parties or the debtor, as an entrepreneur.

(Our translation into english)

Also according to the authors, this Resolution also establishes the guidelines for obtaining authorization for a fintech to function as an *SCD* or *SEP*, as well as the procedures to be observed in its operations. In his words:

> In the case of SCD, the loan or financing must always be made through an electronic platform, with exclusive use of own resources. In relation to SEP,

> the loan or financing will start with the unequivocal manifestation of the will of the parties (potential creditors and debtors). Subsequently, the resources that are the object of the transaction will be made available by the creditors to SEP, which in its turn will sign an instrument representing credit with debtors and creditorsOnly after the conclusion of this step that SEP will be able to transfer the funds to the debtors, in order to ensure that the entity does not retain the credit risk for itself due to possible default by the parties involved in the transaction (OIOLI; SILVA; ZILIOTI, 2019, p. 191) (Our translation into english).

Therefore, only credit fintechs are regulated by National Monetary Council (*Conselho Monetário Nacional – CMN)*, consisting of the formats: Direct Credit Society (*Sociedade de Crédito Direto – SCD*) and a Loan Between People Company (*Sociedade de Empréstimo Entre Pessoas – SEP*).

5 ADVANTAGES OF FINTECHS: REDUCTION OF TRANSACTION COSTS AND SEARCH FOR EFFICIENCY

According to Kashyap and Weber (2017, p. 227), internet, mobility, social networks and the rise of price comparison sites have changed the game over the past decade and created a new generation of customers who demand simplicity, speed and convenience in their interactions with financial service providers. Thus, fintechs, place their customers at the center of their business model.

For Spiros Margaris (2017, p. 240), advisor to the FinTech Forum and CEO of the Margaris Advisory, fintechs are specialized and focused on adapting to customers' dreams and desires, "they are, therefore, more flexible and adaptable than the big financial companies. In addition, its reason for existing and its future are always closely linked to meeting the needs and desires of customers".

Due to the use of technology, fintechs have a lower operating cost, which is why the services offered reach the consumer at a lower price than the services offered by traditional financial institutions.

By way of illustration, the fintech Creditas, which operates with secured loans, makes loans at a rate of 0,99% per month, as informed by its website[7].

In contrast, according to statistics presented by the Central Bank, traditional banks charge a much higher monthly interest rate, such as Banco Santander, which imposes a monthly fee of 14,77%, or Caixa Econômica Federal, with a monthly rate of 12%.

In this sense, fintechs appear as a more viable option for the individual consumer and corporate companies, through a significantly lower cost structure than traditional banks, in view of their leaner business model, through the use of technology.

With this, more efficient solutions can be offered, with financial services customized according to the user's needs, for example, loans, discount of receivables, payment and

7 Available in: https://www.creditas.com.br/. Accessed on: August 08, 2019.

receipt services, cash flow management, offshore payment remittances and electronic trade finance (FARIA, 2018, p. 53).

A major advantage of fintechs in relation to traditional financial institutions is the use of technology, as it's possible for customers to control products through their smartphones (NUBANK, 2019).

Another advantage is the unnecessary move to agencies or headquarters of the fintechs, considering that everything is hired and solved through the internet.

On its website, Nubank cites the advantages of fintechs:

> In general, fintechs are known for offering new financial solutions, less bureaucratic, more intuitive to use - after all, they are usually available on the customer's smartphone - and with very low costs, sometimes nonexistent, for users.
>
> One example is credit cards with no annual fee or free digital accounts.
>
> All this thanks to technology. Because they were born in the digital world and do not have large physical structures, such as bank branches, their costs are greatly reduced. That is why many offer fee-free products and are able to scale quickly.
>
> In short, fintechs arrive on the market bringing innovative financial products. In many cases, they have been designed to be simpler and more beneficial for customers (NUBANK, 2019) (Our translation into english).

Due to all these advantages, fintechs are able to innovate the financial system, making it more efficient, considering that, with its use, it's possible to reduce transaction costs.

This, because, as explained above, the transaction cost is what you need to give up, pay for, or spend time and money on, to effect, maintain, prevent, dispose of or assign the legal effects of a contractual relationship (LANA, 2014, p. 29).

With fintechs, the user saves money, as transactions are less costly and often free, as well as interest rates are much lower than those charged by traditional financial institutions.

In addition, the user is also able to save time, since, as a rule, fintechs operate exclusively over the internet, without the physical presence of the contractor, saving him from wasting time with displacement. Thus, if it's necessary to carry out a transfer of values, for example, the parties can do it from anywhere using a computer or smartphone. Still, any business-man or company that needs working capital to maintain operations, manages to make a loan quickly, efficiently and safely, with lower interest rates than traditionally.

Consequently, it will result in a reduction in transaction costs. With the reduction of transaction costs, there will be greater efficiency in the legal transactions entered into, resulting in the possibility of entering into new contracts, new transactions and, increasingly, organization and accumulation of factors of production, resulting in maximization of richness and profit.

Therefore, it can be said that fintechs make financial services and legal relationships more efficient, as they manage to reduce transaction costs, benefiting their users.

6 CONCLUSION

This work does not intend to exhaust the topic. These are constructive, academic and not definitive reflections, but which sought to be exposed in a technical, objective, complete and reasoned manner.

The problem to be answered in this article is: if the use of fintechs can contribute, specifically, also, to reduce transaction costs, making financial operations faster and more efficient.

As explained above, the Economic Analysis of Law (*Análise Econômica do Direito – AED*), is a legal-economic study method, in which the principles of Economic Science are applied to Law, that is, the application of economic theory to Law. Thus, with the study of EAL, we seek, through the methods of Economic Science, to reduce transaction costs, which is: everything that needs to be paid or given up to constitute, maintain, protect or transfer the rights and duties arising a contractual relationship.

By reducing transaction costs, it will be possible to achieve efficiency and so increase the profit.

Thus, when entering into legal transactions, the parties must always seek to reduce transaction costs and maximize results, achieving the so desired efficiency.

In this tone, with new technologies, the number of startups grows more and more, which is a mixture of innovation, technology, uncertainties and risks, in which a group of people work together in favor of the development of a product or service, replicable and scalable.

In fact, the concept adopted by Complementary Law nº 167/19, when regulating startups, preserved these characteristics.

Some startups operate in the financial sector. These are called fintech, which is the startup that uses technology to improve and innovate financial services. Fintechs provide services such as loans, financing, payments, financial management, asset management, among others, all using technology.

Only the so-called credit fintechs are regulated in Brazil, through Resolution nº 4.656/18, of the National Monetary Council (*Conselho Monetário Nacional*), which created the Direct Credit Society (*Sociedade de Crédito Direto – SCD*) and the Loan Society Between People (*Sociedade de Empréstimo Entre Pessoas – SEP*), disciplined the carrying out of loan and financing operations between people through an electronic platform and establishes the requirements and procedures for authorization to operate, transfer of corporate control, corporate reorganization and cancellation of authorization of these institutions.

Due to the use of technology, fintechs are able to provide financial services, at lower values than usually charged by a traditional financial institution. In addition, fintechs do not need displacement to physical agencies, saving the users' time.

Fintechs have numerous advantages that bring innovation to the financial system, resulting in reduced transaction costs and greater efficiency in the financial services provided, resulting in the possibility of entering into new contracts, new transactions and more organization and accumulation of production factors, resulting in maximizing riches of profit.

Therefore, as a hypothesis to answer the question-problem that was proposed in this article, it appears that fintechs can certainly contribute to reduce transaction costs and increase efficiency.

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CRITICAL ANALYSIS OF STRUCTURAL PROCESSES FROM THE DEMOCRATIC PROCESSUALITY PERSPECTIVE

ANÁLISE CRÍTICA DOS PROCESSOS ESTRUTURAIS NA PERSPECTIVA DA PROCESSUALIDADE DEMOCRÁTICA

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ABSTRACT

The article seeks to present the conceptualization and aspects that gave origin to the so-called structural process, with the aim of questioning it in the face of the conjectures of democratic process in the Demo-

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cratic State of Law developed based on the neoinstitutionalist theory of the process. The text will address the introductory aspects of democratic processuality, seeking to synthesize its main ideas. Theoretically, the neoinstitutionalist theory of the process, associated with the constitutional principles of the process, is intended to criticize the approach to the structural process as a result of judicial activism. The research presented is bibliographical and uses the hypothetical-deductive basis methodology, according to the Karl Popper proposal.

Keywords: Structural process. Democratic procedurality. Neoinstitutionalist theory of the process. Legal democracy.

RESUMO

O artigo busca apresentar a conceituação e os aspectos que deram origem ao denominado processo estrutural, com o objetivo de questioná-lo frente às conjecturas da processualidade democrática no Estado Democrático de Direito desenvolvidas com base na teoria neoinstitucionalista do processo. O texto abordará os aspectos introdutórios da processualidade democrática, buscando sintetizar suas principais ideias. Tendo por referencial teórico a teoria neoinstitucionalista do processo, associada aos princípios constitucionais do processo, pretende-se criticar a abordagem à temática do processo estrutural como fruto do ativismo judicial. A pesquisa apresentada é bibliográfica e se utiliza da metodologia de base hipotético-dedutiva, aos moldes da proposta de Karl Popper.

Palavras-chave: *Processo estrutural. Processualidade democrática. Teoria neoinstitucionalista do processo. Democraticidade jurídica.*

1 INTRODUCTION

This article aims to address the issue of structural or structuring processes, also known as decisions, measures, structural reforms, analyzing them against the premises of democratic processuality, notably from the perspective of the neo-institutionalist theory of the process.

To this end, a study will be carried out on the structural process, as to its conceptualization, objectives and historical basis, pointing out criticisms as to its connection to judicial protagonism and, consequently, to the theory of the process as a legal relationship.

Next, a synthesis will be presented on the premises of democratic processuality, taking as a starting point the allocation of Citizenship, in the same existential plan of the State, emphasizing the citizen's action as a true conductor of decisions and builder of the legal system, this due to the prerogative of citizen self-inclusion, which will be detailed throughout the work.

In the same vein, the principle of access to justice will be approached as being the basis for citizen legal participation in the construction of judicial decisions, so that only the discursively constructed decision will be considered democratic.

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Finally, presenting the relevant points in an approach to legal democracy, the structural process conceived as a result of judicial activism is criticized, seeking to resignify it under the gaze centered on the founding principles of the neo-institutionalist theory of the process.

The research developed here is of a bibliographic nature and has as its methodology the logical-deductive basis, in which a comparison is made between the theories, putting them to the test in order to examine their possibilities in the face of the proposed problem.

2 IDENTIFICATION OF THE SO-CALLED STRUCTURAL PROCESSES

The structural process, also called structural decision, structuring decision or structural reform, can be understood as a new procedural form of differentiated protection of fundamental rights, especially collective rights (BAHIA; NUNES; COTA, 2019, p. 30).

In the conception of Fredie Didier, Hermes Zaneti and Rafael Alexandria de Oliveira, the structural decision is one that seeks "to implement a structural reform (structural reform) in an entity, organization or institution, with the objective of realizing a fundamental right, carrying out a certain public policy or solving complex disputes" (DIDIER; ZANETI; OLIVEIRA, 2017, p. 48-49).

In this bias, "the structural process was first outlined in the United States, in view of the perception of a new category of litigation, structural litigation"[4] (BAHIA; NUNES; COTA, 2019, p. 31).

As outlined by Alexandre Melo Franco de Moraes Bahia, Leonardo Silva Nunes and Samuel Paiva Cota, polycentric structural litigation, that is,

> contemplate different points of influence that interact with each other in different ways. They are also marked by the existence of structural violations of rights, which occur as a result of a set of practices and institutional dynamics, within a complex causality and a multiplicity of overlapping, often antagonistic interests. In this context, they end up demanding the construction of peculiar procedural forms for the realization and satisfaction of rights (BAHIA; NUNES; COTA, 2019, p. 33-34).

Also, as highlighted by Fredie Didier, Hermes Zaneti and Rafael Alexandria de Oliveira,

4 Such litigations cover what Edilson Vitorelli called irradiated diffusion litigations. According to the author: "These are those situations in which the litigation resulting from the injury directly affects the interests of several people or social segments, but these people do not make up a community, do not have the same social perspective and will not be reached, to the same extent, by the result of the litigation, which makes their views on its desirable outcome divergent and, not infrequently, antagonistic. These situations give rise to changeable, multipolar conflicts, opposing the group holding the right not only to the defendant, but to itself. Exemplify yourself with the conflicts arising from the installation of a hydroelectric power plant. If, at the beginning of the licensing process, the prospective impacts of the installation of the enterprise are discussed, in its social and environmental aspects, the construction phase already changes the scenario of the location, with the arrival of large contingents of workers that alter the social dynamics. The problems become other, often unforeseen, and the groups affected are no longer the same as they were in the first moment, when the contours of the project were decided. In the environmental area, the course or flow of the river is altered, blocking roads and separating previously neighboring communities. People are displaced. In the natural environment, fauna and flora suffer significant impacts. With the end of the works, the whole dynamic changes again. Many workers who came, go. Others remain. The displaced people form new neighborhoods and settlements, which require the implementation of new public services. Only because of the realization of a work, the natural environment and social dynamics change in such a way that the society that existed in that place acquires features totally different from the one that originally existed". (LIMA, 2015, p. 97-98).

The structural problem is defined by the existence of a state of structured non-conformity - a situation of continuous and permanent illegality or a situation of non-conformity, even if not exactly illegal, in the sense of being a situation that does not correspond to the state of things considered ideal. Whatever it may be, the structural problem is configured from a state of affairs that needs reorganization (or restructuring) (DIDIER; ZANETI; OLIVEIRA, 2020, p. 104).

In this scenario, Paulo Henrique dos Santos Lucon understands that the expression structural processes designates:

processes aimed at the protection of rights whose performance is not achieved by isolated acts or by watertight measures, on the contrary, require dialogue and cooperation throughout the procedure and the adoption of flexible measures that can be changed according to the modification of phatic circumstances (LUCON, 2017, p. 12).

In Ada Pellegrini Grinover's view, the structural process can be seen as an appropriate means of judicializing public policies, in view of the so-called "conflicts of public or strategic interest" that "arise in society due to the impossibility or difficulty of enjoying fundamental social rights, of a benefit nature" (GRINOVER, 2016, p. 48).

The term structural process, according to Fredie Didier, Hermes Zaneti and Rafael Alexandria de Oliveira, is used as a structured procedural way, because "it is based on the premise that the threat or injury that bureaucratic organizations represent to the effectiveness of constitutional rules cannot be eliminated without such organizations being rebuilt" (DIDIER; ZANETI; OLIVEIRA, 2017, p. 48-49).

Historically, this concept originated in U.S. law, notably through the previous Brown v. Board of Education (1954), from which the expression "Structural injunctions" originated. Through that collective action, the Judiciary was called upon to intervene against the policy of racial segregation admitted in the fundamental schools of the city of Topeka, Kansas, and, therefore, the Supreme Court decided that the discriminatory practice was unconstitutional. However, after unsuccessful attempts to apply the decision, it was found that, in order to be effective, that decision had to be implemented in a progressive manner, gradually making it possible to eliminate the obstacles arising from the policy in force until then (ARENHART, 2013; BAHIA; NUNES; COTA, 2019).

Owen Fiss (2004) would have been the first author to talk about the issue in the United States, and his doctrine, in fact, seeks to give evidence to the judicial protagonism, with the judge as the interpreter of constitutional values, since, according to the author's doctrine, in a synthesis made by Leonardo Silva Nunes, "the Judiciary Power would also have legitimacy (and duty) to participate in the dialogue held in the political arena, in order to give concreteness to the values enshrined in the constitution" (NUNES, 2021, p. 689).

. For the American author,

The structural judicial process is one in which a judge, facing a state bureaucracy in terms of constitutional values, restructures the organization to eliminate the threat imposed on such values by existing institutional arrangements (FISS, 2004, p. 26-27).

In addressing the issue, Fabrício Bastos lists the theme as a result of judicial activism, taking into consideration that "it is a decision-making modality that (pre)occupies itself

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more with the effectiveness of the command issued in its body than with the resolution of the procedural legal relationship. This is because, according to him, “the court, in addition to indicating the solution of the dispute, provides a decision that has prospective effectiveness” (BASTOS, 2018, p. 59).

It is noted, therefore, that the theoretical basis so far outlined about the so-called structural process is, fatally, linked to legal dogmatics, more notably, to the instrumentalist theory of the process, whose origin is the Bulowian theory, in which process is perfomed as a subjective legal relationship.

From this perspective, the judge is endowed with innate knowledge, is seen as an authority that possesses considerable cognitive privilege, and the interpretative function of the norm loses relevance vis-à-vis the interpreter himself.

The emphasis given by traditional doctrine to the structural process revolves around judicial protagonism, in which the premise is that the judge will be able to impose the necessary measures to unfold the proposed problem. It is a question of staggered decisions, in which at first, after analyzing the process (with reference to the dogmatic view), the judge will make a decision, which will be limited to fixing in a general manner the guidelines for the protection of the protected right. From this decision on, others will come according to the implementation given to the measures initially imposed.

As Sérgio Cruz Arenhart summarizes,

> These decisions can (and often should) go beyond the simple specification of the result to be obtained, clarifying the means for this. The judicial sentence, by fixing the expected consequence, may impose a plan of action, or even delegate the creation of such a plan to another entity, so as to achieve, in a more prompt manner and with the least sacrifice to the interests involved, the desired result. This is what Ricardo Lorenzetti calls micro institutionality. In fact, the structural provision must often take the form of a “new institution”, created to monitor, implement and think about the achievement of the scope of the judicial protection offered (ARENHART, 2013, p. 394).

The authoritarian bias of the way the subject has been treated is thus verified, even, so to speak, by removing from the scene the main stakeholders of the measures to be taken, the citizens. Whether in the face of complex litigation, or even when dealing with the implementation of fundamental rights, the focus, as placed, revolves around the central figure of the judge, who, as a divine expression, will “offer” a judicial tutelage capable of fully covering, even in a staggered and gradual manner, all the necessary measures.

In addition, although there is no legislation dealing with the issue, part of the doctrine has defended the compatibility and operability of the use of the structural process based on article 139, IV of the Code of Civil Procedure[5] (BRAZIL, 2015), since such provision encompasses a general clause of effectiveness or atypicality of executive measures.

As such, what is evident is that the structural process worked by the doctrine so far ignores a point that, in fact, should have real prominence: Citizenship as an element of democracy.

5 Art. 139. The judge shall direct the proceedings in accordance with the provisions of this Code: [...]IV - determine all inductive, coercive, mandatory or subrogation measures necessary to ensure compliance with a judicial order, including actions for the purpose of pecuniary restitution; [...] (BRAZIL, 2015).

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In view of this, the way in which the structural process has been approached so far is criticized under a dogmatic aspect, based on judicial activism, ignoring the principiology of the Democratic State of Law.

3 NOTIONS ON DEMOCRATIC PROCESSUALITY

Even before entering into the attempt to correlate the ideology of the structural process from the perspective of democratic processuality, it is necessary to explain, even if in synthesis, the basic concepts inherent to the Democratic Rule of Law.

The first delimitation that is made concerns Citizenship, since, differently from the way it is approached by juridical dogmatics, in which Citizenship is subjugated to the State, in a democratic approach, Citizenship must be understood on the same hierarchical level of the State.

For Rosemiro Pereira Leal, Citizenship is characterized as "a deliberate legal-political-constitutional bond that qualifies the individual as a driver of decisions, builder and reconstructor of the legal system of the political society to which he has affiliated" (LEAL, 2002, p. 150-151).

Based on this conception, Roberta Maia Gresta points out the fundamentals by which Citizenship is not subordinated to the State, providing that:

> (1) Citizenship is not a state benevolent, but a bond that connects the person directly to the juridical-political status inscribed in the Constitution; (2) the legal system is not a donation of the State, but an object of permanent construction and reconstruction through decisions (legislative, administrative and judicial); and (3) the citizen is not a mere recipient of state tutelage, since he participates in these decisions as a driver (GRESTA, 2014, p. 9).

Thus, Citizenship fits into the same institutional level, because both State and Citizenship are constitutionally drawn institutes, therefore, they fit into the same existential plan, that is, both are born with the Constitution[6].

The citizen, therefore, is not seen only as a sheltered subject, receiver of rights, subordinated to the State, on the other hand, with Citizenship occupying an institutionally isonomic space, the citizen emerges the prerogative of self-inclusion, which grants him/her the possibility of promoting his/her own insertion in the legal order (GRESTA, 2014, p. 10).

In the democratic vision that is defended here, man must be understood as a 'natural subject', that is, his own biological nature makes him the holder of rights that belong to all

6 In addition to these points, it is worth mentioning that for Leal the Constitution is part of the so-called world 3, an expression coined by the philosopher Karl Popper when dealing with his theory of objective knowledge, because, according to Leal, "the Constitution emerges as a linguistic entity, autonomous in relation to the historical context in which it is produced and the concrete situations that demand the application of the Law" (GRESTA, 2014, p. 185). In this sense it is observed that the theory of knowledge developed by Popper lists the coexistence of three worlds, world 1 being made up of the physical bodies and their physical and physiological states, world 2 being the mental states, while world 3 is the world of the products of the human mind, both physical, such as sculptures, paintings and drawings, as well as immaterial things such as knowledge and science.

men indistinctly. Thus, “natural subjects are invested, directly by the Constitution, in fundamental rights” (GRESTA, 2014, p. 55).

In this sense, therefore, man is given the right to participate in the construction of the legal order, and the point of this work is more precisely the construction of the judicial decisions that concern him. The materialization of this participation, which is placed as an ‘autonomous and nuclear legal element of Citizenship’, is exactly in the prerogative of ‘self-inclusion’, defended by Leal, and this should be seen as the possibility given to the subject of effectively discussing the content of state acts when they are produced (GRESTA, 2014, p. 51-52).

An effective ‘direct action’ is then defended, understood as:

> the opening of decision-making bodies to citizen participation, not just to representatives. From a legal perspective, this openness includes the enunciation of meanings with a binding character. This means that it is not enough to ensure that citizens attend the places of deliberation, as listeners, or granting them the opportunity to demonstrate. The entrance to the decision-making instance is made when the sense enunciated by the citizen, even if it does not prevail, cannot be disregarded in the decision making (GRESTA, 2014, p. 56).

In the judicial sphere, direct action is analyzed from the perspective of access to justice, a fundamental right instituted by the 1988 Constitution of the Republic, which is embodied in access to jurisdiction (BRAZIL, 1988).

However, it is considered that in the current panorama, whose basis is legal dogmatics, the interpretation of Law is given to the judicial authority, and the access to justice is approached in the sense that the Judiciary is responsible for the production of decisions.

Jurisdiction is understood as the activity of the Judicial State that resolves the conflicts placed before it. Thus, in this bias, the citizen is placed before the judging state only as the addressee of its decision, so that by provoking the exercise of jurisdiction, he immediately submits himself to the judge, giving cause for the formation of the process. His participation is reduced to a persuasive character, since his “function” is simply to influence the convincing of the judicial authority.

On the other hand, in the democratic conception treated by Rosemiro Pereira Leal, the access to jurisdiction is approached from the compatibility of the state decision-making activity (what Leal calls judicial) with the premises of the Democratic State of Law, so that “jurisdiction is presented as a set of legal contents that, produced by the due legislative process, are accessible to the entire legal-political community” (GRESTA, 2014, p. 58). Thus, in line with this perception, in democratic law jurisdiction cannot be identified as an enforcement activity of a decision produced under the authoritarian cloak of the Judicial State.

Thus, in summary to Leal’s thought, Gresta clarifies that “Judication consists in structuring the State’s decision-making activity in the form of procedures” (GRESTA, 2014, p. 58), and it is only configured in a democratic manner when it is presented “as a legal duty to assure the parties of the Constitutional Process, and not as a tutelary or interdisciplinary activity of rights freely discovered by the judge’s intelligence on the margin of the structural scope of the processualized procedure” (LEAL, 2014).

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In democracies, therefore, the judge or decision maker "is not a free interpreter of the law, but the enforcer of the law as interpreter of the logical-legal articulations produced by the parties building the procedural structure. (LEAL, 2014)

In this respect, "access to democratic jurisdiction, therefore, requires the opening of judicial procedures to citizens, not only formally, but by recognizing them as the articulator-builder of the judicial decision. (GRESTA, 2014, p. 59).

Thus, taking up the constitutional principle of access to justice, which is the basis for the legal participation of the citizen in the production of the judicial decision, it is reiterated that only a decision constructed discursively can be considered democratic, that is, in the face of the legitimate possibility that is opened to the part of being the builder of the decision that will affect him.

Inseparable from the right to petition is the approach to the legitimacy to be in court. It is considered that democratic legitimacy, as treated here, differs from legitimation, which is usually approached by dogmatics, because:

> While the legitimacy of the exercise of state functions is gauged by its constitutional framework, especially by the intangibility of the prerogative of total population self-inclusion, legitimization involves a strategic state effort to stabilize practices that undermine institutional equality between state and citizenship (GRESTA, 2014, p. 81).

Legitimacy to be in court is a fundamental guarantee guaranteed constitutionally since, according to article 5, XXXV of the Constitution of the Republic, "the law shall not exclude from the Judiciary's appreciation injury or threat to the law" (BRAZIL, 1988). Thus, in this perspective, the law is illegitimate when it restricts access to jurisdiction by means of a 'permission rule' (what is dogmatically called legitimation), which is exemplified in the sphere of public civil actions (Law 7347/85), in which the law stipulates a list of persons or entities authorized[7] to bring claims that give rise to injury or threat to rights affecting the community (BRAZIL, 1985).

From this feeling, by democratically understanding legitimacy,

> It is noticeable that: a) the citizen can only enunciate meanings autonomously in State procedures when these are normatized as structures enabling horizontal articulation between Citizenship and the State; b) the first requirement affecting this normatization is the non-restriction of the scope of the principle of inapplicability of jurisdiction, by the exclusion, even if implicit, of constitutional legitimations to act (GRESTA, 2014, p. 85).

7 Article 5, Law 7.347/85. They have legitimacy to file the main action and the precautionary action:
I - the Public Prosecution Service;
II - the Public Defender's Office;
III - the Union, the States, the Federal District and the Municipalities;
IV - the autarchy, public company, foundation or mixed economy society
V - the association which, concomitantly:
a) has been established for at least one (1) year under civil law;
b) includes, among its institutional purposes, the protection of public and social heritage, the environment, the consumer, the economic order, free competition, the rights of racial, ethnic or religious groups or the artistic, aesthetic, historical, tourist and landscape heritage.
[...] (BRAZIL, 1985).

It means, then, that as a starting point to make a democratic process viable it is necessary not to legally restrict the citizen's access to jurisdiction, preserving the constitutional prerogative of self-inclusion.

> The prerogative of self-inclusion is permanent, constitutionally instituted and, therefore, independent of the State's predisposition to admit it. The space for the exercise of Citizenship presupposes that the creation and interpretation of the law is linked to the confrontation of the senses enunciated by citizens, as a guarantee of access to jurisdiction (GRESTA, 2014, p. 98).

Thus, in this bias, the interest in participating in the procedural relationship must be self-proclaimed, so that the "provocation to exercise the judicial function is, in itself, the demonstration of the existence of an interest to act, that is, the interest to enter the judicial decision-making instance and enunciate meanings" (GRESTA, 2014, p. 102).

The construction of democratic processuality has as its premise the possibility of free enunciation of interests, especially when it concerns the exercise of fundamental rights expressly brought by the Constitution of the Republic.

Under these bases the objective of the procedures is defended, whose core is the legal argument. It means, therefore, that the interested party, in provoking the Judiciary, presents his pretension, which will be confronted with the legal system in order to build a judicial decision.

In the objective procedure the analysis of the pertinence to the debate is redirected from the subject to the object (GRESTA, 2014, p. 105), so that the focus of the judicial process will not be the convincing of the judge of the cause, but rather the argumentation presented in order to achieve the claim exposed there.

The change in this panorama is based on the theory of objective knowledge of Karl Popper[8] (1975), which, although founded on the growth of scientific production, has premises applicable to decision-making procedures.

The theoretical basis brought by the Austrian philosopher points to the importance of the argumentative function, so that in the procedural sphere, the interested party will present the facts by means of the descriptive function, which has the ability to expose the facts according to their existence in the world, however, it is the argumentative function that allows the formulation of problems and their confrontation through competing theories (proposals offered to criticism), with results that exert a retroload on individuals (their minds) and the collectivity (traditions) (GRESTA, 2014, p. 106).

In the words of Roberta Gresta,

> When the self-proclaimed interested party acts before the judicial body (initiation of the procedure or intervention in it), one must observe how it manifests itself. [...] If the manifestation reaches the superior functions of language, through the conformation of the object (descriptive function) and the construction of a reasoned claim (argumentative function) regarding this object, the interested party inaugurates or integrates the debate. Since formulated, the claim is submitted to tests during the procedure, by the production of evidence and the argumentative objections presented by other

8 The exhibition of which took place in the work "Objective knowledge: an evolutionary approach". Published in Brazil by the University of São Paulo in 1975.

> participants. In the end, the decision must be the result of rational criticism, forwarding the thesis that has shown itself to be more resistant to the tests of falsifiability. The judgment corresponds, then, to the prevalence of one of the meanings forwarded by the legal argument (GRESTA, 2014, p. 107).

However, it is considered that the judgment cannot be definitive. This is because the senses enunciated and debated throughout the procedural process will not be considered as dogmas, i.e., they will not be considered unquestionable or indisputable, being possible to open them for rediscussion in another procedure, if so.

These conceptions meet the neo-institutionalist Theory of Process developed by Rosemiro Pereira Leal. Thus, from now on, the work will stick to the brief presentation of this theory in order, then, in counterpoint to it, to criticize the judicial protagonism that has been the focus on the so-called structural processes.

4 THE STRUCTURAL PROCESS IN COUNTERPOINT TO THE NEO-INSTITUTIONALIST THEORY OF THE PROCESS

The neo-institutionalist theory of the process, conceived by Rosemiro Pereira Leal (2013), is based on popperian theory, with emphasis on critical rationalism and the formation of objective knowledge based on the criteria of the theories' falsibility. Based on these conceptions, Rosemiro Pereira Leal develops his own theory establishing criticism about legal democraticity.

The initial scope of this theory is to break with the dogmatic science of law, emphasizing the authoritarianism of the Liberal and Social States, previously in force, pointing out a new paradigm of State, being it "an accessory and protossignificant institution to configure itself [...] as a Democratic State of Law already received in the Brazilian Constitution of 1988 with the designation of a Democratic State of Law (art. 1). (LEAL, 2013, p. 3).

As explained by Rosemiro Pereira Leal,

> The neo-institutionalist theory has in the Constitution the institution that originated from its existential possibility; however, the Constitution itself, by proclaiming itself a Democratic of Law, with little importance to the legifiable scope of its elaboration, as is the Brazilian one of 1988, already puts itself under the regency of the constitutional institution of the process as a democratizing and juridical-discursive condition governing the realization, recreation and application of the rights assured in the constitutional discourse (LEAL, 2014).

For this conception, as Roberta Maia Gresta explains, the Democratic State of Law requires the elaboration of a critical rationality:

> a) establish meanings from the logical relations between the theoretical elements gathered from its principiology (connection between world 2 and world 3); b) produce (provisional) solutions compatible with the democratic institutional matrix (production of scientific knowledge in world 3); and, from there, c) apply such solutions in order to refute "subjectivities and [...] behav-

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> ioral dispositions, [...] individual, collective and cultural expectations of ways of life incompatible with democratic principiology (GRESTA, 2014, p. 187).

The exercise of interpreting the Law is carried out in an isonomic manner, in which the interpreter is bound by the normative sense of fundamental rights, allowing for an opening of interpretation and argumentation to all equally.

It is worth remembering that in the sense of democracy as outlined in this perspective, Citizenship occupies the same space of existence as the State, which allows for the citizen's self-inclusion and a full opening of the judicial function to the interpretation and argumentation of legal contents.

The neo-institutionalist theory of the process seeks to redefine the due legal process and for this purpose presents the principles of the contradictory, broad defense and isonomy as the markers of the process as a 'constitutional institution', through which a permanent critical-argumentative opening is inaugurated. The principles in question are considered institutions, a characteristic that gives them precedence over the exercise of the judicial function (GRESTA, 2014, p. 188).

In the words of Leal, the process, as an institution, is therefore presented as follows:

> [...] set of legal principles and (institutes) gathered or approximated by the constitutional text under the name of due process, whose characteristic is to ensure, by the institutes of the adversary, broad defense, isonomy, right to the lawyer and free access to jurisdiction, the exercise of rights created and expressed in the constitutional and infra-constitutional order through procedures established in legal models (due process) as manageable instrumentality by the legally legitimized (LEAL, 2014)

According to Leal, the institution of a constitutional process is the legal-discursive framework for the creation of judicial procedures, as well as legislative and administrative ones, and its provisions (judicial decisions, laws and administrative decisions) derive from the dialogical-procedural sharing within the constitutionalized legal community in the creation, amendment, recognition and enforcement of rights (LEAL, 2014).

Thus, such a principiological conception creates, through the process, a space open to the direct participation of all interested parties, thus allowing a joint construction of the state provision.

It can therefore be seen that the process, for this proposal, is a "constitutionalised and constitutionalising theory that makes possible, by the principles of contradiction, broad defence and isonomy, the installation of spaces for production, reproduction and interpretation of democratic law" (LEAL; ARAÚJO, 2016, p. 145).

The principle of the contradictory, as an institution, is equivalent to the necessary dialogicity between interlocutors (parties) who place themselves in defense or dispute of the alleged rights, being still possible to exercise their freedom to say nothing (LEAL, 2018, p. 155).

> Unlike the opportunism of saying and contradicting, and even of not saying, the contradictory, developed between the parties, as a constitutional principle, assured in article 5, LV, of the Constitution of the Republic of 1988, finds in the neo-institutionalist theory a position different from that given by

> Fazzalari, because the right to the contradictory does not integrate a simple rituality of the procedure to convince the judge (LEAL; ARAÚJO, 2016, p. 147)[9]

On the democratic side, therefore, the contradictory is the institutional basis of the process, referring to legal democracy, thus enabling the enunciation of meanings by the interested parties in favor of the construction of the legal decision, not limited to a mere saying and contradiction for the formation of the judge's conviction.

In turn, the principle of isonomy is substantially linked to the procedure in contradictory, since it is characterized by the equality in time between the saying and the contradictory exercised by the procedural parties in the constructive and implementing realization of the procedure (LEAL, 2018, p. 155).

The broad defense, in turn, correlates directly with the principles of the adversarial and isonomy, since the scope of the defense is made within the temporal limits of the adversarial procedure (LEAL, 2018, p. 156).

It is fair to clarify that the defense must be produced by legal and systemic means and elements by allegations and evidence in the procedural time provided by law. It means, therefore, that the defense must be broad, assuming the opportunity to exhaust the argumentative articulations of the law and the production of evidence (LEAL, 2018, p. 156).

Thus, according to the neo-institutionalist approach, the process is "the governing institution and attribute of legitimacy of all creation, transformation, postulation and recognition of rights by the legal, judicial and administrative provisions" (LEAL, 2018, p. 145).

Still in this area, Gresta, based on neo-institutionalist theory, points out that the process is demarcated by a permanent 'space of refutation', which identifies in the constitutional discourse binomials that connect fundamental rights and institutional principles of the process (GRESTA, 2014, p. 189).

Leal highlights that in neo-institutionalist theory,

> The process is an institution (linguistic-autocritical-legal), co institutionalizing and co institutionalized (constitutional) that propositionally enunciate itself by the institutes (normalized principles) of the contradiction-life-, broad defense-freedom, isonomy-dignity (equality). This biunivocity is presented as fundamental, liquid, certain and enforceable fundamental rights of the system, depending on how they are placed, in a pre-cognito character, in the bulge of the legal system (LEAL, 2013, p. 40).

In the concept outlined by Leal, the term contradiction-life-is conceived by the idea that the contradictory does not constitute a fundamental right, but only if it is capable of realizing the right to a dignified human life. The ample defense of freedom is verified by the free manifestation of ideas, being coextensive to the principle of the contradictory, making possible the reanalysis of a monocratic decision by a collegial organ. Finally, isonomy-dignity (equality) means that it is not enough to have equal time for the manifestation of the parties, it is neces-

9 It is observed that Fazzalari, although he constructs his discourse in the sense of trying to move away from the theory of the process as Bulow's legal relationship, ends up, like Bulow, focusing on the role of the judge, so that the contradictory loses its referential as a constructor of decisions whose legitimacy does not originate from the presupposed knowledge of the judge. Unlike the neo-institutionalist theory of the process, for which the contradictory is a reference of legal democracy (LEAL; ARAÚJO, 2016, p. 147)
The expression 'space of refutation' is by Andréa Alves de Almeida, who in her work, Espaço Jurídica Processo na Discursividade Metalinguística (Curitiba, CRV: 2012), lists "democratic participation as the occupation of the procedural space, conceived this as a space of refutation (testification by exercise of argumentation) [...]". (GRESTA, 2015, p. 188).

sary that the decisions that concern them be comprehensible, even more, the interpretation of the Law and the possibility of requesting the modification and exclusion of norms must be equally accessible to all (LEAL, 2013, p. 10-11).

In a nutshell,

> The neo institutionalist theory of process seeks to establish the constitutional concept of what is legally a process, with the productive basis of its contents as the structure of a discourse arising from the permanent exercise of citizenship through continued plebiscitizing in the procedural space of the issues fundamental to the effective construction of a legal society of democratic law (LEAL, 2018, p. 145).

From the above, the so-called process/decision/structural measure, although it seeks in its essence the protection of very sensitive rights, notably fundamental rights constitutionally guaranteed, is in fact an authoritarian discourse, since the center of what is proposed is the decision of the judge, characterized as a logical and direct result of judicial activism.

As already described in this work, the structural process is made possible by the gradual implementation of judicial decisions, so that as the judicial decision is put into practice it will have the exact notion of eventual problems that arise, opening itself to the verification of eventual other impositions that the case may require.

In the words of Sérgio Cruz Arenhart, it will be the complexity of the cause that, commonly, will imply the need to try various solutions to the problem presented in court, so that this 'trial-right' technique will allow the selection of the best technique and the search for an optimized result (ARENHART, 2013, p. 394).

The lack of commitment to the structural process as presented by the doctrine is criticized, especially in view of its emphasis on judicial protagonism combined with the lack of critical-argumentative openness to interested parties.

However, without trying to exhaust the possibilities of discussion on the subject, it is possible to conjecture such an ideology from the perspective of democratic processuality, resignifying the structural process based on the principiological conception brought by the neo-institutionalist theory of the process.

5 CONCLUSIONS

Thus, the realization of a public policy, the implementation of a fundamental right, or even the resolution of complex or 'radiated diffusion' disputes, both in the judicial and administrative spheres, must be effected through a procedurality, which is based on the principles of contradiction-life-, broad defense-freedom and isonomy-dignity, in which an open space is created for the democratic participation of all interested parties, who thus proclaim themselves.

The process, therefore, as a facilitator of a 'critical argumentative opening', should make it possible for the interested parties (self-includers) to effectively debate the contents of state

decisions when producing them, thus making it possible for them to enunciate meanings that will truly be taken into account by the judgment.

Thus, to speak of structural processes from the perspective of democratic processuality means to remove the emphasis from judicial protagonism, in order to opportunize to the legitimized broad dialogical openness in the construction of structured decisions. Let us say decisions because, due to the complexity of the demands, the parties will arrive at a first decision, which cannot be definitive, since the meanings enunciated and debated there will be put to the test, since they cannot be considered as dogmas, being then possible to rediscuss them as the needs arise, to provide a series of decisions in the best interest of the legitimate.

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THEORIES OF ECONOMIC REGULATION: AN APPROACH ACCORDING TO RICHARD POSNER

TEORIAS DA REGULAÇÃO ECONÔMICA: UMA ABORDAGEM SEGUNDO RICHARD POSNER

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ABSTRACT

The purpose of this paper is to analyze the theories of economic regulation from the standpoint of Richard Posner. The basic assumptions of public interest theory, catch theory and economic theory of regulation were presented. Each theory was analyzed from criticisms and observations made by Richard Posner with the main objective of verifying which of the theories presents a more efficient formulation. For the accomplishment of the work was used bibliographic research using as a method the literature review. The results obtained allow us to affirm that Richard Posner concluded that there is no absolutely efficient and critique-free theory of regulation, but the one that is closest to efficiency is the economic theory of regulation.

Keywords: Theories of regulation. Richard Posner. Efficiency.

RESUMO

O presente artigo tem como finalidade analisar as teorias da regulação econômica sob a ótica de Richard Posner. Foram apresentados os pressupostos básicos da teoria do interesse público, da teoria da captura e da teoria econômica da regulação. Cada teoria foi analisada a partir de críticas e observações realizadas por Richard Posner com o objetivo principal de se verificar qual das teorias apresenta uma formulação mais

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eficiente. Para a realização do trabalho foi utilizada pesquisa bibliográfica utilizando como método a revisão da literatura. Os resultados obtidos permitem afirmar que Richard Posner concluiu que inexiste uma teoria da regulação absolutamente eficiente e livre de críticas, porém a que mais se aproxima da eficiência é a teoria econômica da regulação.

Palavras-Chave: *Teorias da regulação. Richard Posner. Eficiência.*

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1. INTRODUCTION

The State's coercive power stands out as one of its main prerogatives in the face of private initiative. Economic regulation corresponds to the exercise of the state's coercive power through the economic agents in order to discipline the market.

The north american model of regulatory policy was one of the pioneers in the world and its theoretical framework is important not only for understanding the circumstances related to regulation in the United States, but also so that its vast experience in the field of regulation can be transplanted in the brazilian scenario and applied according to the local peculiarities.

Due to the importance of this model not only worldwide, but also in relation to the regulation carried out in Brazil, the present work will use the United States model as a theoretical basis, which is fundamentally based on two theories of regulation, the theory of public interest and the economic theory of regulation.

The analysis axis of both theories will be structured according to the risk derived from the capture of the regulatory agents, which, commonly, is approached by the Economic Analysis of Law as one of the relevant factors in the institutional design of the agencies.

In order to carry out the analysis of these theories of regulation, the work will proceed according to the standpoint of Richard Posner, based on his article published in 1974 entitled "Theories of economic regulation", considered, to this day, as a seminal text for the study of the theme.

Thus, the main objective of the present work is to analyze the theories of regulation, as exposed by Richard Posner, in order to verify what is the formulation that this author presents for a more efficient regulation theory in view of the risk of capture.

In this manner, the functioning of the State's role as a regulatory agent will be explained, addressing the concept of economic regulation and what would be its main objectives and finalities. The following section will present the concept of "capture" and expose its relevance to executing a critical analysis regarding the theories of regulation.

Then the presentation of the main foundations of economic theories will follow, with the fourth section devoted to exposing the assumptions of the public interest theory and the fifth to the economic theory of regulation.

This work will be performed based on a critical analysis grounded on the standpoint of Richard Posner, so that it can be verified, which are the flaws present in the themes approached and which points bring them closer to a more efficient economic regulation. As such, the sixth section will be aimed at addressing one of the main criticisms made by Posner regarding the theories of regulation, namely, the insufficiency of empirical support.

The present study was carried out through bibliographic research, using the method of literature review.

2. THE STATE AS A REGULATORY AGENT

The actions of the State as a regulatory agent is the target of interdisciplinary studies, covering mainly the areas of economics, law and political sciences. This multiplicity of instruments is important for addressing the regulation executed by the State in a broad way, seeking to analyze how economic regulation should take place and how it effectively occurs.

The regulatory activity developed by the governmental power includes primarily three prerogatives, which are: the edition, implementation and inspection of the rules, with the consequent penalties in case of non-compliance. Therefore, the State does not only act passively, it takes an active stance, imposing behaviors on the markets that will be regulated (OLIVEIRA, 2015, p. 137).

The concept of regulation of economic activity can be presented as "a set of indirect forms of intervention by the State on the economic activity as opposed to direct intervention, which is that of the State as an entrepreneur, that is, as an offerer of goods and services in the market " (SAMPAIO, 2013, p.61).

This intervention can happen in several ways, Posner (2004, p. 50) explains that the term economic regulation "refers to all types of taxes and subsidies, as well as to explicit legislative and administrative controls over fees, market entries and other facets of economic activity".

Such regulation will be executed through regulatory agencies, which are defined by Thomas Merrill (1997, p. 1049) as:

> The agency is a centralized source of governmental authority that can bring coordinated solutions to social and economic problems throughout its jurisdiction (which in the case of a federal agency, is the entire country). It combines all governmental powers, legislative, executive, and judicial, under one convenient roof. Its leadership is expected to be nonpolitical or at least biparti san. And its staff is expected to have the specialized information and systematic knowledge-in other words, the expertise-to comprehend complex problems and to fashion rational solutions to them[3].

This concept of regulatory agencies come from the north american law and comprehends the agency as any entity in the administrative organization that differs from the Executive, Judiciary and Legislative Branches (OLIVEIRA, 2015, p. 141). However, it is imperative to point out that, when imported into Brazil, that the agency model was used in a more restricted manner, with its legal nature explained by Sérgio Guerra (2012, p.118) as:

3 A agência é uma fonte centralizada de autoridade governamental que pode trazer soluções coordenadas para problemas sociais e econômicos em toda a sua jurisdição (que, no caso de uma agência federal, é o país inteiro). Ele combina todos os poderes governamentais, legislativos, executivos e judiciais, sob o mesmo teto. Espera-se que sua liderança não seja política ou, pelo menos, bipartidária. E espera-se que sua equipe tenha informações especializadas e conhecimentos sistemáticos - em outras palavras, a experiência - para compreender problemas complexos e criar soluções racionais para eles. (Tradução nossa)

> The brazilian regulatory agencies are autarchys of special regime, having autonomy from the public power.
>
> This special regime means that specific benefits are granted to the autarchic entity, aiming to increase its autonomy in comparison with the comum autarchys, without the infringement of constitutional precepts that are relevant to these entities of public personality.

The emergence of agencies, both in Brazil and in the United States occurred as a result of the growth of regulation by the State. There is an understanding that intervention in the market is justified with the objective of ensuring balance and removal of harmful practices carried out by economic agents, correcting market failure and ensuring the balance of the regulated system. Monopoly, externalities and asymmetric information can be cited as examples of the main market failures that drive the necessity for state regulation. The removal of market failures aims at achieving an economic balance that will cause private interests to be distanced in favor of maximizing social welfare (CAMPOS, 2008, p.283-284).

Despite the widespread conception that market failures are the main reason for regulation, Posner (2004, p.51) is opposed to this position and claims that after fifteen years of theoretical and empirical research there is no evidence to support this claim and that the dangers of market failures are less and less relevant.

In view of this divergence, the north american regulatory policy was a precursor in presenting theories that address the theme, called theories of economic regulation. George Stigler (2004, p.23) explains that these theories aim to "justify who will receive the benefits and who will bear the burden of regulation, what form the regulation will take and what are its effects on the allocation of resources".

The theories of regulation, therefore, take different approaches due to the possibility that regulatory norms, in fact, are committed not to the improvement of market relations, but to the interests of groups that seek personal favor.

This risk of influence in the process of formulating regulatory norms has been systematically presented in studies of Economic Analysis of Law, as the capture problem that will be addressed in the next section.

3. THE CAPTURE PROBLEM AS AN AXIS FOR CRITICAL ANALYSIS OF THE REGULATORY MODELS

The capture theory becomes the point of intersection between the public interest theory and the economic theory of regulation, which will have topics for their more specific analysis in the present work. It is possible because capture is not a theory of autonomous regulation, but rather a criticism arising from the public interest theory, based on the assumption that regulation would not occur with the aim of achieving a state of welfare, but rather that it would be coming from a process by which pressure groups aim to achieve their own interests.

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The Economic Analysis of Law, which has Richard Posner as one of its main exponents, corroborates this perspective, since for this theoretical current individuals are maximizers of their own utilities.

There is also, within the Economic Analysis of Law, a school of thought dedicated to the study of the functioning of the political market called *public choice*, which has as its object the analysis of the State and the behavior of individuals in relation to it, assuming that both in personal and public life economic agents will act rationally in order to maximize their own interests, not being rational to assume a dichotomy of the individual, who on a personal level would act for his own benefit, but when entering public life would withdraw from his personal interests to dedicate himself exclusively to social purposes (TULLOCK; SELDON; BRADY, 2005, p. 141).

In this manner, the analysis made from the *public choice* would make it clear as to why the public interest theory can't possibly be applied, demonstrating that the capture of the agencies would occur primarily due to the need of the captured agency's member and to maximize this agent's utilities instead of giving up possible personal advantages in favor of the public interest.

However, despite expressing relevant criticisms and with antagonistic assumptions towards the public interest theory, the capture theory was also the subject of a reformulation, since, as explained above, it could not be considered a regulation theory.

The capture problem points out that, usually, the regulatory process ends up protecting the interests of individuals or groups that in theory should be regulated, but that in fact are controlling the regulation. Peltzman (2004, p.85) explains that according to the capture theory "the regulation served the interests of the producers, either by creating cartels in industries where they would not exist, or by being unable to control the power of the monopoly".

As such, in addition to the market failures already exposed by the public interest theory, the capture theory also came to show the existence of government failures (SAMPAIO, 2013). This perspective of regulatory policy makes the process of economic regulation even more complex and has resulted in several consequences. In the United States, even the position of the Courts in the face of economic regulation was influenced by the dictates of this theory, when witnessing the conflict between market regulation representing an anti-competitive threat and the meddling in the autonomy of the State (WILEY JR, 1986, p. 728).

The capture theory has several versions, the first of which, the most radical of them, was presented by Marxists and political activists and, according to Posner (2004, p. 57) corresponds to a syllogism in which the big capitalists control institutions, a regulation is an institution, therefore the regulation is controlled by the big capitalists.

Subsequently, a reformulation of the theory proposed by political scientists was presented, highlighting the role of interest groups in legislative and administrative processes. Sanson (2013 p.127) conceptualizes these groups as:

> Organisms present not only on the national political scenario but also internationaly, possibly being ephemeral or long lasting, not limited to economic matters (for exemple, the feminist and environmentalist movements), represent a rupture of the partisan monopoly in the formulation of demands before the public bodies, when they use countless resources, through pressure, to influence them in the defense of their own interests.

The interest groups would act to influence both in the legislative process for the formation of regulatory policies and the regulatory agencies themselves in order to serve their personal interests. Therefore, as mentioned earlier, a regulation will not always be an imposition of unilateral interest by the State, since, based on the assumptions of the capture theory said regulation can be carried out due to the interest of the regulated company itself. In this regard, Posner (2004, p.57) explains that:

> This theory - which the term "capture" describes particularly well - states that over time, regulatory agencies end up being dominated by the regulated market. This formulation is more specific than that of the general interest groups theory. It highlights a particular interest group - regulated companies - as prevalent in the battle to influence legislation, and it provides for a regular sequence, in which the original purposes of the regulatory program are subsequently obstructed by pressure from interest groups.

However, despite having a more solid foundation than the first version, Posner states that even the reformulation proposed by political scientists is, in several aspects, very similar to some versions of the public interest theory and, there is no theoretical foundation to support it as a theory, which makes it unsatisfactory as a theory of regulation (POSNER, 2004, p. 57).

Posner proposes questioning as to who captures the regulatory agency. The theory just maintains that the regulated agents can capture the agency so that it starts to serve their personal interests, but is it not questioned why this capture cannot be made by consumers? What makes this class not able to capture agencies? It is well known that consumers have as much interest in having their needs met as regulated companies, so Posner questions that there is no way to talk about capture by just one of the agents and remove other possibilities without justifications being given (POSNER, 2004, p. 58).

For a market regulation to exist, it is assumed that there is an inefficiency that justifies this intervention, following this thought, the agency's performance occurs in search of market balance. For the capture theory, the original purpose of regulation is replaced by objectives imposed by interest groups. However, if the regulation made by the agency was established as a result of a market need and in the course of time there was a distortion of its purpose, it is concluded that the market will remain in need of regulation and due to the same inefficiency that was affected by before the existence of the agency (POSNER, 2004, p.57).

In this regard, the acceptance of the capture theory and the understanding that all agencies would not aim at the search for economic regulation that would serve the common interest is as uncompromising as the claim that regulation is always used with the purpose of achieve collective interest. Just as the existence of captured agencies has been demonstrated, Posner (2004, p.57) also states that:

> A significant portion of economic regulation serves the interests of small business associations, or non-profit institutions, including dairy producers, pharmacists, barbers, truck drivers and, in particular, workers unions. These forms of regulation are totally inexplicable (and are usually ignored or applauded) in this version of interest groups or capture theory.

However, affirming the existence of economic regulation that serves the interests of consumers and small businessmen is not the same as talking about the capture of the agency by those same groups that do not possess the same amount of resources. Although Posner

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questions why this capture is not made by consumers, it is important to highlight two important factors: the first is that the larger the group, the greater the transaction costs become so that they can organize themselves for a particular purpose, the second aspect to be focused on is that the capture occurs as a result of the political and administrative control that the regulated companies have over the agencies, which does not exist regarding the other groups (POSNER, 2004, p. 58).

Posner also questions the fact that economic agents only capture agencies, not using their influence to obtain the creation of an agency in order to reach their personal interests, or even use its influence to achieve its objectives within the scope of the Legislative Branch, which would make the capture of agencies unnecessary, since the laws themselves would be created according to their interests (POSNER, 2004, p. 58).

In addition to stating that none of these questions raised are answered by the capture theory, Posner also proposes the analysis of three sets of evidence, namely: (i) capture is not always necessary, since not all agencies are endowed with integrity and honesty; (ii) it is not uncommon to see situations in which the same agency regulates conflicting markets or interests, that is to say, there are interests of competing groups within the same market; (iii) and finally, the capture theory ignores the various cases in which the interests defended by the agencies are those of consumer groups (POSNER, 2004, p. 58).

These sets of evidence confirm the flaws of the theory and corroborate the claim that capture cannot be considered a theory, since there is no theoretical basis or empirical evidence to support it. However, it can be understood as an important axis that links the public interest theory and the economic theory of regulation, which will be presented respectively in the following topics.

4. PUBLIC INTEREST THEORY

The early works dealing with economic regulation support that the need for regulation came from the existence of market failures. The State should act in an indirect manner to avoid the action of harmful agents and the perpetration of personal interests. In this way, obstacles would be removed so that the market would flow organically and obtain the maximization of social welfare (CAMPOS, 2008, p. 283).

A spread of these ideas became stronger in the United States after the crisis of 1929 and the policies of the *New Deal*. The Regulation was viewed positively as an important tool for overcoming market failures. It was from the 1930s that these currents of thought were consolidated and became known as the public interest theory (SAMPAIO, 2013, p. 44).

The theory received its name because its supporters believed that regulation was primarily intended to serve the public interest, being a response to social concerns and a way of intervening in the market to resolve its shortcomings. There are two main assumptions that structure the public interest theory. The first of them states that the markets are extremely fragile and are willing to act inefficiently. The second assumption, on the other hand, states that the State has an almost negligible cost on making regulation (POSNER, 2004, p. 50).

The fragility of the markets is supported by the assertion that these are the targets of numerous failures, which means that there is an economic inefficiency. The role of regulatory agencies, according to this theory, aims to act by remove these flaws. In this regard, the increase in State intervention through regulation would be directly proportional to the growth in efficiency in the regulated sectors (CAMPOS, 2008, p.284).

Asymmetric information can be pointed out as one of the most relevant market failures. About this failure, Campos (2008, p.287) explains that:

> Regarding asymmetric information, it is important to point out that market competition models are based on the assumption of perfect information in which consumers, when making their decision, know everything they need to know about the quality of a product, the price of the competition etc. Such an assumption is not realistic because obtaining information has costs, products can be complex or their effects can only be felt in the long run, or there are unknown side effects.

Asymmetric information means the inequality of information between the poles of the relationship, which may benefit or harm one of the agents. Depending on when this asymmetry is identified, it can be classified as adverse selection or *moral hazard*. Adverse selection occurs when the difference in the degree of information between the agents and the benefit of one of them due to the informational superiority happens before the transaction is executed. As such, the lack of access to ample information drives the agents to often make decisions that at least one of them would not have chosen if access was granted to all the information beforehand. (MACKAAY; ROUSSEAU, 2015, p. 136).

Asymmetric information *ex post* occurs through *moral hazard*, which occurs when the economic agent changes its behavior after having its property protected. In this manner, the most widespread example concerns vehicle insurance, when the agent, after acquiring the insurance, starts to adopt behaviors that increase the risk of an accident occurring. (MACKAAY; ROUSSEAU, 2015, p. 138).

In view of these market failures and the assumptions already mentioned, namely, the expectation of increased efficiency plus the low cost to be spent by the State, regulation came to be seen as an ideal solution to the economic problems of various sectors.

However, these two assumptions cited as pillars of the theory are contested by Posner (2004, p.51) and he exposes that regulation is not necessarily linked to market failures and that "the concept of government as a free, reliable and effective instrument for changing market behavior has also already been undone".

As previously explained, the theory was named in this manner because regulation is understood as a response to social demands in search of an economy that favors the common interest. It just so happens that the defenders of this theory shied away from explaining what this "common interest" would be to pursue it. Talking about a regulation that aims at social interests ends up becoming empty before a plural society.

The public interest theory has undergone some reformulations, the first of which maintains the belief in the importance and probity of regulatory agencies, but recognizes that they may not achieve the expected efficiency, justifying that the flaw is not found in the structure of the agencies and neither in the way regulation occurs, but in the inefficiency of its employees and managers. In this regard, Posner (2004, p.52) explains that the reformulated theory

holds “that regulatory agencies are created for suitable public purposes, but are poorly managed and, as a result, the objectives are not always achieved".

Posner (2004) continues to maintain its disagreement with the theory and states that the reformulation is not satisfactory due to two reasons. The first one suggests that regulatory inefficiency can be an objective pursued by interest groups that have great influence in the creation of legislation that establishes regulatory policy. This argument assumes that the lack of regulation effectiveness will not always come from the way thing operate within the regulatory agency. The agency's creation guidelines may be lacking and prevents it to perform regulation in order to privilege the public interest.

It is imperative to point out that this is not an error in the formulation of the agency's structure, but rather concerns the favoring of groups that have a strong influence on the political scene. This criticism can be directly related to the capture theory.

In this regard, Stigler (2004) accurately notes that just as regulation can be imposed on an industry, it can also be objectified by it, with the purpose of using economic regulation to achieve its own interests. Therefore, just as an industry can be chosen as an object of regulation, it can also choose regulation as an instrument.

The second reason cited by Posner (2004) reveals that there is insufficient data to affirm that there is maladministration behind the agencies. The agency's efficiency is encouraged due to budget distributions, that is, the better the agency's performance, the greater the amount allocated to it. In addition, the director has an obligation to report to the Executive and Legislative Branches, which means that there is an interest in demonstrating a good performance.

It is not only the leadership of the agencies that benefit from demonstrating their efficiency, the other employees also receive incentives so that their performance is the best it can possibly be. Although their performance does not directly influence their remuneration, employees who are part of the staff of a regulatory agency gain visibility and increase their personal appreciation if they wish to migrate to the private sector, therefore, the efficiency of the agency in which they are a part of is also an objective to be pursued by them, even if it is for the purpose of adding value to themselves.

Posner (2004, p.54) further states that “another objection is that the agency has few incentives to minimize costs because, unlike a private company, it cannot maintain profits from reduced costs", however, this argument cannot support itself either, since countless private sector employees also do not benefit from the increased profit of the companies in which they are part of, however, this does not prove a strong enough incentive for them to start performing their activities inferiorly.

The public interest theory goes through a reformulation in which Posner admits that there is a possibility to consider that regulation really has the public interest as an end, but it is performed unsuccessfully due to some factors (POSNER, 2004, p. 54).

As far as admitting a regulation with an inadequate purpose can go, some obstacles to its efficient realization must be observed. The first of these concerns is the inflation of activities to be performed by the regulatory agencies, which means that even with good intentions, these entities are not successful while performing their activities.

The second aspect that can be addressed as an obstacle to an efficient regulation is the precarious supervision of agencies by the Legislative Branch, as stated Posner (2004, p.55) by revealing that "as the activity of the Legislative increases, one can expect an increasing delegation of work to the agencies and a decreasing control over these agencies".

Therefore, the growth in the activities performed by regulatory agencies, coupled with the precariousness of their inspection by the Legislative, achieving their objectives efficiently becomes impossible, as well-intentioned as the regulation may be.

Thomas Merrill argues that inevitably failures on the part of the Public Administration may occur and that, in these situations, the review of administrative performance by the Judiciary Branch should take place, however, he stresses that the Courts should act with caution when reviewing the agency's performance, since, as a rule, the agencies would be better than the Courts at pursuing the public interest (MERRIL, 1997, p. 1049).

The public interest theory was eminently developed by economists and although its formulation is consistent, the presence of several flaws is clear. Due to the failures pointed out in the public interest theory, explanatory theories were developed that aimed to remedy these flaws.

As explained, the capture theory emerged as the main explanatory theory resulted from the public interest theory shortcomings. Despite its antagonistic precepts, the analysis of risk of capture of regulatory agents can be used even to ratify the applicability of the public interest theory, if it is demonstrated that there is no risk of capture.

However, if the existence of captured agents is proven, as explained above, the capture theory does not have substance to be considered as a regulation theory, in this manner, it was necessary to carry out a theoretical improvement resulting in the theory that will be analyzed in the topic following.

5. ECONOMIC THEORY OF REGULATION

The foundation of the theory was created by George Stigler and published in an article in 1971 called "The theory of economic regulation", however, he did not come up with a name to refer to it. In 1974 Richard Posner published an article dealing with the theories of regulation, among them, the theory created by Stigler, which came to be called by Posner the economic theory of regulation.

On the theory Peltzman (2004) states that:

> The most important element of this theory is the analysis of the political behavior based on the parameters of economic analysis. Politicians, like any of us, are seen as maximizers of their own interests. This means that interest groups can influence the results of the regulatory process by providing support financial or otherwise to politicians or regulators (PELTZMAN 2004, p. 81).

Posner states that despite the theory also departing from the unreasonable assumptions of regulation and admitting the possibility of "capture" by interest groups, in addition to

the groups that would be composed by regulated companies, it cannot be confused with the capture theory, since for the author " the economic theory is more accurate and well-finished - more easily comparable and testable with a set of empirical data - than political theory". In this regard, the economic theory of regulation rejects the supposed virtuous and integral purpose of the legislation, admits the possibility of capture by interest groups other than the regulated company and substitutes the term "capture" with a more neutral terminology of "supply and demand" (POSNER 2004, p.59).

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The economic theory of regulation is based on two assumptions:

> The first is that given the government's coercive power can be used to give valuable benefits to specific individuals or groups, economic regulation - the expression of that power in the economic sphere - can be seen as a product whose allocation is governed by laws of supply and demand. The second idea is that the cartel theory can help us identify supply and demand curves. (POSNER, 2004, p.60)

As already mentioned, the coercive power of the State is one of its greatest assets in relation to the private initiative, it is what makes possible for both the restrictions imposed on regulated companies and the granting of benefits to them.

Stigler (2004) explains that there are four main benefits that the State can grant to an industry, namely: cash subsidies, control over the entry of new competitors into the market, the power over substitute and complementary products (which are those related to the activity developed by the company) and control over pricing (STIGLER, 2004, p. 25).

The cartel theory is used as an example to explain the supply and demand curves by regulation. About this theory Posner (2004, p. 60) explains that "the value of cartelization is greater the less elastic the demand for the product in the market is and the more expensive, or the slower it is to enter that market".

In this regard, Posner (2004, p. 61) believes that the main costs that increase the value of cartelization are transaction costs for sellers to adjust the amounts to be charged and the amount of product that each seller can sell and the costs of imposing the cartel agreement on those agents who are not participating or for those who break the agreement. In countries where cartels are considered an illegal practice, there is still an estimated cost of punishment.

Despite being cited as an example, the occurrence of private cartelization usually meets the need for regulation. This is because when the number of companies is smaller it is considerably easier to constitute a cartel, since the transaction costs and the risks of breaking the agreement also decrease. On the other hand, the inverse occurs when the number of companies increases, in this case making regulation becomes the most viable and least expensive solution. However, like cartelization, the economic theory of regulation points out that regulation in these cases will also have a cost (POSNER, 2004, p.61).

Given the above, the economic theory of regulation can be used to understand the high incidence of protectionist legislation in areas where it would be difficult to carry out private cartelization (POSNER, 2004).

The biggest differential of the economic theory of regulation compared to the public interest theory and even the assumptions of the capture theory, is the inclusion of politics as one of the main factors that influence economic regulation. Regulations would be like goods

offered by politicians, who offer the benefits that only the public power could, as long as the economic agents are willing to bear the price demanded by said politicians (POSNER, 2004, p.63).

In this manner, the theory adopts the precepts of economic rationality to explain that politicians, even if invested in public positions, are individuals who seek to maximize their own interests.

A large part of Posner analysis of the economic theory of regulation is aimed at finding empirical evidence that supports it, however, the author also does not shy away from presenting the flaws found in this body of evidences (POSNER, 2004, p.70).

Therefore, the empirical support presented by the theories of regulation has a prominent role in the analysis made by Posner, which makes a more detailed exposition on the subject necessary.

6. THE INSUFFICIENCY OF EMPIRICAL SUPPORT IN THE THEORIES OF REGULATION

The theories of regulation and the assumptions of regulatory capture have a weakness as a point of intersection, that being, the lack of empirical support. A brief reading of the analysis made by Posner reveals, at various times, his concern about the lack of empirical studies regarding economic regulation, which led the author to conclude that no theory was sufficiently refined to generate accurate hypotheses capable of empirical verification (POSNER, 2004, p. 74).

Over the course of this work, some aspects have already been mentioned in which Posner reveals this insufficient empirical support, however, it becomes necessary to reserve a section for analysis of the theme, since this can be pointed out as a weakness present in all regulatory approaches analyzed by Posner.

However, before entering the field of economic regulation, it should be noted that in the scope of law, in general, there is a shortage of empirical studies. Despite the fact that there is no shared central theory of law, it is a barrier to the verification of hypotheses universally, empirical works have an important role in revealing how human behavior plays out under different legal norms. As such, although it is still scarce, the recognition of its importance has slowly and gradually made empirical work occupy space within legal knowledge (ULEN; COOTER, 2014, p.62-63).

The importance of empirical evidence is ratified in the scope of regulation with the failure to recognize capture as a theory, since, Posner (2004, p. 57) concludes that capture is "a hypothesis devoid of any theoretical basis", which makes the existence of empirical validation techniques unfeasible.

There is no evidence of interaction between regulatory agencies and regulated companies (POSNER, 2004, p.57). The absence of proof of the capture hypothesis, added to the

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evidence sets already exposed, which reveal several situations unexplained by the capture theory, demonstrate the insufficiency of the theory.

Regarding the theories of regulation, despite being manifestly recognized as theories, they also reveal themselves with insufficient empirical support.

Some precepts exposed as true by the public interest theory lack empirical evidence, such as, for example, claims that regulatory agencies are poorly managed or that they are less efficient than other organizations (POSNER, 2004, p. 52-53).

One of the factors that made the economic theory of regulation recognized as having the best theoretical basis was its empirical support. In this regard, Posner (2004, p. 67) exemplifies that:

> There is a substantial number of case studies - road, air, rail transportation and many other markets - which supports the idea that economic regulation is better explained as a product provided to interest groups than as an expression of social interest with legal efficiency.

However, as explained above, although the economic theory is considered by Posner to be the theory of regulation with the best foundation and support, it is not free from flaws. As such, Posner presents six weaknesses present in the body of empirical evidence that supports the theory (POSNER, 2004, p. 70).

The first flaw argues that most of the evidence is compatible with any version of the interest groups theory. The distinction between the public interest theory and the economic theory of regulation can be easily made, but this distinction is made difficult by comparing it with any theory based on the interest groups theory. In this manner, Posner (2004, p.70) states that:

> For these case studies to support the economic theory of regulation, they would have to demonstrate that the characteristics and the circumstances of the interest groups were such that the economic theory would have predicted that they, and not any other groups, would obtain the regulation from which they would benefit.

The second evidence reports that the empirical research is not being executed systematically, that is to say, the cases mentioned as an example of the theory are chosen precisely because of their peculiarities conducive to its application. The studies regarding the theory were performed, eminently, from the analysis of case studies, which were not selected at random, but from their similarities with the precepts defended by the theory. This fragility does not invalidate the studies that have already been made, however, it points to the need for more systematic empirical research (POSNER, 2004, p.70).

The third evidence claims that some regulatory case studies have produced evidence that is difficult to relate to economic theory. It is also noteworthy that the theory does not address the possibility of failures in an attempt at regulation, which inevitably may occur (POSNER, 2004, p.71).

The fourth fault mentioned is due to the fact that the empirical evidence depends heavily on a confident rejection of the justifications of public interest. The economic theory rejects the justification that regulation can be realized for the purpose of obtaining public interest, however, the theory does not explain why this possibility does not exist, it also avoids justify-

ing the reason for creating all of the regulatory legislation according to the economic theory (POSNER, 2004, p. 72).

The difficulty in tracking the effects of economic regulation is the fifth failure presented by Posner, that reveals as a side effect of regulation the difficulty in distinguishing which markets are benefited or harmed due to this state intervention (POSNER, 2004, p. 73).

Finally, in the sixth critic Posner adds that there is no explanation for the rhetoric used by the public interest theory to expose the process of elaborating public policies. The introduction of fraud theories, or more broadly of information costs, suggests a revival of the public interest theory in a way that it can even be tested empirically (POSNER, 2004, p. 73).

From this analysis made by Posner, it is possible to see that most of the weaknesses exposed are subject to adjustment based on a development of the theory. In this regard, an economic theory is sustained not only because of its robust empirical framework, but also because from the verification of its flaws it is possible to propose an improvement of the theory.

7. FINAL CONSIDERATIONS

A brief analysis of the theories of regulation reveals the complexity with which economic regulation developed over the course of a century. The approach from the perspective of economics became only the starting point of the study of regulation, which added interdisciplinary research in areas such as political sciences, law and even behavioral psychology as a necessity.

The purpose of this paper was to explain the public interest theory and the criticisms arising from it, which led to the elaboration of two explanatory theories, in order to expose and propose solutions to the flaws present in the public interest theory.

The capture theory was the most important theory that emerged in opposition to the "problems" of the public interest theory, considering that it opposes the idea of "common good" and that regulation would be carried out with the aim of achieving a public interest. However, although it seems closer to reality than the public interest theory, the capture theory was also the target of criticism, which caused it to undergo a reformulation that resulted in the economic theory of regulation.

However, the importance of capture in terms of economic regulation is notorious, since, even though it does not have the *status* of a regulation theory, the analysis from its perspective is what allows a complete dissection of the other regulatory theories that were addressed in the present work.

Proof of the non-existence of the agencies capture would demonstrate the consistency of the public interest theory, making it so that even if it is found that the capture does not exist, the studies derived from it become indispensable for the analysis of the regulated market.

Just as the verification of the existence of the capture would make the theory that was originally elaborated impossible to apply, considering that for the reasons explained, refine-

ment is essential for it to be configured as a regulatory theory, which occurred from the reconfiguration that gave rise to economic theory of regulation.

The risk of capturing of regulatory agents must be analyzed according to the scenario of each State, since it depends on variable factors such as obviously the market and even politics.

In Brazil, the marked presence of a captured model is directly related to the political and administrative control that interest groups have in the agencies and even in the Legislative Branch. In this scenario, the understanding of how capture takes place and what are the reasons that cause public agents to be captured is fundamental to verify how market and government failures can be solved, enabling more efficient regulation .

In this aspect, the importance of Economic Analysis of Law is well known as a theoretical tool for the application of capture as an axis of analysis.

Despite the search for improvement, all theories are riddled with flaws and the present work uses the approach of Posner (2004) to expose the central points of each theory and the main criticisms that the author addresses to each one of them. However, it was also sought from a specific perspective to demonstrate the importance of the analysis of capture regardless of the theory addressed.

In reality Posner (2004, p. 74) argues that none of the theories of regulation that are the object of the present work have significant empirical support. All of them have not been tested enough to be verified empirically, however, there is no hesitation in stating that among the theories explained, the economic theory of regulation is the one that comes closest to the intended efficiency, because it considers a factor that until now was ignored by other theories, which is the analysis of human behavior and the rationality of individuals.

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REFLEXIONS ON THE DEVELOPMENT OF STATES UNDER THE PERSPECTIVE OF FOREIGN INVESTMENTS

REFLEXÕES SOBRE O DESENVOLVIMENTO DOS ESTADOS SOB A PERSPECTIVA DA CAPTAÇÃO DE INVESTIMENTOS ESTRANGEIROS

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ABSTRACT

The phenomenon of globalization and market expansion, accentuated by the propagation of neoliberal ideals, made it possible for the economic agents to transpose state borders with great ease, implying a great challenge to the governance of states, considering that the traditional concept of sovereignty was not sufficient to regulate the relations that took place at the transnational level. The fluency and voltuosity of the commercial activities enabled the extraordinary growth of the activities of the so-called transnational companies, whose economic potential became decisive for the actions of the States, which began to compete with each other, with the formalization of international agreements and with the flexibilization of internal rules, in order to become attractive ground for foreign investment. Thus, through the deductive method, the study will analyze the consequences of deregulation, in order to conclude that the investments made will not always have an impact on the development of States.

Keywords: Development. Deregulation. Globalization. Foreign investments. Sovereignty.

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RESUMO

O fenômeno da globalização e expansão dos mercados, acentuado a partir da propagação de ideais neoliberais, possibilitou que a atuação dos agentes econômicos transpusesse fronteiras estatais com enorme facilidade, o que implicou num grande desafio à governança dos Estados, tendo em vista que o conceito tradicional de soberania se mostrou insuficiente a regulamentar as relações que ocorriam em nível transnacional. A fluência e vultuosidade das atividades comerciais viabilizou o extraordinário crescimento das chamadas empresas transnacionais, cujo potencial econômico se tornou determinante para a atuação dos Estados, que passaram a competir entre si, com a formalização de acordos internacionais e com a flexibilização de normas internas, a fim de se tornar solo atrativo para investimentos estrangeiros. Assim, por intermédio do método dedutivo, o estudo analisará as consequências provocadas pela desregulamentação, de modo a concluir que, para repercutir em desenvolvimento dos Estados, a intervenção estatal nas atividades de mercado por meio do Direito é a grande chave para promover ações econômicas que revertam em bem-estar social.

Palavras-chave: *Desenvolvimento. Desregulamentação. Globalização. Investimentos estrangeiros. Soberania.*

INTRODUCTION

In the mid-80s of the 20th century, **contemporary society underwent profound transformations,** with consequences that reached various dimensions of human existence. From the strengthening of neoliberal ideals, there were processes of economic restructuring, deregulation of markets and easing of the sovereignty of states. These events provoked economic opening and intense use of new technologies, but also reflected in concentration of capital, weakening of rights and social exclusion.

In this context of expanding markets to international areas, the advancement of the activities of transnational companies was highlighted, driven by the intensification of advertising that stimulated the proliferation of exaggerated consumerism. In another band, the exponential growth of these economic conglomerates led their power and influence to dictate the norms for action of the States to whose legislation they should submit.

Convinced that the operation of transnational corporations can leverage the economy and increase technological innovation of the means of production, States have begun to compete with each other to attract foreign investments, with the subjection of their sovereignty to international organizations and the formalization of agreements that offer guarantees to investors, as well as often obliging them to make domestic environmental, labor, tax and other regulations more flexible, in order to create a national environment that favours the entry of foreign capital.

From then on, by means of a methodology based on bibliographic review and analysis of relevant legal documents, the study contemplates in a critical way the attitude of States to relax internal rules in order to attract foreign investments, because this deregulation tends to directly hurt rights that the State should technically protect. The investigation has relevance because it points to the state regulation through the Law as a central factor to the induction of economic conducts that emphasize social benefits, in order to prevent the increase of the internal economy in numerical terms to overlap with the good-individual and national society.

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1 DEVELOPMENT AND THE ECONOMY

In general, the first studies that linked development and the economy considered development as the highest stage of economic growth, when reconciled with policies of income distribution and improvement of the population's living conditions. More recent studies, however, point to the understanding that growth within a quantitative notion represents only a portion of development, with boundaries that cannot be confused.

In general, the first studies that linked development and the economy considered development as the highest stage of economic growth, when reconciled with policies of income distribution and improvement of the population's living conditions. More recent studies, however, point to the understanding that growth within a quantitative notion represents only a portion of development, with boundaries that cannot be confused.

Indeed, the concept of the term "development" does not find peaceful delimitation, having evolved over the years. Norbert Rouland (1991, p. 186) discusses that, in its emergence, which occurred between the twelfth and thirteenth centuries, the word "development" had as meaning to "reveal, expose", starting to mean the progression from simpler stages to more complex ones only around 1850. Since then, development has been linked to the realization of diverse and complex perspectives, depending on the context in which analyzed, involving social, legal, political, economic and cultural aspects.

When it comes to economics and the development process, it is important to highlight the studies of the Brazilian economist Celso Furtado (1980, p. 17), who identifies development in two ways: the first, concerning the increase of the efficiency of the production system by means of the accumulation and progress of the techniques; the second, concerning the degree of satisfaction of human needs.

Celso Furtado (1980, p. 20) believes that the degree of effectiveness of the production system is not a sufficient condition to measure development as an improvement in the living conditions of the population, and there is therefore a need to replace the classical indicators, as the global national product, the Gross Domestic Product (GDP) or the per capita income, by other indicators that better fit the notion of development as an instrument to satisfy human needs.

In Celso Furtado (2000, p. 102-107), the idea of development includes growth, but goes far beyond it, because development would be linked to the elevation of the material level of life of the people who make up society, by means of a scale of values that reflects the balance of the forces existing and prevailing there.

The importance of the link between the economy and development made the constitutional legal framework also return to the protection of the rights and duties that involve this relationship. In this sense, Gilberto Bercovici (2004, p. 24), argues that the intrinsic relationship between the economy and the implementation of the development process can be verified through the analysis of the constitution elaborated after the end of the First World War, such as the Mexican Constitution of 1917 and the Weimar Constitution of 1919, which inaugurated social constitutionalism and institutionalized economic and social rights.

These constitutions were characterized by bringing, alongside the traditional individual rights, the declaration of social rights or benefit rights, which, linked to the principle of

material equality, have their implementation dependent on direct or indirect benefits from the State. “Social or socializing conceptions, as well as the determination of constitutional principles for state intervention in the social and economic domains, are thus considered the foundations of the new social constitutionalism” (BERCOVICI, 2004, p. 25).

In possession of the understanding that the State is the main promoter of development as well as social welfare, Gilberto Bercovici (2005, p. 52-53), still takes care to highlight that underdevelopment is not a stage of development, but a specific condition, that can be overcome through transformation in the economic, productive, social, institutional and political structures in force, accompanied by adequate and comprehensive planning directed by the State.

For the sake of a wellbeing economy it is still important to highlight the studies of the Indian economist Amartya Sen, whose approach defines development as a process of expanding the capacity of individuals to have choices and make choices, an idea of expanding the social and cultural horizon of people's lives. Within this conception, freedom is a component of development, but not only that: freedom is the main means and the main end of development (SEN, 2000, p. 17-18).

Amartya Sen (2000, p. 17-18) diverges from more restricted views of development that identify it with Gross Domestic Product and the simple increase in personal incomes, arguing that development can be seen as a process of expanding the real freedoms enjoyed by people. From the correlation between development and freedom, the scholar points to the need to remove the main sources of deprivation of freedom, such as poverty and tyranny, lack of economic opportunities, systematic social destitution, neglect of public services and intolerance or excessive interference by repressive states.

For Amartya Sen (2000, p. 32), the success of a society can be assessed according to the substantive freedoms that its members enjoy, as freedom is not only the basis for evaluation for success and failure, but also a determinant of individual initiative and social effectiveness. In this understanding, the individual is seen as a member of the public and a participant in economic, social and political actions, leaving aside the notion of the human being as a patient of an inexorable process, in which he does not influence and cannot take part.

The expansion of freedom has the role of constituting and mediating development, since it excels in the enrichment of human life in an expression of prerogatives that give the individual conditions to avoid deprivation such as hunger, malnutrition or premature death. In this way, institutions are effective means to guarantee and consolidate important freedoms for the development process (SEN, 2000, p. 25-52).

Therefore, taking into account the most recent studies on the importance of economics as the driving force of the development process, it is possible to think of institutions as an instrument for promoting development, not only in the economic sphere, but also social, political and legal. Within this concept is the State and its entire legal structure, which must have the necessary foundations to enable individuals to be able to develop their full potential.

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2 GLOBALISATION OF MARKETS, STATE SOVEREIGNTY AND REGULATORY DIFFICULTIES

The phenomenon of globalization of markets has been intensified by the advance of advertising and information technologies. Since then, the activity of economic agents has gained enormous strength because the supply of products and services did not see more borders. The action of the markets, however, raised questions about the role of the State in containing the harmful consequences that such a process inflicted on human societies.

In spite of this, Gilberto Dupas (2005, p. 33) discusses that "global capitalism has completely taken over the destinies of technology, focusing exclusively on the creation of economic value", in a logic in which technological leadership began to determine the general patterns of accumulation, pressing ethical values and moral norms established by society.

While new technologies make it possible to expand the geographical fragmentation of production chains, they also make it possible to use cheap labour on a large scale in many countries, as well as the deterioration of its power of exchange in relation to the natural resources offered there, due to the faster technological incorporation into the services and industrialized products. These large corporations, which combine availability of labour and strategic raw materials in a scenario that disregards borders, sustain the accumulation rates of the capitalist system and introduce immense challenges to world politics, especially with regard to the actions of States (DUPAS, 2005, p. 35-36).

Ulrick Beck (1999, p. 30) defines globalization as an irreversible phenomenon, characterized by the geographical expansion and increasing interaction of international trade, as well as the global connection of financial markets and the growth of the power of transnational companies. The phenomenon implies processes in which States see their sovereignty, their identity, their communication networks, their chances of power and their orientations suffer cross-interference from transnational actors.

Nevertheless, the universalisation and intensification of competition on a global scale, the concentration of entrepreneurial power and the consolidation of a system of world corporations imply the formation of business networks that tend to progressively weaken the power of states. This is because, the figure of border delimitation of States is giving way to economic geography, in which transnational companies operate randomly, integrating and interconnecting markets, in which what is sought, Primarily, they are favorable tax and labor regimes, that is, an environment in which the economic overrides the political, which causes states to lose control of their internal and external sovereignty (ACCIOLY, 2006, p. 70).

Indeed, while the concept of sovereignty is linked to the idea of territoriality, the actions of economic agents go beyond state borders with almost no control, which implies the need to regulate international trade through guidelines that are also international. As a result, spaces traditionally reserved to law and politics tend to no longer coincide with territorial space, which raises questions about the scope and effectiveness of the sovereignty of states.

In view of the extraterritorial nature of the problems that have arisen, José Eduardo Faria (2010, p. 37-38) maintains that States tend to lose autonomy to the market as an instance of coordination of social life because, in the dynamics of international trade, countries are not

the agents who dictate the rules, but those who seek regulations that can help them from the interests of private economic forces.

It should be examined that in principle any national government could refuse to open its economy with the aim of trying to preserve a relative independence in setting its decision-making agenda and also, refuse to link internal decisions to the operational logic of trans-national markets (FARIA, 2010, p. 38). However, this option would mean running the risk of mass flight of capital and subsequent difficulties in accessing credit sources and technological innovation, which ultimately determines the conduct of subordinating national governments to the markets.

In this way, the notion of sovereignty has been modified in order to better adapt it to the international legal order, which is undergoing profound transformation. In this sense:

> [...] the old concept of the absolute sovereignty of the State - and its power to dispose as well as understand of its borders - was overcome by the evolution of the international order, increasingly integrated with international orders and with values consecrated by humanity as a whole. ignore treaties on the pretext that international and internal orders are independent and that the state, obliging itself to other countries, is not obliged to observe in the internal sphere the sovereign commitment made, to end so to the liking of those who think so, is an act that no longer sympathizes with the current world (MAGALHÃES, 2000, p. 62).

Indeed, the new contours given to the concept of state sovereignty determine the deep interaction between internal and international orders, so that adherence to international documents, as well as respect for the commitments made internationally, are essential to the full recognition of States in the international legal order.

In this tuning fork, formal attributes related to the principle of sovereignty, such as supremacy, unconditionality, inalienability, indivisibility, centrality and unity of the state, are progressively relativized and weakened not only by the substantive power of the markets, but also by the entry on the scene of new local or regional actors, claiming spaces of ever wider political, administrative and fiscal autonomy. (FARIA, 2010, p. 41).

Celso Duvivier de Albuquerque Mello (1993, p. 1987) emphasizes that the so-called "New International Legal Order" is composed of "a set of principles, rules, and private or public practices that govern and organize economic relations among the actors that today determine international society: State, international organizations and transnational groups"so that what is relevant to the concept of sovereignty is related to the self-determination of peoples on the use of natural resources, which deals directly with the very Right of development and mirrors, conflicts of interest between exporting and capital importing countries.

In this context, José Eduardo Faria (2010, p. 42) discusses that there are justices and practices implemented in supranational spaces, with the formation of networks of actors and institutions with functionally regional or global, which require the harmonisation of national legislation, the technical-organizational standardization and bureaucratic unification resulting from the formation of large commercial blocks and the experiences of regional integration.

In addition, the dynamics of the globalized market subjects States to supervisory and controlling mechanisms originating from the most diverse organs and multilateral organiza-

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tions. The numerous institutions of this kind perform functions that intertwine and relax the sovereignty of states, such as the World Bank (WB), the International Monetary Fund (IMF), the World Trade Organization (WTO)the Organisation for Economic Cooperation and Development (OECD), and regional economic integration bodies such as the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Southern Cone Common Market (MERCOSUR).

And if, on the one hand, the concept of sovereignty prevails, loaded with the juridical-political precept inherent to it, the need to adapt to the world economic reality of interdependence has evolved the notion of sovereignty to that of territorial competence, in which each State, as a member of the international community, exercises its authority within its territory (MAGALHÃES, 2006, p. 262). At the international level, in order to develop economic-international relations well, States choose to submit their actions to the control of international institutes and organizations.

The analysis then shows that the free movement of goods, the formalisation of international agreements and the internationalisation of political decisions demonstrate a loss of the hard core of power of states, namely their sovereignty, that in the international sphere does not have the same valorous preponderance that prevails in the internal sphere of the countries.

Nevertheless, even internally, the traditionally interventionist role of States has undergone major transformations, because the speed demanded by globalized consumption has imposed an intense dynamic of substitution of the goods and services offered. The phenomenon has led economic agents to adopt strategies specially designed to put pressure on governments to reduce barriers, in order to give states the role of guaranteeing the stability of the legal order and facilitating the functioning of markets (FARIA, 2010, p. 24).

The performance of transnational companies has great prominence within this movement that affects the role of States. This is because the main characteristic of a transnational company is its ability to centrally guide its operations in various parts of the world, through a global planning to increase its influence and expand its consumer market. Operating as if there were a world market, these conglomerates relativize local interests, since national markets are considered less important (BAPTISTA, 1987, p. 25-26).

From the legal point of view, transnational corporations are subject to national jurisdictions, however, due to their economic power, these new international actors end up imposing on countries a series of pressures for deregulation, related to the easing of environmental laws, tax benefits and work regimes (DUPAS, 1999, p. 113). States tend to give in to the pressures of these conglomerates, because the main instrument of transnational corporations is the ability to say “no”, in a context where the power of the world economy vis-à-vis the national states consists of “not investing” (DUPAS, 2005, p. 41).

In this new dynamic imposed by the globalized market, countries see themselves within a vicious cycle of submission of state interests to the interests of economic agents, a process that places the capacity to attract foreign investments as a condition for the economic development of the States.

3 OS ESTADOS E OS INVESTIMENTOS ESTRANGEIROS

One of the most intriguing effects of the phenomenon of globalization and expansion of the markets is the realization that States are going in a competition to attract capital from foreign investments, which focuses on the fall of their original ability to coordinate, market control and regulation.

Foreign investments are one of the main sources of external financing in developing countries (FONSECA, 2008, p. 31) and consist of the transfer of tangible and intangible assets from one country to the other, with the purpose of usinggenerating wealth through total or partial control of the owner of the assets (SORNARAJAH, 2004, p. 7).

Even states with strong industry tend to admit them, because they see in foreign investment the supplementation of capital and technology they need, as well as the possibility of promoting competition in their own domestic market (MAGALHÃES, 2006, p. 258). The inflow of capital from abroad is also able to influence the fixing of the international confidence index in relation to the economic stability of states.

In Brazil, the discipline of foreign investments is provided for in Article 172 of the Federal Constitution, which states that "The law will discipline, based on the national interest, foreign capital investments, encourage reinvestments and regulate the remittance of profits" (BRAZIL, 1988).

At the international level, the World Trade Organization supports foreign investments through the Agreement on Trade-Related Investment Measures (Agreement on Trade-Related Investment Measures - Trims). Trims entered into force in 1995 and forms part of the multilateral treaties on trade in goods included in the "Annex Ia" to the Marrakesh Agreements, which binds all WTO members.

The purpose of Trims is to promote trade clearance and prevent the use of investment measures that are incompatible with the basic provisions of the General Agreement on Tariffs and Trade (GATT)such as discrimination against foreign products and investors, the use of investment measures that may lead to quantitative restrictions or measures that require specific quantities of local content (WTO, 1995).

Still in the multilateral sphere of supervision of foreign investments, it is also important to highlight the role of the World Bank, through the system of the International Center for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (Multilateral Investment Guarantee Agency - MIGA), which were created in 1966 and 1988, respectively, with a view to leveraging foreign investments in developing countries (ITAMARATY, 2020).

The Bilateral Investment Agreements (Bilateral Investment Agreements - Bits), however, constitute the most significant set of rules on the promotion and protection of investments abroad. Bits "are instruments through which two countries, usually a developed country and a developing country, seek to regulate relations in matters of investment in order to increase their flow" (PERRONE-MOISÉS, 1998, p. 24).

The Bits foresee the concept of investment and the sectors covered, disposing on the desire to promote greater economic cooperation between the parties and encourage the flow

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of private capital, besides creating favorable conditions for this. Bits also seek to make it clear that the entity, foreign or controlled by nationals of the other party, will be entitled to the protection established by the treaty regardless of whether it was incorporated in the receiving country of the investment (LOWENFELD, 2011, p. 555).

It is noteworthy that Bits, in general, usually contain clear obligations and rules focused on the field of protection of foreign investments, with a strong legal structure and efficient systems of execution and enforcement of sanctions. The rules on environmental and labor standards within these agreements, however, tend to be quite flexible, presenting little precision, clarity and conformation of concrete obligations. Similarly, dispute resolution is usually limited to investment and investor protection rules (COSTA, 2006, p. 70).

Nevertheless, the recognition of international rules on foreign investments "contributes to improving the business environment, increasing legal certainty for the investor and reducing the risk of investing" (THORSTENSEN; MESQUITA; GABRIEL, 2018, p. 8-9).

The economic strength of transnational investor companies was evident at the beginning of the 21st century, when a survey promoted by UNCTAD in 2001 found that among the 100 largest world economies, 71 were countries and 29 were transnational conglomerates (FARIA, 2010, p. 34). These data confirm, therefore, that the race between states to attract foreign investors is not unreasonable, since the numbers obtained can maximize the final performance of their economies.

In another band, the facility to transfer industrial plants and work units, according to their interests, gives transnational companies extraordinary power to negotiate the place of expansion of their activities with any State, independent of the continent where it is located. And when such companies do not have their requirements met, they withdraw their investments from the countries that offer them obstacles and as soon as they relocate them in other states (FARIA, 2010, p. 34).

In fact, what determines the operation of a transnational corporation in host countries is the economic support offered. Thus, new localities become attractive to the detriment of others, because they offer competitive advantages, such as tax incentives and skilled labour (NETO, 2006, p. 100). Business power grows before the States and, instead of companies competing for new consumer territories, it is the States that compete with each other offering incentives in the search for capital from abroad.

This finding makes the proliferation of questions against the investment agreements entered into inevitable, which tend not to concern themselves with the interests of the international community or the recipient country, and unless these documents reflect a balance between the rights of foreign investors and the regulatory interests of the countries receiving investments, their future viability will be constantly challenged, because they tend to contain rules that generate imbalance in a relationship that was intended to be reciprocal (SORNARAJAH, 2004, p. 267-208).

Thus, although it is found that the action of countries to attract foreign investments is related to the objective of promoting the development of their domestic economy, it is not possible to leave aside the no less important finding that market forces, represented by large transnational companies and conglomerates, see in this condition the very fragility of the States, that when competing with each other through the offer of incentives, end up attending

to private interests that, almost always, do not fit with the ideals of promoting social well-being.

4 FOREIGN INVESTMENT AND DEVELOPMENT PROMOTION

The admission of resources from abroad is linked to the development need of the receiving State, which is convinced that it will be able tothrough the transfer of capital and technology from transnational companies that choose to establish activities in their territory.

From the links of development with social, legal, political, economic and cultural aspects, its importance made the term transpose the sphere of the economy and became the object of protection by the Law, both in the international sphere and within the internal framework of States.

Furthermore, the origin of "development" as a normatively assured right dates back to the Charter of the United Nations of 1945, which in the preamble and in Article 1.3, stressed that the component States committed themselves to preserving the equality of law of the large and small nations and to establishing conditions under which justice and respect for obligations arising from treaties and other sources of international law could be maintained, in order to promote social progress and better living conditions within a broad freedom, as well as to promote greater international cooperation to address international economic, social, cultural or humanitarian problems (UN, 1945).

Already in 1986, this right was issued in a worldwide declaration, called "Declaration on the Right to Development", adopted by Resolution 41/128 of the General Assembly of the United Nations, whose preamble took care to provide that:

> [...] development is a comprehensive economic, social, cultural and political process aimed at the constant improvement of the well-being of the entire population and of all individuals based on their active participation, free and significant in the development and fair distribution of the resulting benefits (UN, 1986).

The development depends, then, on the promotion of several aspects, with the purpose of providing well-being to the population and fair distribution of the benefits derived from the exploitation of the economic activities promoted.

Thus, the development of a state depends on its economic growth, but it also involves the creation of structures necessary for people to improve their basic living standards in fields ranging from education and health to consumption, leisure and information.

Since financial resources are needed to realize the importance of rights demanded by development, this fact determines the intense promotion of trade activities by States, as well as the search for foreign investments in the globalized world economy scenario.

According to José Eduardo Faria (2010, p. 34), as a condition to attract or withhold investments, which are job generators and allow the elevation of local levels of economic activity in the states, the economic conglomerates do not hesitate to demand tax exemptions

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to adaptations in labor, social security and environmental legislation, as well as numerous other state, financial and legal guarantees.

For José Eduardo Faria (2010, p. 35), the assumption of countries to these demands makes governments give up significant portions of their decision-making and regulatory autonomy, favoring the exploitation of the labor force in the conditions that interest the capital. This causes individuals to live without protective laws effectively guaranteed in their universality, in a logic in which the advance of deregulation of the economy is deepening inequality and exclusion (FARIA, 1997, p. 48-50).

On this basis, Eduardo Saldanha (2009, p.14) argues that it is essential to impose an ethical dimension on the legal instrument that, in turn, provided the economy with a "reflective character on the ultimate aims of legal and economic activity in a society, interrupting the isolation of essentially quantitative and dogmatic methods of analysis"in order to insert the need to evaluate the processes of generation and division of wealth from the competition between ethical reasoning and legal reasoning. This approach puts the Law in a position that really has conditions to answer questions related to the distribution of wealth and expansion of human freedoms, in order to reconcile social breadth with the dictates of economic efficiency.

In spite of this, Flávia Piovesan (2006, p. 389) disagrees that there is a need to increase the social responsibility of companies, since they are the major beneficiaries of the globalisation process, exemplifying the importance of encouraging them, by means of legal rules, to adopt human rights codes relating to trade activity, as well as to impose trade sanctions when they violate rights, among other measures, to exercise control over international financial investments.

> Foreign Direct Investment (FDI) is one of the main sources of financing for the development of countries and is fundamental for the promotion of so-called sustainable development, since billions of dollars are needed to improve living standards and reduce global poverty, as well as to replace unsustainable practices with sustainable ones, be it industrial, energy, environmental or other.
>
> [...] It is necessary, in this sense, to establish rules that not only attract foreign investments, but are capable of promoting the development of countries. Foreign investment can produce positive and negative effects on the development process of countries, rather than properly administered.

Thus, the promotion of protection to foreign investments derived from the actions of transnational companies without their respective counterpart in promoting the development of receiving countries is not reasonable, because it contradicts the very aims pursued by States, in addition to giving rise to negative policies of suppression and violation of human rights, as can be seen from the analysis of the case "Kiobel vs. Royal Dutch Petroleum".

The "Kiobel vs. Royal Dutch Petroleum" case involved the American company Shell and its operations in Nigeria. The issue was brought before the Supreme Court of the United States by the Ogoni people on the grounds that Shell had been complicit in the violation of human rights committed against the population of that region of Nigeria during the Abacha dictatorship between 1992 and 1995. In this regard, it has been established that the corporation has assisted and provided resources for the Nigerian government to carry out repression against Protestants against Shell, that since the beginning of the exploitation of oil activi-

ties in that region caused environmental and social damage. The violations included acts of torture, extrajudicial executions and crimes against humanity. To end the long legal battle, in 2009, Shell agreed to pay $15.5 million to the victims' relatives (RUGGIE, 2014, p.63-64).

The case raised refers to the reflection on the need to adopt more efficient international and national normative measures, in order to link the actions of transnational companies to respect for human rights, so that the performance of these conglomerates can actually revert into development for the States that receive their investments.

In the international context, in 1973, the United Nations created a Commission to discuss the theme "transnational corporations and human rights", whose intention was to draw up a "UN Code of Conduct on Transnational Enterprises" was frustrated by strong resistance on the part of the States. At the same time, the subject returned to prominence after the elaboration of the so-called "Marco Ruggie" (named after its creator, John Ruggie) approved by consensus within the United Nations in 2011 and recognized for fixing the "Guiding Principles on Business and Human Rights" (UN, 2011).

The so-called "Marco Ruggie" contains 31 principles, which were elaborated with the fixing of three guiding pillars, namely, "protect, respect and repair". Since then, States have been given the obligation to protect human rights, companies have been given the responsibility to respect human rights and the need for adequate and effective resources to repair damage in the event of non-compliance with these rights by companies (UN, 2011).

In fact, although they are not binding, the principles derived from the "Marco Ruggie" represent great progress for the international discussion of the theme "transnational companies and human rights". Regarding progress towards binding obligations, it should be noted that at the 26th UN Session, held on June 26, 2014, Resolution A/HRC/26/L was adopted, that established an Intergovernmental Commission whose purpose is to prepare a legally binding international instrument to regulate the activities of transnational enterprises.

Thus, in the absence of a mandatory international regulation that limits the actions of transnational companies, it is up to the State itself, therefore, require that the practice of business activities respect the normative institutions that support human rights in their internal context, in order to direct the aims of economic activity to meet the assumptions of development.

Jurgen Habermas (2001, p. 65) stressed that it is not possible to effectively use the function of allocation and discovery of self-regulated markets without bearing the social costs and the disparate divisions that are incompatible with the conditions of integration of societies composed in a way liberal and democratic. Thus, it should be emphasized the importance of the State's normative intervention in the economic field in order to promote actions that revert in respect to human rights and promotion of social welfare, pillars of development achievement.

In this sense, the studies of Calixto Salomão Filho (2008, p. 97-100) highlight law as a preponderant factor for regulating economic activity and inducing agents to make choices aimed at the common good, since well-designed rules are able to create a cooperative environment, in which decisions are made in a natural and not coercive way.

In fact, according to the author, creating an environment conducive to cooperation is the most important institutional task of the States:

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> Firstly, as has already been seen, cooperation, unlike individual behaviour, does not naturally appear in society. There is in this statement no Hobbesian conception of human nature, but simply the recognition that there are social conditions that hinder its behavior. This condition is basically the fear of the strategic behaviour of the counterparty. If this is so - and this seems to be a reasonable presumption -, then it is enough for the Law to create conditions for the disappearance of this fear for cooperation to find fertile field (SOLOMON SON, 2008, p. 100).

Calixto Salomão Filho (2008, p.101) also takes care to point out that the presence of cooperation in regulated sectors is fundamental to development, because it ensures greater effectiveness to the rules and decisions of the regulatory body, as well as ensuring the parties the possibility of discovering the behaviors of greater social benefit in the midst of the performance of market agents.

The proper regulation of the activities of economic agents, including the activities of foreign investors, must be made, first, within the internal scope of the States, through its Legislative Power, so that qualitative developmental purposes are met.

In spite of this, it should be emphasized that development is an objective pursued by the Federative Republic of Brazil, whose purposes can be found in Article 3 of the Federal Constitution of 1988, which provides:

> art. 3º Are fundamental objectives of the Federative Republic of Brazil:
>
> I - to build a free, just and supportive society; II - ensuring national development; III - eradicate poverty and marginalisation and 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 (BRAZIL, 1988).

Article 170 of the Federal Constitution of Brazil also provides on the principles that will govern the operation in the economic order, which, "founded on the valorization of human work and free initiative, aims to ensure everyone a dignified existence, as dictated by social justice [...]". In the same sense, Article 219 of the Federal Constitution of Brazil praises the importance of the market for the promotion of well-being, providing that "The internal market integrates the national heritage and will be encouraged in order to enable cultural and socio-economic development, the well-being of the population and the technological autonomy of the country [...]" (BRAZIL, 1988).

From the description of the constitutional provisions cited, it can be seen that the development pursued by the Federative Republic of Brazil is not limited to the increase of numerical values in the market, but it introduces a qualitative dimension of improving the living conditions of the population. For these purposes, the constituent also ensures the intervention of the State in the economic field, providing, in Article 174, that "As a normative agent and regulator of economic activity, the State will exercise, in the form of the law, the functions of supervision, incentive and planning [...]" (BRASIL, 1988).

Taking as an example the constitutional regulations of Brazil, it is concluded that it is not up to the State to distance itself from its internal regulations of protection and promotion of development for the purpose of attracting foreign capital. Development is an objective and cannot be left out of negotiations that can relax their inherent rights, such as environmental, labour and tax rights. State intervention through law to regulate these areas in the face of foreign investors is essential.

Jurgen Habermas (2001, p. 73) praises the need for an awareness of the obligation of cosmopolitan solidarity in civil societies and in the public political spheres of geographically wide regimes that are developing, because only a change in the consciousness of citizens, effective in terms of internal politics, as well as the self-understanding of actors able to act globally, can make them understand themselves more and more as members of the framework of an international community and that therefore, they are subject both to essential cooperation and to mutual respect for interests.

It is certain that the goal of any company is to achieve profit. And the expansion of transnational companies to different countries is always guided by the possibility of maximizing these profits. However, even entrepreneurial activity must comply with the public objectives of responsibility for promoting the development of States, and even if this is not the maximum to be pursued by corporations, is an ideal that can be directed through state regulatory intervention.

And to foster real development, the actions of States when trying to attract foreign investment must not happen without the primacy of human rights, because economic growth alone does not mean development, when the country no longer wants items related to the protection of the environment, labor relations and others. Finally, a more active state action is necessary, at the core of the struggle so that social welfare is not subtracted from the interests of market forces.

FINAL CONSIDERATIONS

The advance of globalization and expansion of markets, with the culmination of the technological revolution, focused on a weakening of the capacity of response of the national states through the supervision, control and intervention on the international flows of capital. The process triggered a crisis in the sovereignty of the States, which, in order to adapt to the new reality of the globalized market, were forced to sign international agreements to regulate the economic relations disseminated in the transnational context.

The advance of neoliberal ideals of deregulation of markets has found fertile soil and has grown the performance of transnational investor companies, with ramifications in several regions of the planet. The economic power of these large business conglomerates started to dictate the direction even of state policies, since the search for foreign investments caused the dispute between states for attracting new investors, through the offer of incentives that, often focus on relaxing national standards to protect the rights of individuals.

The States' search for foreign investments is legitimate, especially when it comes to poor countries, which see the entry of capital from abroad the chance to leverage their internal economy, with the promotion of technology transfer, improvement of the means of production and allocation of new jobs. However, the relaxation of market regulation regulations to attract external investments can only mean attention to the interests of market forces, without commitment to the internal development of countries.

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The principles contained in the "Marco Ruggie" of 2011 constitute the great level of orientation of the actions of transnational investor companies in the international sphere. Although its pillars "protect, respect and repair" are not binding, they still represent great progress for the international discussion of the theme "transnational companies and human rights".

In this context, the regulatory intervention of market activities within the internal scope of the States is the greatest response to overcome this deficit of mandatory regulations established in the international context. It is necessary that the State leads the realization of the development through the due normative intervention in the economic field, in order to reconcile the performance of market forces with respect for fundamental human rights, mainly because the development, in its contemporary sense, it covers qualitative spheres of human well-being.

From that point on, the importance of government action through law is seen in order to constitute a regulatory system capable of addressing social inequalities and compensating for imbalances caused by market forces, in order to enable real development, which is not linked only to the wealth and investments embedded in society. In this tuning fork, state intervention is essential to promoting complementarity between market growth and human development.

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INTERNATIONAL COOPERATION: FISCAL GOOD PRACTICES TO ACHIEVE GLOBAL JUSTICE

COOPERAÇÃO INTERNACIONAL: BOAS PRÁTICAS FISCAIS PARA ATINGIR JUSTIÇA GLOBAL

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ABSTRACT

In 2019, it was found that 17% of all global wealth held by at most 0.1% of people on the planet is managed by financial secrecy jurisdictions. This investigation sought, after presenting the limitations and conceptual scope of the concept of fiscal justice, to identify the appropriate mechanism to achieve fiscal justice, on a global level. This is because there is a consensus that, at a time of increasing global inequality of wealth, the Avoidance tax *must* be combated, this being a struggle that goes beyond the territorial limits of states. It is a research of applied nature, which aims to generate knowledge focused on the solution of the exposed problematic, whose problem was approached by qualitative perspective and with exploratory objective, made possible by the bibliographic study, whose material collection focused on the international doctrinal production, written almost entirely in English and published, in the last 5 years, supported by the inductive method. The result indicated that the union of nations is essential, adopting measures of international cooperation, to achieve fiscal justice, on a global level. It was also emphasized the need to expand research on global perceptions of justice and the formulation of an agenda, with broad participation by States, International Organizations and civil society, to discuss the issue under discussion.

KEYWORDS: Globalization. Aggressive tax planning. harmful tax competition. International tax cooperation. Global fiscal justice.

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RESUMO

Em 2019, apurou-se que 17% de toda a riqueza global, detida por, no máximo, 0,1% das pessoas no planeta é gerenciada por jurisdições de sigilo financeiro. Essa investigação buscou, após apresentar as limitações e as abrangências conceituais do conceito de justiça fiscal, identificar o mecanismo adequado para atingir a justiça fiscal, em patamar global. Isto porque é consenso que, em um momento de crescente desigualdade global de riqueza, o tax avoidance deve ser combatido, sendo esta uma luta que ultrapassa os limites territoriais dos Estados. Trata-se de uma pesquisa de natureza aplicada, que visa gerar conhecimento voltado à solução da problemática exposta, cujo problema foi abordado pela ótica qualitativa e com objetivo exploratório, viabilizado pelo estudo bibliográfico, cuja coleta de material focou na produção doutrinária internacional, escrita quase que na totalidade em língua inglesa e publicada, nos últimos 5 anos, amparado pelo método indutivo. O resultado apontou ser imprescindível a união das nações, adotando medidas de cooperação internacional, para atingir justiça fiscal, em patamar global. Ressaltou-se também a necessidade da ampliação de pesquisas sobre as percepções globais de justiça e a formulação de uma agenda, com a ampla participação pelos Estados, Organizações Internacionais e sociedade civil, para discutir a questão em debate.

PALAVRAS-CHAVE: *Globalização. Planejamento fiscal agressivo. Concorrência fiscal prejudicial. Cooperação fiscal internacional. Justiça fiscal global.*

1 INTRODUCTION

"Offshore *Leaks", "Swissleaks", "Luxleaks" and "Panama* Leaks" reports *produced* by the International *Consortium of Investigative Journalists - ICIJ* (2013; 2014; 2015; 2016) reached the headlines from 2013, triggering leaks over offshore, tax havens and scandals involving tax evasion and aggressive tax schemes, tax activities until then little known (BARANGER, 2017; VAN HORZEN, 2017).

According to The Boston Consulting Group, in the world, approximately $9.6 trillion, which accounted for 17% of all global wealth in 2019, is managed by financial secrecy jurisdictions, with Switzerland being the primary destination, followed by Hong Kong and Singapore. The consulting firm also pointed out that the Covid-19 pandemic tends to lead to an increase in cross-border capital flows in the short term, with investors choosing to move their mobile assets to tax havens (ZAKRZEWSKI et al., 2020).

Most of the wealth that is destined for jurisdictions with preferential and harmful tax regimes comes from an opaque network of companies, trust funds and foundations, which belong to at most 0.1% of the people on the planet. Much of this investment stems from tax evasion, kleptocracy, money laundering, bribery, and other criminal activities. As a result, individual taxpayers and large transnational corporations do not materialize fair share and fail *to collect* taxes that would finance the costing and provision of essential services of states, especially in the case of developing countries.

It is noteworthy that in a time of growing global inequality of wealth, tolerating the *Avoidance* tax is simply unacceptable (HENRY, 2016). To reverse this scenario, the understanding grows that the progressive taxation on the income of the juridical person may represent the main instrument of promoting justice in a liberal democracy (GRINBERG, 2016). However, compliance with fair share and the promotion of fiscal justice need to go beyond the mere coordination of tax systems that provides for cooperation and exchange of informa-

tion between tax administrations, but it maintains gaps and differences that make undesirable behavior possible, such as evasion and aggressive tax planning. Thus, in a global world, effective fiscal justice exceeds the parameters and limits of the State, and should be considered in global terms and no longer in the domestic sphere of States (DAGAN, 2017).as well as the scope of the duty of justice to reduce it, has always been a central concern of political justice. Income taxation has been seen as a key tool for redistribution and the state was the arena for discussions of justice. Globalization and the tax competition it fosters among states change the context for the discussion of distributive justice. Given the state's fading coercive power in taxation and the decreasing power of its citizenry to co-author its collective will due to global competition, we can no longer assume that justice can be realized within the parameters of the state. International tax policy in an effort to retain justice often opts for cooperation as a vehicle to support distributive justice. But cooperation among states is more than a way for them to promote their aims through bargaining. Rather, it is a way for states to regain legitimacy by sustaining their very ability to ensure the collective action of their citizens and to treat them with equal respect and concern. The traditional discussion in international taxation seems to endorse a statist position - implicitly assuming that when states bargain for a multilateral deal, justice is completely mediated by the agreement of the states. In contrast, this Article argues that such a multilateral regime intended to provide the state with fundamental legitimacy requires independent justification. Contrary to the conventional statist position, I maintain that cooperating states have a duty to ensure that the constituents of all cooperating states are not treated unjustly because of the agreement. I argue that not only cosmopolitanism but political justice too requires that a justifiable cooperative regime must improve (or at least not worsen

Given the above scenario, the present study seeks to answer the following question: how to ensure fiscal justice, on a global level, given the lack of uniformity of tax rules? The objective is to discuss the limitations and conceptual scope of the term global fiscal justice against the mapping of the mismatch of tax systems and identify the most suitable available tool to achieve fiscal justice, on a global level. The justification for the proposed study is due to the fact that the achievement of justice is closely related to the reduction of social inequalities and promotion of equality, which in turn are listed as fundamental objectives of the Federative Republic of Brazil (BRAZIL, 1988). Moreover, cooperation between nations is among the purposes of the United Nations Charter, promulgated by Federal Decree No. 19,841 of 22 October 1945, disciplined by Article 1, which aims at item No 3, "to achieve international cooperation to solve international problems of an economic, social, cultural or humanitarian nature, and to promote and stimulate respect for human rights and fundamental freedoms for all, without distinction of race, sex, language or religion" (BRAZIL, 1945).

To materialize these objectives, the following methodological strategy was adopted: applied research, as it aims to generate knowledge focused on the solution of the exposed problematic, whose problem was approached by qualitative perspective and with exploratory objective, made possible by the bibliographic study, whose collection of material focused on the international doctrinal production, written almost entirely in English and published, in the last 5 years, supported by the inductive method. In relation to methodological procedures, the integrative review was adopted as an analytical tool. The chosen query basis was *Kluwer Law Online* and the references were located from the expressions: "global tax *Justice", "global tax fairness" and "international* tax *Cooperation".*

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From the execution of such strategy, this work, within a logical chain, was organized into four sections that intertwine and complement each other. In practical terms, throughout the text it will be noted that the intensification of the cooperation of States and the adoption of good fiscal practices are shown as appropriate tools for the promotion of fiscal justice, on a global level. There is also the need to expand research on global perceptions of justice and formulate an agenda, with the broad participation of States, International Organizations and civil society, to discuss the issue under discussion.

2 THE MISALIGNMENT OF NATIONAL TAX SYSTEMS IN THE FACE OF GLOBAL ECONOMIC REALITY AS AN OBSTACLE TO ACHIEVING FISCAL JUSTICE

In recent decades, national tax systems have been seriously undermined by the damaging effects of globalisation in the field of taxation (TANZI, 1999; 2000). With the intensification of tax competition, individuals and businesses have become more free to choose how and where to invest, thus critically undermining the ability of states to promote domestic redistribution of justice, That is why, the vision of fiscal justice at a global level is increasingly strengthened (DAGAN, 2017).as well as the scope of the duty of justice to reduce it, has always been a central concern of political justice. Income taxation has been seen as a key tool for redistribution and the state was the arena for discussions of justice. Globalization and the tax competition it fosters among states change the context for the discussion of distributive justice. Given the state's fading coercive power in taxation and the decreasing power of its citizenry to co-author its collective will due to global competition, we can no longer assume that justice can be realized within the parameters of the state. International tax policy in an effort to retain justice often opts for cooperation as a vehicle to support distributive justice. But cooperation among states is more than a way for them to promote their aims through bargaining. Rather, it is a way for states to regain legitimacy by sustaining their very ability to ensure the collective action of their citizens and to treat them with equal respect and concern. The traditional discussion in international taxation seems to endorse a statist position - implicitly assuming that when states bargain for a multilateral deal, justice is completely mediated by the agreement of the states. In contrast, this Article argues that such a multilateral regime intended to provide the state with fundamental legitimacy requires independent justification. Contrary to the conventional statist position, I maintain that cooperating states have a duty to ensure that the constituents of all cooperating states are not treated unjustly because of the agreement. I argue that not only cosmopolitanism but political justice too requires that a justifiable cooperative regime must improve (or at least not worsen

The global economic market, marked by brand globalization and operations, has impacted the way multinational companies (Nmcs) are structured and managed. Global competition, growing pressure on production costs, operation and the need for research and development (R&D) investment result in downward pressure on margins and profitability. Thus, companies need to evolve and focus on maximizing margins, innovating, improving quality, focusing on increasing operational efficiency, reducing costs, and managing risks. More than ever there

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is a need to draw up an adequate and effective tax strategy, since the tax element becomes a defining factor in choosing how and where to invest. Consequently, globalization made tax planning more complex and created the need to align tax strategy with corporate, structural and operational reality (FINNERTY et al., 2007).

There is a consensus that in today's complex business environment, the tax strategy needs to be global and has as its ultimate goal to achieve and maintain a lower global effective tax rate. (FINNERTY et al., 2007) However, all this movement to obtain better performance and to overcome the competitiveness of the world market, made the Emns take advantage of business schemes and maneuvers, classified as aggressive tax plans, whose first and often only purpose is to reduce or eliminate the tax burden arising from its activities (PASSOS; BERALDO, 2020).

Within the scope of this study, the impact of globalization from the perspective of the States must be observed. This phenomenon has contradictory consequences, because the same State that is increasingly dependent on taxes to finance (fiscal purpose), also needs to act extrafiscal, with the objective of influencing behaviors and/or addressing market failures, justice and equity (PIRES, 2018).

It should be noted that the mobility of economic agents, facilitated by elements such as electronic commerce, digital currency, business relations between companies of the same group, use *of offshore financial centers* and proliferation of tax havens and harmful tax regimes, reflects deeply and negatively on tax revenue collection, undermining traditional tax systems (JOHANNESEN, 2010; JOSEPH, 2004; and TANZI, 2000).

In addition to this, the fact that domestic legal systems are not coordinated regarding the identification of the taxable person (who to tax) and the taxable object (what to tax), as well as the identification of mutual differences in the allocation of the taxable base (where to tax) ends up triggering, in cross-border relations, gaps and overlaps, which reflect situations of double taxation and other economic non-taxation, for example mismatches of hybrid entities, of hybrid income and allocation of the tax or legal base in the case of disparate applications of the international tax principles of nationality, residence or source (DE WILDE, 2015).

Another current challenge is the effective taxation of the digital economy, since the income from this form of doing business is not yet satisfactorily taxed, which affronts the principles of payment capacity and the principle of[4] neutrality, with consequent violation of the stability of tax systems (PIRES, 2017).

The entire scenario narrated has resulted in States as increasingly strategic actors, since in the face of the difficulty of exercising their tax sovereignty, they began to compete with each other in order to attract investment. Such tax competition can take place in various ways, and among the main measures are: (i) the adoption of a territorial taxation model, limited to profits earned within the State of residence and excluding profits earned abroad; (ii) exemption by States from the source of income from dematerialised services, such as financial services and the digital economy; (iii) non-taxation or significantly lower taxation aimed at attracting patent registration (DOURADO, 2019a). The spread of small territories with policies of banking secrecy and total lack of clarity regarding the identification of taxpayers and the absence of taxation (DOURADO, 2019a) began in the 1960s.

4 conhecido como *ability-to-pay principle*

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Thus, the challenge posed from the global economic and political reality consists in defining the scope and scope of public policy (ADAM; KAMMAS; LAGOU, 2013; HAUPT; PETERS, 2005; and SCHÖN, 2000). This is because nations can offer different baskets of policies, programs, projects and public actions, fiscal, social and economic, which are interconnected and mutually influential. It is a network of mitigating responses that are implemented to ensure the sovereignty and the ability to produce citizenship and social welfare of the local population, but which end up causing spaces, gaps and differences in national legislation that can be used by the taxpayer to the detriment of the tax state.

Therefore, globalization has provoked political, economic and social imbalances and conflicts and has been responsible for profound implications and changes in national and international tax powers and rules, impacting on each nation's sovereign tax system (PIRES, 2017). Taxpayers individuals and large Emns are taking advantage of a "fragmented and incoherently regulated global cross-border taxation system to evade and/or tax evasion" (OBENLAND, 2017, p. 03), making it difficult to comply with fair share, breaking fiscal *neutrality*, increasing inequality and preventing the achievement of fiscal justice.

In the context of global fiscal justice, important considerations should be considered, as indicated in the sequence.

3 NOTES ON THE MAIN PERSPECTIVES OF FISCAL JUSTICE

Traditionally, fiscal justice has been assessed from two main perspectives. The first seeks to verify how the tax system should be used to provide equality to individuals, for example equal opportunities. This perspective is based on the scope of distributive fiscal justice, which refers to the substance of the tax system and the respective impact of resource allocation on the dynamics of personal interactions. The second perspective is based on the procedural perspective of fiscal justice, and refers to the legitimate and democratic character of the rules that involve the decision-making process in tax matters.

In the context of this article, it draws attention to the second perspective. This is because, in a cross-border context, procedural justice is concerned with rules designed to allow countries to make, for example, fiscal choices about the size of the budget and the level of domestic redistribution. Thus, the procedural perspective could be considered a prerequisite for achieving substantive and distributive fiscal justice (PIRLOT, 2020).

For a cosmopolitan view, distributive justice must be global, and universally applied to all human beings throughout the world. On the other hand, proponents of political justice maintain the duality of a system of justice, firmly distinguishing the national and global levels. However, it has increasingly prevailed that justice will be effective if thought at a global level, because fiscal competition in the age of globalization has dramatically changed the ability of states to sustain the conditions necessary for the provision of justice. Thus, the ability of States (rich and poor) to unilaterally sustain the domestic conditions necessary for the promotion of justice is being undermined (DAGAN, 2017).as well as the scope of the duty of justice to reduce it, has always been a central concern of political justice. Income taxation has been seen as a key tool for redistribution and the state was the arena for discussions of

justice. Globalization and the tax competition it fosters among states change the context for the discussion of distributive justice. Given the state's fading coercive power in taxation and the decreasing power of its citizenry to co-author its collective will due to global competition, we can no longer assume that justice can be realized within the parameters of the state. International tax policy in an effort to retain justice often opts for cooperation as a vehicle to support distributive justice. But cooperation among states is more than a way for them to promote their aims through bargaining. Rather, it is a way for states to regain legitimacy by sustaining their very ability to ensure the collective action of their citizens and to treat them with equal respect and concern. The traditional discussion in international taxation seems to endorse a statist position - implicitly assuming that when states bargain for a multilateral deal, justice is completely mediated by the agreement of the states. In contrast, this Article argues that such a multilateral regime intended to provide the state with fundamental legitimacy requires independent justification. Contrary to the conventional statist position, I maintain that cooperating states have a duty to ensure that the constituents of all cooperating states are not treated unjustly because of the agreement. I argue that not only cosmopolitanism but political justice too requires that a justifiable cooperative regime must improve (or at least not worsen

In this context, it is stressed that "justice can be used to assess different situations, from criminal law to the market economy and to the ability to contribute" (DOURADO, 2019a, p. 464). Traditionally, the main instrument to ensure justice is law, strictly associated with state sovereignty. However, not only in the fiscal area, but in all branches of the law, it is possible to verify some decades ago, the growth of "reciprocal influences of different state, infrastate and suprastate legislations and ordinances in the search for the best solution to certain common problems that may designate global problems" (DOURADO, 2019a, p. 459), a fact that can contribute to the enrichment of national law, but at the same time, can contribute to the weakening of tax sovereignty.

Precisely because of the scenario of investment and globalized work, with greater mobility of agents and bases of taxation, the International Organizations - Ois, as OECD, IMF, World Bank, United Nations; the supranational organizations, such as the EU; and specialised organisations such as ATAF (African Tax Administration Forum) have dealt with the concept of fiscal justice, thereby accentuating legal pluralism and giving supranational content to domestic and international issues such as tax transparency, cooperation between tax administrations, actions to minimize and combat tax evasion and aggressive tax planning (DOURADO, 2019a).

These organizations have explored the concept of fiscal justice, mainly from an economic perspective, in that they demand the payment of the fair share by the Emns and stimulate fair competition between states, in addition to showing concern about the need to increase tax collection levels to enable the provision of public services, seeking to make tax administrations more efficient and fair, examples in the fight against corruption and aggressive tax planning (BURGERS; VALDERRAMA, 2017).

Occasionally, other perspectives of justice, besides the economic one, are explored in the measures and positions of the Ois. Some reports from these organisations reflect a philosophical and political perspective of justice, such as when: (i) the IMF and the World Bank refer to issues of legitimacy, on the grounds that it is unfair that local businesses are not

competitive and that developing countries should have a say in the debate on regional and global cooperation; (ii) the EU and ATAF refer to agreements between taxpayers and state, under a philosophical approach; or (iii) when the OECD mentions that citizens have become more sensitive to tax issues, which shows concern for the political dimension of justice (BURGERS; VALDERRAMA, 2017).

The political dimension of justice is apparent when OECD IMF, World Bank, United Nations express concerns about developing countries' participation in BEPS discussion and international cooperation to establish fair tax systems that citizens can trust (BURGERS; VALDERRAMA, 2017). The relevance of these Ois' contribution is verified when, in response to the global discussion on justice in the context of the G20/OECD BEPS Project, some countries have changed their domestic legislation. In 2015, the United Kingdom and Australia decided to include a new tax on misappropriated profits to ensure that Emns pay their fair share of taxes. The approach of Australia and the United Kingdom focuses on the payment of multinationals of the fair share, regardless of whether these multinationals contribute in accordance with the law. In Australia, the new tax aims to prevent Emns who sell goods and services to Australian residents from avoiding Australian taxes by artificially limiting their tax presence in Australia. In the United Kingdom, the main purpose of profit tax evasion is to combat aggressive tax planning used by many Nmcs to transfer profits from UK jurisdiction. Therefore, these national laws aim to prevent aggressive tax planning so that Nmcs comply with fair share (BURGERS; VALDERRAMA, 2017).

These unilateral initiatives are refuted by the OECD, which maintains that without a coherent global approach, problems such as those that gave rise to the BEPS will probably resurface (BURGERS; VALDERRAMA, 2017). Thus, in a globalised world, the need for the employment of adequate and effective fiscal policies has prevailed to maintain national tax sovereignty and propagate welfare and fiscal justice, It is insufficient that States consider only their domestic legal systems to achieve equality and provide justice, and there should be cooperation in seeking global solutions (DAGAN, 2017).

4 HARMONISATION OF TAX RULES TO PROMOTE GLOBAL FISCAL JUSTICE

The tax scandals portrayed in the introduction shed some light on the importance of tax transparency involving not only tax fraud, but also tax evasion and aggressive tax planning (BARANGER, 2017)in addition to intensifying the debates on corporate and fiscal governance, cooperation between tax administrations and compliance with fair share or Ability-to-pay principle as a means of maximising global well-being and distributing it fairly, globally. International tax scholars and policymakers, by engaging substantially in the practical aspects of income taxation in the globalised world, have highlighted the erosion of States' tax bases and have endeavoured to explore possible solutions, highlighting among them, the intensification of international cooperation as an attempt to sustain the tax bases, which in turn, enables better distribution of social welfare (DAGAN, 2017). However, it is suggested

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that tax justice rhetoric has still prevailed in relation to the adoption of a real substantive agenda on tax justice, which would imply, for example, the adoption of tax policies that could offer equal economic opportunities to citizens (PIRLOT, 2020).

A number of projects encouraging cooperation, aimed at increasing tax transparency and reducing tax evasion, have been the subject of the OECD/G20 since 2012. Among the actions mentioned are: (i) the automatic exchange of information on income and cross-border assets between tax authorities; (ii) public registry of the true beneficial owners of companies and trusts; (iii) report by country of profits, assets, sales, employment and corporate business units; (iv) stricter regulations against money laundering; (v) allocate corporate tax revenues according to the location of actual economic activities and not to front companies based on artificial havens; (vi) stricter regulation of transnational private banking jurisdictions, money laundering and financial secrecy; and (vii) restricting tax incentives that individual and corporate investors now need to become "citizens of nothing" for tax purposes (HENRY, 2016). Examples of successful experiences in this regard include the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, which aims to combat tax havens and harmful competition. On the other hand, attempts to implement supranational hard law are no guarantee of a common approach by Member States as can be seen in the initiative of the Caribbean Community and Common Market - CARICOM (BURGERS, 2017; VAN HORZEN, 2017).

The success of these projects, which aim to reduce tax evasion by increasing the collection of tax revenues by transferring wealth from richer to poorer countries, thereby allowing it to maximize global well-being and distribution fairly, depends on increased cooperation between states. However, the predominant decentralised nature of international taxation creates serious gaps. It is therefore necessary for nations to become aware of the need to preserve tax bases and work together to inhibit tax competition, tax evasion and aggressive tax planning, local corruption and government cartels.

> In this way, the effective fight against such practices that undermine the tax revenues of states and impact on the provision of social services necessary to reduce inequality should be combined, through measures such as broad international cooperation and global exchange of information can strengthen efficient competition (DAGAN, 2017). In the same sense, it is also believed that the concept of tax fair Competition should be better employed and together with the increasingly used concept of fair share in taxation (PIRES, 2018). In a speech in 2016, EU Commissioner Vestager explained "why fair taxation is important", stating the following:
>
> For me, this issue of justice is the most important message of the application of state aid rules in tax form and it is my duty, as Commissioner for Competition, ensure that the rules are applied fairly to any company that does business in the sector. (...) Taxpayers do not need to pay the bill left by tax-evading companies. And the public must trust that there is equality and justice for all, and not just for some well-connected companies (VESTAGER, 2016, s.p).

Fair tax competition means that a third country should not apply harmful tax measures in the area of corporate taxation (DOURADO, 2019b). It is therefore essential to distinguish fair and harmful tax practices, despite the lack of consensus on what is a 'low effective tax rate' or 'significantly lower effective tax level, including zero taxation, than the levels which

generally apply in the third country'. The concept of fair tax Competition, which requires a minimum level of taxation in third countries, has been included in the EU Anti-tax Package (EUROPEAN COMMISSION, 2016) and is part of the EU's external strategy with third countries on good tax governance. Furthermore, at EU level, the Code of Conduct in the field of business taxation (1997) represents a political commitment by Member States to combat harmful tax competition. Thus, better coordination of States, based on harmonisation of tax rules aimed at inhibiting harmful behaviour for the maximization of global welfare and justice, would also contribute to global governance.

The global governance proposed by the Ois covers similar issues: (i) concern and measures to prevent harmful competition, tax evasion and avoidance, and unnecessary tax incentives; (ii) mapping planned tax incentives; (iii) the mapping of advantages and disadvantages of volume-based versus incremental schemes, as well as targeted schemes; (iv) work on measuring costs and benefits of tax incentives and the effectiveness of tax incentives; (v) advising governments on assessing the success and / or failure of tax incentive schemes; and (vi) advising governments on achieving legal, economic and administrative transparency (VAN HORZEN, 2017). Another example of action that involves the harmonisation of tax rules aiming at the preservation of tax revenues, is the global anti-erosion rule, entitled Globe, drafted in the first half of 2019, in the OECD/G20 Inclusive Framework (IF) of the BEPS Project. The proposal consists of a global minimum tax, which would serve as a potential solution of global consensus for the challenges of digitisation and the remaining challenges of Tax Base Erosion and Profit Transfer (BEPS) related to the digital economy. The overall consensus solution could understandably comprise an overall minimum standard of cross-border income taxation and a best practice recommendation, which was adopted only by a subset of IF jurisdictions. It is considered that the express support of the G7 Finance Ministers to the minimum tax can be considered a determining factor in increasing membership of the Globe project, but it remains to be seen whether the remaining G20 countries as well as the other IF members, will, in fact, adhere to this bold proposal (HO; TURLEY, 2019).

All the measures mentioned, such as the spread of global governance, the adoption of strategies for the observance of fair share and tax fair Competition could lead to greater coordination of national tax systems which, in the long term, could result in harmonisation, not only at a regional level, but in global terms of governance issues, such as legal, economic and administrative transparency, voluntarily or through hard law. The G20's leading role in the UN could, in the long term, result in a convincing consensus on standards formulated, debated and implemented by international, supranational and intergovernmental institutes (VAN HORZEN, 2017). A more extreme option would be to require, in the name of global fiscal justice, the adoption of recommendations for best tax practices at the multilateral level, through a multilateral convention adopted on a large scale. For some, the cooperative efforts and interdependence of states in a multilateral regime would be sufficient to give rise to a supranational duty of justice. Meanwhile, advocates of strict political justice claim that this is not sufficient to justify such a duty of justice, as only the establishment of a global or multilateral fiscal state (or something close to it) would make this possible, since certainly multilateral cooperation that established a global state or federation of states would have to adhere to the principles of justice in the treatment of its constituents in order to acquire legitimacy. Such a regime could, in fact, be the best response to the justice concerns of cosmopolitans and statisticians; however, it is not only an unworkable solution, but probably also an unjustified solution. A global

state would probably not respond particularly to the preferences of its constituents, suffer an excessive concentration of power and lack of accountability, and have a serious efficiency problem (DAGAN, 2017).

Thus, as an alternative to the multilateral regime, the creation of a multilateral antitrust agency would work to dissolve cartels of states that are driving out competitors, preventing them from increasing the profits of the States' cartel at the expense of less powerful actors and reducing government waste. This regime would potentially increase the promotion of global well-being, reducing transaction costs, misuse and other market failures, and more accurately distribute revenues. Although this type of cooperation also faces strategic challenges, a careful design of the governance of these cooperative mechanisms could help ensure this more modest but more distributive and just regime (DAGAN, 2017). In short, the truth is one: nations must assume that global fiscal justice must prevail over economic rivalry. Therefore, the awareness of States and their contributors, the broad regional cooperation, which should be combined with the open dialogue with third countries promoted by the Ois, supported by supranational and intergovernmental organizations and the encouragement of good tax competition practices and fair shair compliance and governance initiatives is the way forward (BURGERS, 2017).

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5 CONSIDERAÇÕES FINAIS

The current scenario calls for international cooperation on global tax issues in order to decrease or even end tax havens and preferential regimes that only aim to attract foreign investment, reaching, too, the neutrality of the tax element. Currently, not only Nmcs, but also individuals take advantage of the facilitated mobility of tax bases and use fragmentation and differences between national tax systems to evade and/or eliminate taxes. The negative impact of these evasive practices is supported by states around the globe, since the untaxed sums reach hundreds of billions of dollars every year. The Ois pioneered the fight against evasion by introducing measures to stem losses from tax base erosion and profit transfers to tax havens and harmful preferential regimes. Initiatives such as the UN/OECD BEPS - Erosion and Profit Shifting Base - and the creation of a Tax Collaboration Platform between the Bretton Woods institutions, the OECD and the UN have been widely accepted by nations, recognising the harmful effects of harmful tax competition and harmful tax planning. While there is a consensus that such harmful practices hamper international fiscal sustainability, various issues, such as national sovereignty, prevent a minimum level of direct taxation or complete harmonisation of cross-border taxes.

Thus, without full harmonisation of taxation at international level, it is primarily up to States to raise awareness of the need to address persistent deficiencies in global tax governance in order to jointly, be able to implement, by means of soft or hard international law, more advanced and better developed measures, such as a multilateral convention with broad ratification and full adoption by nations, aimed at ensuring compliance with fair share, of fair tax Competition or the creation of an antitrust agency with global activity, in order to enable a more egalitarian distribution of wealth, thereby achieving global fiscal justice.

From this international cooperation made possible by States, a change of mentality on the elaboration, improvement and compliance with tax rules in society in general should be encouraged. It is noteworthy that legislation alone is not sufficient, for this reason so much is made necessary the awareness and interest of States in adopting initiatives of cooperation and international governance, aiming at the implementation of the necessary tools to amplify global fiscal governance.

Finally, it is of the utmost importance that all approaches to justice are taken into account in the design of a sustainable global tax system, thus providing for the broadening of the field of investigation into global perceptions of justice and the formulation of an agenda, with the broad participation of States, Ois and civil society, to discuss fiscal justice on a global level.

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INTER AMERICAN CONVENTION ON HUMAN RIGHTS PROTECTION OF ELDERLY PEOPLE: ANALYSIS OF THE ELDERLY MENTAL HEALTH TUTELAGE AND THE INTERFACE WITH PERSONALITY RIGHTS

CONVENÇÃO INTERAMERICANA SOBRE A PROTEÇÃO DOS DIREITOS HUMANOS DOS IDOSOS: ANÁLISE DA TUTELA DA SAÚDE MENTAL DOS IDOSOS E A INTERFACE COM OS DIREITOS DA PERSONALIDADE

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ABSTRACT

The present article analyzes the increase in the aging population around the world and the new challenges created by this increase, emphasizing the health of an elderly person, in special his/her physical, mental and social integrity. It brings forth the World Health Organization and the Organization of American States pre-occupation in making member countries implement adequate public policies regarding the health of elderly people. The objective is to examine the tutelage of the psychophysical health of the elderly through a panoramic view of the theme, based on the Statute of the Elderly and the Inter American Convention on Protecting the Human Rights of the Older Person, which guarantees their personality rights. This research adopts the deductive approach and intends, through a specialized, descriptive and exploratory literature review, to promote a reflection on the theme by the academic legal community. Results from this study show the latent need for implementing Brazilian public policies adequate to the health of people over 60 years of age,

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respecting their personality rights and favoring their dignity, mainly in regards to their integrity and mental health.

KEY WORDS: Inter American Convention on Protecting the Human Rights of Older Persons. Statute of the Elderly. Personality Rights. Mental Health.

RESUMO

O presente artigo analisa o aumento do envelhecimento da população mundial e os novos desafios que advém desse crescimento; enfatiza a saúde da pessoa idosa, em especial, a sua integridade física, mental e social e resgata a preocupação da Organização Mundial da Saúde e da Organização dos Estados Americanos para que os países membros adotem políticas públicas adequadas à saúde da pessoa idosa. Objetiva-se, por meio de uma visão panorâmica acerca do tema, partindo do Estatuto do Idoso e da Convenção Interamericana de Proteção aos Idosos, de 2015, examinar a tutela da saúde psicofísica da pessoa idosa, a qual efetiva os seus direitos da personalidade. Esta pesquisa emprega como método de abordagem o dedutivo, promove por meio da revisão de literatura especializada, descritiva e exploratória uma reflexão à comunidade jurídica acadêmica sobre a temática. Conclui-se que há a necessidade latente de implementação de políticas públicas brasileiras adequadas à saúde dos sexagenários, respeitando os direitos da personalidade do idoso, favorecendo a sua dignidade, principalmente, no que tange a sua integridade e saúde mental.

PALAVRAS-CHAVE: *Convenção Interamericana sobre a Proteção dos Direitos Humanos dos Idosos. Estatuto do Idoso. Direitos da Personalidade. Saúde Mental.*

1 INTRODUCTION

The post-modern society has presented a new population picture with the increase of the elderly, therefore new social and legal challenges are raised and deserve the attention of the legal operators. Thus, the present study is relevant to scientific research, since it launches a new perspective on the health of the elderly.

As problematic, the importance of the Statute of the Elderly of 2003, henceforth called the Statute, and the Inter-American Convention for the Protection of the Elderly of 2015, from now on called the Convention, in which these two legal acts protect the psychophysical health of the elderly person by enforcing their personality rights. These, refer to essential values such as life, psychophysical integrity and dignity.

This article, with the introduction, is divided into five more parts. The second topic deals with a new picture of the world's population and increasing ageing. The third focuses on the guardianship of the Brazilian elderly population and the contribution of the Statute. The fourth, analyzes the objectives of the Convention emphasizing the health of the elderly. Finally, the fifth one discusses the health of the elderly and Brazilian public policies in the face of the call of the World Health Organization, henceforth named WHO.

The research deals with the time span understood from some crucial international milestones related to the importance of the health of the elderly. These are portrayed since the World Assembly on Ageing of 1982, rescuing the United Nations Principle in Favor of Older Persons of 1991 and the Second United Nations World Assembly on Ageing of 2002. The national frameworks refer to the period of analysis between the Statute of 2003, through the 2015 Convention, which Brazil has committed to, until Law 13,819 of 2019 that instituted the

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National Policy for the Prevention of Self-harm and Suicide. These documents seek legal devices that corroborate the protection of the psychophysical health of the Brazilian elderly.

The present study uses deductive as the method of approach. To obtain an overview of the subject, a broad review of specialized literature is carried out. The sources employed were the Statute; the Convention; legal journals; newspapers; books; jurisprudence; scientific articles; specialized websites of hospitals union, psychology, nursing; national and international legal sites that corroborated the theme. A set of dynamic, quantitative and qualitative material is thus established.

To this end, a study developed by the WHO, through which there is an increase in the number of cases of depression among older people in the world, is rescued. The results make international institutions such as the WHO call for changes to member countries, including Brazil, demanding new alternatives to these challenges. For its part, the Organization of American States, hereafter designated (OAS), succeeds in drafting the Convention, as a document binding on the Member States. It commits most American countries, including Brazil, to the engagement of various rights of the elderly, including the right to psychophysical health of this group.

It then focuses on domestic legislation, the provisions of the Statute, the Federal Constitution of 1988 and personality rights on the subject. The research shows that the increase in the population of elderly Brazilians and the growth of certain problems involving the health of this group deserve special attention. It was observed that many causes of depression among the sexagenarians are caused by the lack of economic conditions, discrimination, abandonment, violence and the absence of an adequate space of coexistence for many of them. Given these findings, it is concluded that Brazil needs to implement effective public policies for the integral health of the elderly, aiming to promote their psychophysical and social well-being.

2. A NEW PICTURE OF THE WORLD'S POPULATION: INCREASING AGEING

Today, there is an immense transformation in the world's demographic process with the increase of the elderly population and, on the other hand, a sharp decrease in the birth rate. This new configuration occurs in several countries and in Brazil is not distinct. This is evidenced by data released by the United Nations (UN) and the WHO.

The UN warns that the number of sexagenarians is expected to double between the years 2007 to 2050 and the perspective is that this current number triples, approaching the average of two billion. It is not by chance that the UN, WHO and the UNFPA have presented guidelines and focus on public policies in the face of this new demographic situation. The number of elderly people from the age of 60 worldwide is estimated to reach 1.4 billion in 2030, and approximately 2.1 billion in 2050 (UNITED NATIONS, 2019).

Due to the increase of the elderly population in the world, the clash on the rights of this group has expanded. In 1982, the World Assembly on Ageing approved the Vienna International Plan of Action on Ageing. This Action Plan "contains 62 recommendations, many of

which have a direct relevance to the International Covenant on Economic, Social and Cultural Rights, which is the basis of politics for the elderly at the international level" (ROBINSON, 2019).

Specifically in 1991, the General Assembly highlighted the document called "United Nations Principle in Favor of Older Persons and enumerated 18 rights of older persons in relation to independence, participation, care, self-realization and dignity" (UNITED NATIONS, 2019). Continuing this policy, the following year the International Conference on Aging met to follow up the Plan of Action, adopting the Proclamation of Aging. Following the recommendation of the Conference, the UN General Assembly in 1999 declared the International Year of the Elderly (UNITED NATIONS, 2019).

In 2002, the Second United Nations World Assembly on Ageing was held in Madrid, Spain, and aimed to develop an international policy for ageing in the 21st century. The Assembly adopted a political declaration, which became known as the Madrid International Plan of Action on Ageing (2002) and its specific recommendations for action were as follows: priority to older people, development aiming to improve health, well-being in old age, ensuring education and support environments (UNITED NATIONS, 2019).

Brazil, as reported in the Jornal da Universidade de São Paulo, is on the way to becoming the fifth largest population of elderly people in the world and already accounts for approximately 27 million people aged over 60 years. In 2050, it is estimated that this number will be close to 64 million, representing almost 30% of the Brazilian population (UNIVERSIDADE DE SÃO PAULO, 2018).

Given the scenario presented, it is necessary that the Brazilian society rethinks public policies that take into account the trend of aging of the national population and that meet the needs of the elderly, respecting their dignity. This constitutes a new challenge to postmodern society. Brazil also needs to seek the implementation of public policies appropriate to the elderly to meet these new requirements.

3. THE GUARDIANSHIP OF THE BRAZILIAN ELDERLY POPULATION: THE CONTRIBUTION OF THE STATUS OF THE ELDERLY

After five years of processing in the National Congress, the Statute was instituted that regulates the rights of Brazilian elderly. It acts as a fundamental legal instrument to bring to the fore the dignity that the elderly deserve. In this sense, it should be examined in order to visualize, in this important institution, the protection of the full health of sexagenarians.

In Brazil, the elderly is protected by the Federal Constitution of 1988 in the chapter that deals with the family, more specifically in Article 230, which provides that the family, society and the State have the duty to support the elderly, ensuring their participation in the community, defending their dignity and well-being and guaranteeing them the right to life. Also in article 229, the same diploma establishes the duty of older children to assist parents and care for them in old age, in need and in sickness (BRAZIL, 1988).

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The Statute, whose project was born with the organization and mobilization of retirees, pensioners and seniors, processed for years in the National Congress, was approved in September 2003 and instituted by Law 10,741 of 2003. This Statute is intended to regulate the rights granted to the elderly and has rules and guidelines for the formulation and implementation of public policies and services for the elderly. In addition to its normative force, the Statute still enjoys the prestige it has earned before society, and has become a milestone in the history of protection from old age. Resulting in significant changes in relations with the elderly and social spaces assigned to them (BRASIL, 2003).

The aforementioned legal act is also understood as a "State device and also as part of a set of discursive practices that establishes old age as a category of thought and meaning from images generated, through which reality becomes apprehended and modeled" (JUSTO; ROZENDO, 2010). It is worth remembering that, according to the provisions of Article 1, a person aged 60 (sixty) years or more is considered elderly, and this elderly population is protected by the Statute (BRASIL, 2003).

Despite the 1988 Federal Constitution already provides for the list of fundamental rights, in its Article 5, the Statute, aiming to give greater emphasis, reproduced this constitutional rule in its Article 2, which states that the elderly person enjoys all the fundamental rights inherent in the human person. Assuring by law all opportunities and facilities for the preservation of his physical and mental health, as well as his moral, intellectual, spiritual and social improvement, in conditions of freedom and dignity (BRASIL, 2003).

Also, aiming at the preservation of health and physical and psychological integrity, as well as the welfare of the elderly, Article 4 of the Statute, established its protection against any kind of negligence, discrimination, violence, cruelty or oppression. Furthermore, by providing that any violation of their rights, by action or omission, will be punished in the form of the law. On the other hand, the law dispensed differentiated treatment to the elderly, guaranteeing them, among other rights, priority care in public and private bodies providing services to the population; preference in the formulation and implementation of specific public social policies; prioritizing the care of the elderly by their own family, to the detriment of nursing care, except for those who do not have it or lack the conditions to maintain their own survival; ensuring access to the network of local health services and social assistance, etc. (BRAZIL, 2003).

The Statute also ensured that priority was given to the conduct of proceedings and procedures and to the execution of judicial acts and procedures in which the person considered to be elderly by that law appears as a party or intervener in any instance or Court. It should also be noted that due to the increase in Brazilian life expectancy, in 2017, Law 13,466 was published, guaranteeing the differentiated priority to older adults over 80 (eighty) years, that is, the priority of priority (BRASIL, 2003).

There is also provision in the Statute that ageing is a personal right and its protection is a social right, and that it is the obligation of the State to guarantee to the elderly the protection of life and health, through the implementation of public social policies that allow for a healthy ageing and under conditions of dignity, and to guarantee the elderly their freedom, respect and dignity as a human person and subject to civil, political, individual and social rights, guaranteed in the Constitution and laws (BRASIL, 2003).

As far as the right to health is concerned, an entire chapter is available to deal with the issue. The article ensures comprehensive health care for the elderly, through the Brazilian Unified Health System, SUS. Guaranteeing universal and equal access, together articulated and continuous actions and services, for the prevention, promotion, protection and recovery of health, including, special attention to diseases that preferentially affect the elderly. It also determined that the Public Power is responsible for providing free medicines to the elderly, especially those for continued use; as well as prostheses, orthotics and other resources related to treatment, habilitation or rehabilitation (BRASIL, 2003).

Among the various rights related to the health of the elderly, the Statute provided that elderly people with disabilities or disability will have specialized care. In addition, included the sealing of the requirement to attend the elderly sick before public agencies, being assured to the elderly, under these listed conditions, home care by the medical expertise of the National Institute of Social Security - INSS, by the public health service or by the private health service, contracted or contracted, which integrates the SUS, for the dispatch of a health report necessary to exercise its social rights and to obtain tax exemption (BRASIL, 2003).

Finally, the Statute assured the elderly hospitalized or under observation the right to a companion. The health unit must provide the appropriate conditions for full-time care, according to medical criteria, and it is up to the health professional responsible for the treatment to grant permission to follow up the elderly person or, if this is not possible, justify it in writing (BRASIL, 2003).

The World Report on Violence and Health of 2002 defines violence against the elderly as any act, single, repetitive, omission, that occurs in any relationship supposedly of trust, that causes harm or discomfort to it (WORLD HEALTH ORGANIZATION, 2002). Violence against the elderly, on the other hand, is also conceptualized, by the Statute, as that practiced against the elderly by any action or omission in a public or private place that causes death, damage or physical or psychological suffering (BRASIL, 2003).

Regarding the protection against violence against the elderly, the Statute stipulates that, in cases of suspicion or confirmation, they will be subject to compulsory notification by public and private health services to the health authority, as well as will be, obligatorily, communicated by them to any of the following bodies: I - police authority; II - Public Ministry; III - Municipal Council of the Elderly; IV - State Council of the Elderly and V - National Council of the Elderly (BRAZIL, 2003).

Aiming to protect the elderly against abandonment, the Statute also predicted that social assistance to the elderly will be provided, in an articulated manner, according to the principles and guidelines provided for in the Organic Law of Social Assistance (LOAS)in the Brazilian Unified Health System and other relevant standards. Also, the payment of a monthly benefit in the amount of a minimum wage to the elderly, from sixty-five years, who do not have the means to provide their subsistence, or to have it provided by their family (BRASIL, 2003).

Finally, in order to curb all forms of violence against the elderly, the Statute listed a series of conduct that has come to be considered crimes, such as: discriminating against the elderly, preventing or hindering their access to banking operations, means of transport, the right to contract, or by any other means or instrument essential to the exercise of citizenship, on

grounds of age; no longer to provide assistance to the elderly person, where possible without personal risk, in imminent danger, or refuse, delay or hinder their health care, without just cause, or do not ask, in these cases, the help of public authority, etc. (BRASIL, 2003).

The Statute amended Article 244 of the Penal Code of 1940 to make it a crime of material abandonment to cease without cause to provide for the spouse, or a child under eighteen or unfit for work, or an invalid ascendant or over 60 years of age. Not providing them with the necessary resources or failing to pay the legally agreed, fixed or increased alimony. And also, leave, without just cause, to help descending or ascending, seriously ill (BRASIL, 2003).

The courts are already enforcing the crime of material abandonment against the elderly, in accordance with Article 244 of the Criminal Code added by the Statute, as decided by the Court of Justice of Rio de Janeiro in criminal appeal trial number 0201897.91.2011.8.19.0001, of the 38th Criminal Court. In this ocasion, that Court ruled the application of the penalty provided for in the Statute and also increased the penalty based on the aggravating provided for the crime committed against the elderly (RIO DE JANEIRO, 2013).

Despite the legislator's concern to legally protect the elderly, what is currently present, in several homes in Brazil, is the abandonment, violence against the elderly and the lack of adequate public policies. Sometimes, it is observed that the main perpetrators of elder abuse are their own relatives and neighbors, thus constituting a high rate of aggressors within families. Conclusion that stems from the weakening of the bond of solidarity and affectivity among its members, and the overload of the caregiver, the situation that triggers these abuses (BRASIL, 2017).

According to the Secretariat for Human Rights of the Ministry of Women, Family and Human Rights, there is an increase in cases of abandonment and violence against the elderly. In 2011, 24,669 elderly people died from accidents and violence in the country, meaning 68 deaths per day. Men were 15,342 (62.2%) and women 9,325 (37.8%). In 2017 alone, the Department of Human Rights recorded more than 33,000 cases of aggression against people over 60 years of age (BRASIL, 2017). The figures are alarming, especially in view of the increasing ageing of the population. Violence against the elderly is considered a violation of human rights, consisting of one of the most relevant causes of injury, illness, loss of productivity, isolation, depression and even suicide.

Public mental health policies in Brazil, although they have achieved progress, in relation to proposals for the treatment of mental disorders, still lack attention from managers and public authorities to ensure the right to adequate and dignified treatment for patients with depression or some mental disorder. (ALENCAR; RAIOL, 2020). Therefore, there is an urgent need for the articulation between the family, civil society and the public power to minimize the rate of self-harm and suicides. It is necessary to make a public policy with a multisectoral and integrative character, aimed at prevention, able to identify in a timely manner those who develop suicidal ideation, before the attempt is consummated, and thus reduce the numbers of suicides (SANTOS; SCHMIDT, 2019).

This suicide trend among the elderly population is also verified in Brazil according to a study conducted by the professor of the National School of Public Health of Fiocruz-RJ, the sociologist Maria Cecília Minayo. The study was conducted between 2010 and 2012 and

published in the Jornal Diário da Manhã, with the title "Violence against the elderly provokes the desire for suicide" (DIÁRIO DA MANHÃ, 2016).

In this study, the teacher explains that driving a person to suicide never has a single cause and that the influence of the person's life history, including suffering, violence, isolation and often abuse, lead them to practice such an act. "And then when the person reaches the last age he feels that his life has no meaning anymore". (MINAYO, 2016).

In this bias, it is essential that society pay more attention to the vulnerability of the elderly person, as prescribed by the Statute. Turning attention to your health in a comprehensive way, particularly with regard to your mental and emotional aspect, will help minimize the numbers of depression and consequently decrease the cases of suicide among older people. The rights of personality, conceptualized as those inherent to the human person itself, constitute prerogatives or faculties that allow individuals to develop their abilities, physical and psychic energies. These must be respected in the daily life of the elderly population, which must live with dignity.

4. ANALYSIS OF THE OBJECTIVES OF THE INTER-AMERICAN CONVENTION ON THE PROTECTION OF THE HUMAN RIGHTS OF THE ELDERLY: FOCUS ON THE HEALTH OF THE ELDERLY

Given the aging scenario of the world population, Brazil follows the same trend and, therefore, it is crucial to protect the fundamental rights of the Brazilian elderly. Even, as already pointed out, this population has gained a new look before international organizations such as the WHO and the OAS. American countries also have a similar profile in relation to the growth of this specific group.

In order to present responses to this new reality, the nations of the Americas negotiated and approved, on June 15, 2015, the Inter-American Convention on the Protection of the Human Rights of the Elderly, concluded within the framework of the Organization of American States (OAS) in 2015, celebrated in Washington. This document legally binds the States that have committed themselves to the rights of the elderly. Among these, it is included, the Brazil that signed it (ORGANIZATION OF AMERICAN STATES, 2015). In this sense, it is emphasized that "modern States are not limited to guaranteeing minimum rights to individuals, but also act in promoting the implementation of individual, social and collective fundamental rights" (REMEDIO; FARIA, 2019, p. 723).

The Convention was concluded with the aim of promoting, protecting and ensuring the recognition, enjoyment and exercise, on equal terms, of all human rights and fundamental freedoms of the elderly. This document recognizes the elderly as subjects of rights, ensuring their inclusion, integration and participation in society, in line with the provisions of the Statute, established in Brazil, by Law 10,741 of 2003 (BRASIL, 2017).

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The text was signed by the States that are part of the OAS based on the need to establish a regional document, legally binding, that would protect the human rights of the elderly and promote active ageing in all areas. However, care was taken to implement an instrument that would not limit the rights already acquired by the elderly population in their nations (ORGANIZATION OF AMERICAN STATES, 2015).

The Draft Legislative Decree nº 863 of 2017, within the Federal Chamber, approved the text of the Inter-American Convention on the Protection of the Human Rights of the Elderly with 41 (forty-one) articles. The text is divided into 7 (seven) chapters and contains, at the end, footnotes regarding the content and limits regarding the commitments made by States Parties (BRAZIL, 2017).

Chapter I of the 2015 Convention delimits the objectives, scope and definitions of the terms used in the conventional text. However, the main objective of the Convention is "promote, protect, ensure the recognition and full enjoyment and exercise, on equal terms, of all human rights, fundamental freedoms of the elderly, in order to contribute to their full inclusion, integration and participation in society." It should be noted, however, that the provisions of this legal act "should not be interpreted as a limitation to broader or additional rights or benefits recognized by international law or by the domestic laws of the States Parties in favor of the elderly." (BRAZIL, 2017).

Chapter II sets out the general principles applicable to the Convention. These principles are listed and present 15 (fifteen) rights and prerogatives that favor the elderly. They are: the promotion and defense of the human rights and fundamental freedoms of the elderly; the valorization of the elderly, their role in society and their contribution to development; dignity, independence, protagonism and their autonomy. It emphasizes the equality and non-discrimination of the elderly, their participation, integration and effective inclusion in society; right to well-being and care, self-realization; solidarity and strengthening of family protection. It should also be emphasized that the participation of the family, the community, the State in the active and productive integration of the elderly, observing the internal legislation (BRASIL, 2017).

Chapter III sets out the general duties of States Parties, which undertake to safeguard the human rights and fundamental freedoms of the elderly, without any discrimination, as established under Article 4. There is emphasis on measures aimed at preventing, punishing and eradicating practices such as, isolation, abandonment, prolonged physical subjection, crowding, expulsion from the community, denial of nutrition, infantilization, inadequate medical treatment. It is also necessary to eradicate practices that constitute cruel, inhuman or degrading mistreatment or punishment that harm the safety and integrity of the elderly (BRASIL, 2017).

Chapter IV covers the main rights relating to the elderly, which will be protected, but whose responsibility for assurance and observance is the responsibility of the States Parties. Articles 5 to 31 of that Chapter set out these rights, namely: equality and non-discrimination on grounds of age; right to life and dignity in old age; right to independence and autonomy; right to security and to a life without any form of violence; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right to express free and informed consent in the context of health; the rights of the elderly who receive long-term care services; the right to personal freedom; the right to freedom of expression and opinion

and access to information; the right to nationality and freedom of movement; the right to privacy and intimacy; the right to social security; the right to work; the right to health; the right to education; the right to culture; the right to recreation, leisure and sport; the right to property; the right to housing; the right to a healthy environment; the right to accessibility and personal mobility; political rights; the right to assembly and association; right to protection in situations of risk and humanitarian emergencies; right to equal recognition as a person before the law and the right of access to justice (BRASIL, 2017).

The Convention, in its Chapter V, establishes a rule whereby States Parties undertake to promote awareness of the condition of the elderly by means of measures that promote the dissemination and progressive empowerment of the whole society on the Convention; generate a positive attitude towards old age; sensitize society and encourage the participation of this and its organizations in the formulation and structuring of programs aimed at the elderly; include the theme of active aging in teaching programs and the academic agenda; as well as promoting the recognition and contribution of the experience of the elderly to the whole society (BRASIL, 2017).

Chapter VI deals with the monitoring mechanism of the Convention consisting of a Conference of States Parties and a Committee of Experts, as well as, with a System of Individual Petitions, providing for the possibility of petitioning, which contain complaints or complaints to the Inter-American Commission on Human Rights (BRASIL, 2017). Chapter VII deals with issues related to the procedures of signature, ratification, accession, entry into force, filing, denunciation, formulation of reservations and presentation of amendments to the constitutional text (BRASIL, 2017).

In short, when analyzing the text of the Convention, it is noted that the initiative of the said document is salutary and indispensable, since, the population aging, in Brazil, requires public policies that ensure the rights of the elderly population. It should be noted that, on the one hand, the State Party has a duty to protect or protect fundamental rights by means of rules, administrative activity and jurisdiction, resulting in the normative, administrative and judicial protection of rights, on the other hand, there are rights that are also protected by a supranational order, due to its nature of fundamental minimum rights or prerogatives derived from international human rights law (GUERRA; TONETTO, 2018).

Brazil has signed this Convention, which has come to strengthen existing national legislation and programs on the rights of older people, like the National Policy of the Elderly, the National Human Rights Program (PNDH-3)the National Commitment for Active Ageing and the Statute, as well as, contributes to strengthening the actions developed within the National Council for the Rights of the Elderly (CNDI). It should be emphasized that, through Law 16,646 of April 9, 2018, Brazil instituted the year 2018 as the “Year of Valorization and Defense of Human Rights of the Elderly”, this underscores the importance of the present Convention (BRAZIL, 2017).

The Convention dealt with various norms that protect the elderly, but left amply expressed the right to health, in Article 19, which literally transcribes its text:

> States Parties should formulate and implement inter-sectoral public health policies aimed at comprehensive care including health promotion, prevention and disease care at all stages, and rehabilitation and palliative care for the elderly, in order to promote the enjoyment of the highest level of fiscal,

> mental and social well-being. To make this right effective, States Parties undertake to take the following measures: [...] letter b: formulate, implement, strengthen and evaluate public policies, plans and strategies to promote active and healthy aging[...] letter d: strengthen prevention actions through health authorities and disease prevention [...] letter h: including chronic degenerative diseases, dementias and Alzheimer's disease [...] (ORGANIZATION OF AMERICAN STATES, 2015).

The rights of the personality refer to essential values such as life and psychophysical integrity, so, if placed in a hierarchical organization, they will occupy the highest level of this (BARLETTA, 2016). The way to recognize the elderly as subjects with rights is what ensures their inclusion in an integrated society. In this wake of thought, the Convention represents a set of measures whose main objective is to provide greater international visibility to the elderly. Therefore, it is clear that there is a need to seek appropriate policies that respond to the current challenges arising from population aging (OCA et al., 2019).

The Convention is an important step in the recognition of the rights of the elderly, but it must, after the ratification of the National Congress, be accompanied by concrete measures to achieve success in the effective realization of the rights recognized in it. It will take a significant effort on the part of the public authorities to instrumentalize their institutions in order to offer adequate and preferential treatment to issues related to the elderly. (GOLDFARB, 2016).

It is investigated, however, that the Federal Constitution of 1988 in its Article 1, item III, establishes, when considering human dignity as a value on which the Republic is based, a general clause, which protects all rights of the personality. In this way, the principle of the dignity of the human person "acts as a general clause of guardianship and promotion of personality in its most diverse manifestations, which therefore cannot be limited in its application by the ordinary legislator"(MORAES, 2008, p. 6).

The importance of Article 1, Item III of the Federal Constitution of 1988, It established human dignity as a fundamental principle. And also, in relation specifically to the guardianship of the elderly, the article 196 of the Magna Carta, which, establishes that

[...] health is the right of all and the duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other diseases and at universal and equal access to actions and services for their promotion, protection and recovery (BRASIL, 1988).

It should be noted that the Inter-American Convention on the Protection of the Human Rights of the Elderly, 2015, which Brazil signed, is approved by the Federal Chamber and will continue its legal process until it is widely incorporated into the Brazilian legal system. It is noticed that, in this document, there are several rights, which protect the health of the elderly, especially regarding the psychic aspect, preventing mental illnesses and decreasing the number of suicides.

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5. HEALTH OF THE ELDERLY: BRAZILIAN PUBLIC POLICIES FACING THE CALL FROM THE WHO

One of the great challenges of the present century is the implementation of public policies aimed at reducing the number of depression cases related to old age. In Brazil, the situation is no different. This subject encompasses public health and is of extreme seriousness and intense priority in order to be combated. As already pointed out, it was found that the WHO reported a high number of suicides in the world, considering that these occur in all age groups. However, the number of suicides among the elderly has grown in Brazil, deserving attention.

According to the Report of the World Health Organization on Violence and Health, held in Geneva in 2002, at a global level, an average of 800,000 suicides per year was found, revealing a global health problem, highlighting the urgency of the matter. In this sense, it is necessary that the implementation and implementation of public policies that attempt to curb or decrease this situation (WORLD HEALTH ORGANIZATION, 2010).

Suicide rates do not present equally in the entire population. An important population marker for suicide risk is age. Worldwide, suicide rates tend to increase with age, although some countries have recently seen a secondary peak among young people. Overall, suicide rates among people over 70 are approximately three times higher than among younger people (MACIEL, 2017).

Suicide deaths refer only to part of this serious problem. "Many who make the attempt actually die, others, however, manage to survive the attacks against their own lives. However, attempts to injure themselves, which alone, require a lot of medical care". Suicidal behavior ranges from simply thinking of exterminating life to "developing a plan to commit it, getting the means to accomplish it, that is, trying to kill oneself until finally performing the act of completed suicide'. Finally, the term suicide itself brings a direct reference to violence and aggressiveness" (WORLD HEALTH ORGANIZATION, 2002).

Suicide deaths refer only to part of this serious problem. "Many who make the attempt actually die, others, however, manage to survive the attacks against their own lives. However, attempts to injure oneself by themselves require considerable medical care". Suicidal behavior ranges from simply thinking of exterminating life to "developing a plan to commit it, getting the means to accomplish it, that is, trying to kill oneself until finally performing the act of completed suicide'. Finally, the term suicide itself brings a direct reference to violence and aggressiveness" (WORLD HEALTH ORGANIZATION, 2002).

Since 2003, September 10 has been instituted as the "World Suicide Prevention Day by the International Association for Suicide Prevention and the WHO (WORLD HEALTH ORGANIZATION, 2002).

On October 1, 2017, the "International Day of the Elderly" was celebrated, and the WHO called for more effective public policies for the sexagenarians. It was highlighted that, by 2050, the number of elderly people will reach 2 billion.

This international organization criticized the world's health systems, which, in its conception, are not fit to meet this specific population. He also recalled that elderly people are

more likely to have chronic health problems and, often, multiple problems concomitantly. However, current health systems generally focus on treating acute individual diseases. Thus, the articulation of different areas of health, still, is a challenge in the care of the elderly (ORGANIZATION OF THE UNITED NATIONS, 2019).

One of the specific guidelines of the WHO is the document Guidelines on Integrated Care for Older People, which aims to improve care through initiatives such as planning, comprehensive evaluation of patients and improve the integration of sectors that care for sexagenarians. According to the international organization, some countries have already adopted strategies that meet the recommendations of the organization. This is the case of Brazil, which implemented some modifications in services with the elderly (WORLD HEALTH ORGANIZATION, 2017).

The Pan American Health Organization also recalls that the WHO is developing a Global Strategy and an Action Plan on Aging and Health. It shall be drawn up and adopted in consultation with the Member States. They have already been established as priority actions, the creation of age-friendly environments and improvements in the monitoring and adaptation of health systems to the needs and well-being of sexagenarians (ORGANIZATION PAN-AMERICANA DA SAÚDE, 2019).

The increase in the number of suicides is increasingly worrying for the WHO and other international bodies. Thus, mental health is one of the targets to be achieved in the "Sustainable Development Goals, specifically in the "Goal 3.4" by 2030, whose aim is to reduce by one third premature mortality from chronic non-communicable diseases through prevention, treatment and promotion of mental health and well-being". Based on this reasoning, the understanding that "suicide is an indicator of preventable deaths and this shows the commitment of countries to work increasingly on this theme" (ORGANIZATION PAN-AMERICANA DA SAÚDE, 2017).

In this sense, the importance of an overall health care strategy for the elderly is observed, in addition, the involvement and participation of countries in the identification of risk situations, which contribute to the increase in the number of suicides, aiming at its prevention. Therefore, one of the concerns of the WHO is that Member States implement public policies that contribute to improve the quality of life of the sexagenarians, focusing mainly on mental health.

According to WHO statistics, Brazil ranks fifth in the world and first in the Latin American depression ranking. In addition, suicide rates tend to increase proportionally to anxiety and depression rates. The warning from the WHO is that "every 45 minutes there is a suicide in Brazil, that is, 32 people commit suicide per day in the country. Every 40 seconds there is a suicide in the world and every 3 seconds there is a suicide attempt" (FEDERATION OF HOSPITALS, CLINICS, HEALTH HOMES, RESEARCH LABORATORIES AND CLINICAL ANALYSES AND OTHER HEALTH SERVICES ESTABLISHMENTS IN THE STATE OF SÃO PAULO, 2017).

However, the work of the Ministry of Human Rights should be highlighted in Brazil. As an example, it is cited that, from 2015, the Center for the Valorization of Life (CVV) Federal Council of Medicine and the Brazilian Psychiatric Association conducted the campaign "yellow September", calling on society to participate in suicide prevention. Among the various guidelines, there was the provision of a telephone access channel for the whole of Brazil, by

the Center for Valuing Life, together with the Ministry of Health. The service is developed by volunteers and the call is free for 188 (BRASIL, 2019).

In 2017, the Ministry of Health released the first Epidemiological Bulletin on Suicide Attempts and Deaths in Brazil. From this, it has been proven that the suicide rate is high among elderly over 70 years. In this age group, an average of 8.9 deaths per 100,000 were recorded in the last six years. The national average is 5.5 per 100,000. This diagnosis provided a new direction in the nation's mental health care. It was also found that the risk of suicide reduces by up to 14% in places where there are Psychosocial Support Centers (CAPS), which were an initiative of the Unified Health System (SUS), and the unprecedented diagnosis guides the expansion and qualification of mental health care in the country. The Ministry of Health, based on data from the newsletter, launches a strategic agenda to reach the WHO's goal of reducing 10% of deaths by suicide by 2020. Among the actions, we highlight the training of professionals, orientation to the population and journalists, the expansion of the mental health care network in areas of higher risk and the annual monitoring of cases in the country and the creation of a National Suicide Prevention Plan (MACIEL, 2017).

It is estimated that in the next 20 years, depression will become the most known disease in the world, harming more people than any other health problem and will be the one that will bring the most expense to governments because of spending on treating patients. The poorest countries are the ones most overwhelmed by the problem. In Brazil, 23 million people need mental treatment. The most serious diseases are linked to depression and anxiety (MENDES, 2013).

The elderly occupy a prominent position, requiring special attention, especially in relation to mental health. One of the great challenges of public policy is to identify the factors, which involve the risk of suicide, especially among the sexagenarians, in order to develop a national policy of prevention and combat. Analyzing a profile in relation to risk factors, which involve suicide, there is "mental disorders such as depression, alcoholism, schizophrenia; socio-demographic issues such as social isolation; psychological, such as recent losses; and disabling clinical conditions such as injuries, chronic pain, malignant neoplasms" (BRASIL, 2017).

At senile age, when there is loss of referential ties, the elderly person is more vulnerable. On average, the young person makes 20 attempts to an effect, suicide. In the elderly, there are four attempts. Often, there is no attempt, it is unique. They use definitive methods. According to the Ministry of Health, in the age group of 75 years, occur from eight to 12 male suicides by a female. Depression has great influence. It can be seen that, behind the desire to anticipate the end of life, there are issues related to old age, loss of health, autonomy, productivity, not feeling more useful, etc. It is also noteworthy that retirement makes the elderly stay longer indoors, undermining social relationships and increasing isolation (OLIVETO, 2019).

Since 2015, the CVV, in partnership with the Federal Council of Medicine and the Brazilian Psychiatric Association, launched the "yellow September" campaign, calling on each Brazilian to support and participate in suicide prevention. It was made available to the whole country, a telephone access channel, the 188, by the Center for Valuing Life, in partnership with the Ministry of Health. The connection is free and the importance of depressive people having access to this channel is fundamental, because the strategy is to welcome and understand the pain of those who are in depression. Listening can be more important than orienting, so investing

time in this service channel enables the construction of bonds, which help in rehabilitation. In fact, the theme suicide should be conceived as a public health issue, which depends on the mobilization of all Brazilians. These and other guidelines underpin the national policy to combat suicide and, mainly, actions of the Ministry of Human Rights to promote the protection and rights of the elderly (BRASIL, 2018).

Currently, Law 13,819 of 2019 instituted the National Policy for the Prevention of Self-harm and Suicide in Brazil. Such law provides compulsory notification, which should be confidential and will be used for cases, presenting suicide attempt and self-harm. "It included the creation of a national system, involving states, municipalities, preventing self-harm and suicide, as well as a free telephone service for public service" (BRASIL, 2019).

This policy is an important tool to understand the origin of the problems related to the loss of so many lives. The objective of this study was to create more appropriate policies to contribute to the improvement of this situation. Until recently, this problem was treated as taboo and many did not want to touch the subject, opting for silence, believing that it would avoid stimulating new cases (BRASIL, 2019). Today, however, scholars highlight the importance of information on this sensitive subject.

In Brazil, the Statute contributed to guarantee the guardianship of the Brazilian elderly, regulating the rights granted to people from the age of sixty. It should be emphasized that the Statute establishes the opportunities and facilities granted to the elderly and are thus fundamental rights, as a foundation on which to build their integral protection (BARLETA, 2016).

Currently, the demand for specialized care services for the sexagenários has grown. In Brazil, Long-Stay Institutions, Coexistence Centers and Day-Care Centers for the elderly emerged. The former offer collective domicile for seniors in vulnerable situations. The latter offer activities of culture and leisure to those who have autonomy, independence. Third parties are characterized as a space to care for elderly people who have some limitations to perform daily activities, but do not commit severely, in most cases, live with their families, but do not have full-time care in their homes, is a service for daytime activities (FREITAS, 2019).

Most of the time, it is not an easy task, but it is possible to search for options of coexistence, such as classes, gyms, neighborhood and other social spaces. Not forgetting that it is common to over the years reduce social relations networks (VALADARES, 2019). The importance of the elderly in maintaining their friendships, in addition to the family, is emphasized because social coexistence avoids isolation and is fundamental to help prevent depression.

It should be emphasized that the objective of the Centro Dia, should include not only the protection, but the improvement of the quality of life and the autonomy of the elderly, also favoring the living conditions of family members who are assisted in the care of their relatives, without this representing the loss of ties. When living with other people, they do activities to spend time in a pleasant and constructive way, as well as building and increasing social and affective bonds. In the municipalities that have Day Care Centers for sexagenarians, the referral to this service is carried out through the Specialized Reference Centers of Social Assistance (CREAS), related to the respective Municipal Departments of Social Assistance. The problem is that there are not always vacancies available for demand. Public investments are urgently needed to increase the supply of these in municipalities, because many elderly people are excluded from this social assistance that is extremely healthy. (FREITAS, 2019).

In view of the data provided, the WHO calls on the Member States to promote social well-being, taking into account the psychophysical health of the elderly and calls on them to develop appropriate public policies to address or address the problem raised. Brazil has some public policies directed in this area, as evidenced, however, there is still a lot to be done by the elderly person so that it is protected in their needs and their dignity is respected.

6. CONCLUSION

It was emphasized in the present study that there is a relevant concern of the WHO and the OAS directed to the new world demographic picture, given the increasing number of elderly people. Therefore, there is the emergence of new demands to meet the needs of this public, especially regarding the integral health and social well-being of the elderly.

As for Brazil, it was evidenced that in the legal literature there was previously a desire to meet and protect the elderly. Note, in particular, the Statute governing the rights granted to this vulnerable group. It was observed that talking about suicide until recently was considered an immense taboo. However, currently, due to current public policies, this theme has become widely debated by society and also through the Center for the Valorization of Life (CVV), Ministry of Health and the National Council of Medicine.

Based on the analysis of theoretical contributions such as the Statute, the Convention, national, international and governmental legal sites relevant to the research, as well as specialized websites of hospitals trade union, psychology, nursing; legal journals and newspapers; The Ministry of Human Rights and Family verified several Brazilian public policies that corroborate the improvement of the situation presented and four of them stood out in this article. The first is the telephone access channel, by the CVV, together with the Ministry of Health. The second, refers to the importance of the work of the Psychosocial Support Centers (CAPS) reducing the risk of suicide in the available places. The third is Law 13,819 of 2019 directed to the National Policy for the Prevention of Self-harm and Suicide in Brazil. It provides for compulsory notification that should be confidential for cases that present suicide attempt and self-harm. Thus, the data collected form an important tool to understand the causes of this problem.

The fourth policy emphasizes the Long Stay Institutions, the Coexistence Centers and the Day-Centers, spaces of social coexistence with specialized care to meet the needs of the elderly with options of coexistence, leisure and social participation. It is essential to invest in the expansion and availability of this service throughout the national territory. These are examples of Brazilian public policies that have contributed to the improvement and quality of life of many elderly Brazilians, corroborating to decrease mental illnesses such as depression and suicide risk.

In 2015, Brazil signed the Inter-American Convention on the Protection of Human Rights of the Elderly, a document legally binding on States Parties. It should be incorporated into the country's legal system and will contribute effectively to the protection of the elderly, especially with regard to mental health. This analysis was based on the interpretation duly expressed in Article 19 of the Act. Despite the national laws that protect the Brazilian elderly,

this document will collaborate intensely with the health and social well-being of the elderly by being incorporated into the Brazilian legal system, especially in relation to the psychophysical health of the elderly person.

It was found after the literature review that, currently, discrimination, lack of economic conditions, abandonment and violence committed against the elderly, considered as a violation of human rights and essentially, the lack of adequate public policies for the prevention of mental health of the elderly in Brazil, require particular attention from public managers. Given this reality, it was found that there is urgency in the articulation between family, civil society and the public power to minimize the suicide rate among the elderly. Much remains to be done in favour of this vulnerable group.

For all these reasons, it is essential that society and the public authorities pay more attention to the vulnerability of the elderly and implement efficient and adequate public policies, particularly directed to their mental and emotional aspect. In this bias, there must be an engagement on the part of society, because it is essential that the elderly as an integral element of a vulnerable group, have largely ensured their personality rights and respected their dignity.

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RIGHT TO HEALTH AND THE PROBLEMS OF CONSEQUENTIALIST DISCOURSE

DIREITO À SAÚDE E OS PROBLEMAS DO DISCURSO CONSEQUENCIALISTA

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ABSTRACT

The right to health is guaranteed in the Brazilian Constitution of the Republic of 1988 as one of the fundamental rights of the human being, and it is the duty of the State to ensure it through the implementation of public policies, embodied in the so-called vital minimum. However, the erroneous application of the principle of reserve for contingencies, for this purpose, produces a bond between the enforcement of rights and the financial capacity of the State. The constitutional amendment number 95 (2016) implemented a new fiscal regime popularly known as "expenditure caps". As if the improper adoption of the aforementioned theory and the budget issue was not enough, the recent legislative alteration to the law that introduces the Brazilian rules, known as "LINDB", now requires, in the judicial sphere, that the magistrate points out the practical consequences of his decision. As a result, the present study, through the dialectical method, started from the following problem: is the judges given a full range of possible consequences resulting from their decision, making a real exercise in futurology? It can be concluded that there was, in fact, a flagrant attempt to mitigate the normative force of the principles, with the unavoidable objective of curbing judicial activism.

KEY WORDS: Right to health. vital minimum. Reservation for contingences. LINDB. Consequentialism.

RESUMO

O direito à saúde está assegurado na Constituição da República de 1988 como um dos direitos fundamentais do ser humano, sendo dever do Estado garanti-lo através da execução de políticas públicas, consub-

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stanciadas no denominado mínimo vital. Todavia, a aplicação, errônea, da teoria da reserva do possível, para esse fim, produz um vínculo entre a efetivação dos direitos e a capacidade financeira do Estado. A EC 95/2016 implementou o denominado teto de gastos. Não bastasse a adoção enviesada da mencionada teoria e da questão orçamentária, a recente alteração legislativa à LINDB passou a exigir, na esfera judicial, que o magistrado aponte as consequências práticas de sua decisão. Em razão disso, o presente estudo, através do método dialético, partiu do seguinte problema: é dado aos juízes entrever um leque completo das consequências possíveis resultantes de sua decisão, perfazendo-se um verdadeiro exercício de futurologia? Conclui-se que houve, a bem da verdade, uma flagrante tentativa de mitigação da força normativa dos princípios, com o objetivo inconfessável de frear o ativismo judicial.

PALAVRAS-CHAVE: *Direito à saúde. Mínimo existencial. Reserva do possível. LINDB. Consequencialismo.*

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1 INTRODUCTION

The Brazilian Federal Constitution of 1988 has as one of its fundamental principles the dignity of the human person (Art. 1, III). When dealing with fundamental rights and guarantees, it is provided in the Brazilian Constitution that the right to health is, among others, a social right (art. 6). It further says that health is a right of all and a duty of the State (art. 196 and 197) (BRASIL, 1988).

The three-dimensional structure of the constitutional norms is arranged in three concentric circles. In the first, there is the so-called "essential core" which consists in the principle of immediate applicability (Art. 5, §one, Brazilian Constitution/88). Then, the so-called "ponderable part" – which encompasses the principle of practical concordance or proportionality. Finally, the "meta-jurisdictional area" – characterized by the principle of separation of powers.

It is observed that weighting is the process by which the conflict between opposing principles will be resolved. Strictly speaking, there are two very well defined paths as a result of a ponderous process, being: a) the harmonization weighting, which seeks to conciliate the principles in conflict, through the application of practical agreement (reciprocal concessions of the values in confliction); (b) the exclusionary weighting which chooses a winning principle, with sacrifice of the other principles at conflict, by applying the principle of proportionality.

With regard to this exclusionary weighting, one must apply a sub-main triad, which involves the appropriateness, necessity and proportionality in the strict sense. In a collision of rights, the application of this triad would observe the following terms: i) Analyze the possibility of the action leading to the intended achievement (adequacy); (ii) The action must be the least restrictive of the rights and interests involved (necessity); and, iii) The public purpose seeks to justify the imposed restriction (proportionality in the strict sense).

The XXI Century Jurist challenge is precisely to provide scientific theories of legal arguments to support the judgments that innovate the legal system. Therefore, the big dilemma today is always the structure of its decision rule: essential core, weighting zone values or meta-jurisdictional regulatory space (GOES, 2018, p. 166).

The article aims to discuss the principles of immediate applicability (vital minimum) and practical agreement or proportionality (reservation for contingences), before the possibilities

and limitation of the State's action in the fulfillment of the right to health and in the supply of medicaments. The medicine supply is "subordinated" to the existence of public resources available, including the action of the Judiciary, in view of constitutional amendment no. 95 (2016) and the recent modification of the LINDB. The law nº 13.655, of April 25, 2018, establishes in its article 20 that the magistrate is obliged, in the judicial sphere, to consider the "practical consequences" of his decision.

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2 THE VITAL MINIMUM

Theories of the essential core involve the ability to generate a subjective right in itself, without relying on a process of weighting values, nor supervening performance of the democratic legislator, and may all overcome, including the reservation for contingences, factual and legal, and the very counter-majority difficulty of the judiciary.

The theory of fundamental social rights currently hosts a growing discussion around what has been called the vital minimum. This theory imposes the material preservation of the human being, ensuring minimum conditions for the preservation of life and for the integration of society as a harmful issue to public policies to be developed by state governance. The constitutional text is clearly oriented in this sense, for example: by setting citizenship, the eradication of poverty and the reduction of social inequalities as one of its objectives. (NUNES JUNIOR, 2009, p. 71)

Providential transcription of Ingo Wolfgang Sarlet's statements about fundamental social rights:

> [...]we believe it is possible to affirm that fundamental rights - in particular social rights - are not mere whim, caprice, privilege or liberality (...) in the context of a "failed and overcome" ruling constitutionalism, but rather, an urgent need, since disregard and lack of implementation hurts to death the most basic values of life and human dignity in all its manifestations, as well as conducting - as lucidly warns Paul Bonavides - an unfortunate, each time less insurmountable and controllable , transformation of many Democratic States of Law into true "neo-colonial states. (SARLET, 2010, p. 315)

The attendance to rights such as education, health, food, work, housing, leisure, security, social security, protection of maternity and childhood and assistance to the homeless (Brazilian Constitution art. 6) requires, in most cases, positive benefits (rights of promotion or benefits rights).

The implementation of such rights occurs through public policies that are the embodiment of certain individual and/or collective prerogatives aimed to reduce social inequalities and ensuring a dignified human existence (NOVELINO, 2011, p. 459).

It is important to note that the Brazilian Supreme Court, known as "STF", after the advent of the citizen constitution, has positioned itself in the sense that the Judiciary should intervene in public policies, which can be seen in the explanations of RUSSO and LEHFELD (2016, p. 324):

> The Supreme Federal Court has been consolidating the understanding, mainly after the promulgation of the 1988 Federal Constitution, in the sense that the Judiciary must intervene in public policies with a view to the realization of the right to health, with supedaneous in Articles 6 and 196 of the Constitution, in the basic constitutional nucleus that qualifies the minimum existential and ordinary laws in line with the reservation for contingences. (RUSSO; LEHFELD, 2016, p. 324).

Following the same line of thought, the sayings of Bruna Geovana Fagá Tiessi and Ilton Garcia da Costa:

> In this context, the vital minimum began to be studied taking in consideration the very issue of poverty and the minimum conditions of dignified existence. It is therefore understood that there is no possibility of effective fundamental rights without, at the same time, protecting the minimum necessary for each individual (TIESSI; COSTA, 2013, p. 174).

3 RESERVATION FOR CONTINGENCES

In Brazil, the reservation for contingences was originated in 1972, through a trial carried out by the German Federal Court, in a decision known as *"numerus clausus",* establishing that the right postulated by the citizen must be subject to the reservation for contingences, concerning the society.

Here is what Vidal Serrano Nunes Junior teaches:

> The theory under analysis assumps that state installments are subject to connatural material limits, arising from the scarcity of financial resources by the Government. Therefore, the expansion of the social protection network would depend on the availability of budgetary resources for this purpose. (NUNES JUNIOR, 2009, p. 172)

As for this scarcity, Ingo Wolfgang Sarlet points out that:

> It has been stablished for some time that the State has limited capacity to dispose of the object of installments recognized by the rules defining fundamental social rights (...) It is precisely because of these aspects that the support of social rights to benefits has been sustained under what has been called a "reservation for contingences", which, understood in a broad sense, encompasses both the possibility and the power of disposition on the part of the recipient of the standard. (SARLET, 2010, p. 254)

As can be seen, the theory of the reservation for contingences refers to budgets and resources, besides observing reasonably, requirements that the administrator must consider within what is economically possible, respecting the principles of public administration.

One can see that the existence of the principle of the vital minimum, combined with the reservation for contingences, requires balance, in situations where the State has the duty to guarantee the minimum necessary, *exempli gratia*, the health of the citizen, but on the other hand, there are not sufficient financial resources.

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With the scarcity of resources, the State proposes to accomplish only what is within its budgetary limits and when it encounters a fundamental right that has the support of the minimum existential, it claims that the available resources are finite.

Under the understanding that the excuse is unacceptable, it remains to the harmed to take the appropriate actions to guarantee its constitutionally assured right, once the State cannot only shies away from its duty, before the lack of resources.

4 THE CONFLICT BETWEEN THE PRINCIPLES OF THE MINIMUM VITAL AND THE RESERVATION FOR CONTINGENCIES, WHEN APPLIED ON THE RIGHT TO HEALTH

There is no doubt that the right to health is one of the social rights guaranteed by the Brazilian Federal Constitution (art. 6, 196 and 197), which means that it must be made effective in a broad and unrestricted manner by the State.

Following the same line of thought, the sayings of Marcelo Novelino:

> The care of law such as **education, health**, food, work, housing, leisure, security, social security, protection of maternity and childhood and assistance to the homeless (BFC, art. 6) requires, in most cases, positive benefits (*promotion rights or installment rights*). The implementation of such rights takes place through public policies that are the embodiment of certain individual and/or collective prerogatives aimed at **reducing existing social inequalities and ensuring a dignified human existence."** (NOVELINO, 2011. p. 525, with added highlights)

The vital minimum encompasses the social rights, necessary for a life permeated by the fundamental rights inherent to the dignity of the human person, constitutionally and internationally, recognized.

In face of the principles of the vital minimum and the reservation for contingences, and the financial situation of the State, conflicts occur in situations where the citizen needs assistance to ensure his health, such as, *e.g.*, in the supply of medicines. This citizen, based on the refusal of the State to provide care to him, turns to the judiciary, seeking the satisfaction of his right.

From there, questions arise about a possible violation of the principle of separation of powers, under the argument that the judiciary would be meddling in matters related to the Executive. This, however, does not seem to be a feasible argument, in view of the application of the doctrine of effectiveness. In the case of programmatic norms not having full success in its application, it is indoubtful that they lend themselves to guaranteeing the vital minimum, there including the duty to "provide" health. Nevertheless, if the right to health cannot find its fullness, on the other hand, it is a job for the State to draw up the guidelines for achieving the common good, which means that it has a duty to guarantee its core – read, the right to life. For this reason, the Judiciary would be authorized to determine to the Executive the fulfill-

ment of this job, since the Brazilian Constitution of the Republic, in this regard, has sufficient normative density to do so.

It is up to the Judge, when provoked, to provide solid meaning to the law and to restrain the jurisdiction of the administrative act in order to it does not to impugn the consummation of the social order.

However, it is imperative to look into the origin of the principle of reservation as possible, so that you can observe most clearly that there is serious distortion in the import and application of the German model in our legal order, notably when it comes to fundamental rights.

The argument of the reservation for contingences, in its birth, does not comprehend rights that are part of the vital minimum, such as access to health care or basic education, but to higher public education. That is the point.

In the words of Nunes Junior (2009, p. 172), another is not the conclusion: *"the legal-positive conditions in which the theory was born do not reproduce in Brazil."*

Here is what teaches Ingo Wolfgang Sarlet (2010, p. 255) about the same matter:

> [...] it does not seem correct to affirm that the reservation for contingences is an integrant element of fundamental rights, it is as if it were part of its essential core or even as if it were within the scope of what has been called immanent limits of fundamental rights. The reservation for contingences constitutes, in fact (taking in consideration all its complexity), a kind of legal and technical limit of fundamental rights, for example, in the event of conflicts of rights, when taking care of the invocation – always observed the criteria of proportionality and the guarantee of the vital minimum related to all rights – of the unavailability of resources in order to safeguard the essential core of another fundamental right. (SARLET, 2010, p. 255).

Osvaldo Canela Junior (2011), when discussing "The role of the judiciary in the fulfillment of fundamental social rights", brings to light the budget as an instrument for the enforcement of the social state. It is not too much to repeat. From his point of view, the budget must be provided for the implementation of public policies, and not the other way around. Paradoxical as it may be, this is precisely the doctrinal construction formulated by the exegete. It is the budget at the service of social welfare and not as an obstacle to fundamental rights, of immediate applicability and without delaying, thus repelling the logic of the application of the principle of reservation for contingences. Worth the transcript:

> It is observed that the Judiciary has invoked the economic phenomenon to prevent the granting of fundamental social rights. It is claimed that the judiciary cannot grant rights whose satisfaction will demand revenues not available by the State. Such a plea, however, brings with it the disregard that the Brazilian State has objectives to be accomplished in a manner that the budget will serve as an instrument for its fulfillment, and not as an obstacle. Indeed, one of the strongest arguments to justify the lack of effectiveness of social rights is their economic and financial impact. The perception that the satisfaction of life's assets, protected by social rights, causes economic ties in the State budget raised the theme of "reservation for contingencies" widespread in doctrine and jurisprudence, to the point of being used as justification for an eventual inertia of the Judiciary when it comes to protecting those rights. (CANELA JUNIOR, 2011, p. 102)

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In addition concludes, severely criticizing the theory of the reservation for contingences, exposing that the base of the arguments of its defenders is based on the perspective of a liberal state, far from what the Brazilian Constitution of 1988 advocates:

> It can be noticed, therefore, that the theory of "reservation for contingencies" brings within itself the strictly liberal spirit - or neoliberal - incompatible with what the Brazilian Constitution affirms, because it seeks an unattainable budgetary stability, away from what is programmatically postulated about the social state. (...) The premise of the "reservation for contingencies", when considering the budget as a key part of economic-financial balance, it misaligns itself with the principiological reality of the welfare state, causing the paralysis of the jurisdictional activity, in a conduct that goes clearly against the provisions of art. 3rd of the Federal Constitution (Ibid, p. 108-111)

In that segment, when there is a conflict of principles, one does not derogate from the other, but their weighting must be made, through the analysis of proportionality, as is extracted from Robert Alexy's notes:

> Principles are commandments of optimization in face of legal and phatic possibilities. The maxim of proportionality in strict sense, i.e., the requirement of weighing, arises from relativization of legal possibilities. (...) This means, that the maxim of proportionality in the strict sense is deducible from the principle of fundamental rights norms. (ALEXY, 2008. p. 117-118)

Moreover, the Brazilian Supreme Justice Court, known as "STJ" (appeal 1.657.156-RJ) has set requirements for the Judiciary to examine the demands for the supply of medicines that are not included in Annex I of Ordinance No. 2,982/2009 of the Ministry of Health. Those requirements are: i) need of the drug, as well as the inefficacy, for the treatment of the disease, of drugs provided by the Brazilian public system of health, known as "SUS"; ii) the patient's financial incapacity; and iii) registration of the drug in the Brazilian National Health Surveillance Agency, called "Anvisa".

As can be seen, the Judiciary has also acted to ensure consistency and objectivity in granting of the good of life.

5 THE JUDICIALIZATION OF HEALTH

It should be noted that the separation of powers in Montesquieu's work have be analyzed by considering judicial activism and the figure of the democratic legislator. Therefore, is immediately important to clarify the discussion about the impossibility of invoking the principle of separation of powers with the aim of not enforcement of the fundamental social rights, including the right to health.

Canela Junior faces the issue, extolling the independence of the judiciary:

> It is not possible to exhort the principle of separation of powers for the failure to examine the claim of the holder of fundamental social right. As already pointed out, the Judiciary, during the exercise of constitutionality control, does not interfere in the exclusive sphere of attribution of other ways to the expression of state power in which it acts exclusively in the judicial sphere. (...) On the other hand, the principle of separation of powers cannot be used to jus-

> tify the violation of the objectives of the State, to which all forms of expression of the state power are bonded. (...) It is considered impartial a judiciary that, not influenced by political-party vicissitudes, is completely compromised to the objectives of the State. As one of the fundamental objectives of the State is the achievement of substantial equality, which can be confirmed by the Brazilian Federal Constitution in its art. 3, the Judiciary demonstrates all its impartiality and independence when carried out through adjudication fundamental rights especially social rights. (...) Contrary to what the logic of "reservation for contingencies" says, it is the final judgment that will compose the budget, obligating the State to readjust revenue and expenditure, so that its fundamental objectives are effectively achieved. This is, undoubtedly, the best social achievement that the judiciary could give to their decisions, according to the command contained in Art. 5 of LINDB, especially in the case of underdeveloped countries, regarding to the economic oppression and the misery of peoples reaches alarming levels. (JUNIOR CANELA, 2011, 94/95, 98, 109)

Faced with resisted pretension, regarded to the effective state provision of basic social rights, especially the right to health and the refusal by the State, the way left to meet the pleas of the citizen is to enter the judiciary, *e.g.*, for the provision of beds in hospitals, carrying out treatments or surgical interventions, or providing free medicaments. Situations that are part of the daily life of the legal operators.

Moreover, it must be recognized that the specificity of the political system lies in the kind of communication it produces, which is, the communication of power. According to the Luhmannian theory, the politics is an operationally closed, self-referential and self-productive communication system. The political system, as well as law system produce specific social operations that promotes their social differentiation, whose structural coupling between the political and legal systems occurs through the Federal Constitution.

About this matter:

> From the communicative dichotomy (government/opposition), the political system can offer decision-making alternatives between the government and the opposition, in which the government takes collectively binding political decisions, while ideas about alternatives passive of possible decision are considered by the opposition (LUHMANN, 2005, p. 487). Thus, the government decides and the opposition serves as a reflexive reference about this decision, showing the other possibilities that the government could take, allowing pondering on the decision made. The opposition, contrary to what common sense believes, should not oppose to any decision taken by the government, they must show alternatives that were not taken in order to generate wonderment on the decision made by the government. (ROCK; BAHIA, 2016, p. 75/76)

From the above quotation, it can be attested that the performance of the magistrate is the most difficult, with regard to the requirements for the fulfillment of the fundamental social rights, because the actual public administrations may result in an obstacle to the solidification of the judicial decision itself. Which should not happen, for the sake of the truth.

6 THE BUDGET ISSUE

The Planning and Budgeting Instruments, according to the Brazilian CF/88, consists in Multiannual Plan (PPA), Budget Guidelines Law (LDO) and the Annual Budget Law (LOA).

The PPA, with validity of four years, has the role of establishing the instructions, objectives and medium-term goals of the public administration. It concerns the LDO, annually, to set out public policies and their priorities for the following financial year. The main objectives of the LOA are to estimate revenue and fix the schedule of expenses for the financial year.

Having that said, the *Magna Carta* indicates the path to be taken, so, the constituent legislator has established that the fundamental norms have immediate applicability and full effectiveness, so that the budget lends itself to comply with this constitutional command. Any posture different from the public administrator is pure tergiversation.

About this:

> [...] the principle of human dignity is one that qualifies man as the only being endowed with non-relative value. Well, therefore, in the sphere of the vital minimum, once inherent to the sense of human dignity, there is no way to mitigate, it is worth saying, to relativize the notion of dignity based on budget forecasts. (NUNES JUNIOR, 2009, p. 190)

The Brazilian Federal Constitution is lavish when establishing provisions about the right to health. By way of exemplification, in the article 6, is established that health is a social right. In Article 7, two other items refer to health: the IV that determinates that the minimum wage should be able to meet the basic vital needs of the worker and those of his family, including health; the item XXII, on the other hand, cites the reduction of risks inherent to work through health, hygiene and safety standards. Articles 23 and 24, XII, talks about the competence that the Union, the states, the Federal District and counties hold to ensure the protection and enforcement of the right to health. Article 34, item VII, (e) and 35, item III, addresses the possibility of the Union to intervene in states and counties when the minimum required of revenue, resulting from state taxes, including those from transfers, are not applied in the maintenance and development of public health services. Article 196 shows that health is considered a right of all and duty of the State, guaranteed through social and economic policies aiming to reduce the risk of disease and other injuries, universal and equal access to actions and services for its promotion, protection and recovery.

Thus, the right to health, both physical and mental, is essential to the right to life that must be offered by all federative entities through treatment and prevention policies, medical, psychological and legal care, guaranteeing to the society the effectiveness of this right. In other words, the right to health must observe the principle of material equality, which observes the specific case, as well as the vital minimum and dignity of the human person.

However, erroneously, there is the tragic necessity to make choices so that the principle of the reservation for contingencies, based on necessity, respects the principles of reasonableness and proportionality, preventing justice from granting high-cost medication to one individual over another. Remembering that it has no connection between the imposed by the Brazilian order and the requests for universal access to the public higher education – like the Germans.

Under the Law 8.080/1990 and 8.142/1990, the Brazilian public health system (SUS) should be the guarantor of the right to health. It should, through the creation of a decentralized and solidarity policy provides hospitals, health centers, and other ways to promote population care, prioritizing preventive actions, following the provisions of the *Magna Carta* of 1988 as well to inform the population about their rights and health risks.

Once these considerations were made, it cannot be accepted that who is judging gets benevolent to the debtor – in this case, including the State. Failing condemn, because the defendant lacks equity to satisfy the obligation is, at the very least, to act out of benign feelings, as has been said.

Osvaldo Canela Junior gives a good example of what this practice would represent, emphasizing that the judiciary should interfere in the public budget:

> During the declaratory phase of the law, however, it is not given to the jurisdictional body to absorb the economic-financial issue to paralyze its activity. **This would represent, in comparison with the private plan, the weird figure in which the debtor would not be condemned to the repair of the damage, because he does not have enough assets for the future performance of the judicial enforcement order.** If the state›s assets are not sufficient for the complete implementation of its constitutional obligations, it paves the way for two possible solutions: a) the application of the principle of proportionality using the existing resources, in case of emergency guardianships concession; or, b) the budget adjustment for compliance with the final judgment. (...) Budget, like any state act, must be strictly bonded to the objectives set out in Art. 3 of the Federal Constitution. Such a statement is in line with the unavoidable assumption that the ends of the State can only be effectively achieved through the use of public funds. (...) From the perspective of the social state, the budget cannot be an obstacle to the granting of fundamental social rights, but its instrument of fulfillment. (...) It is concluded, therefore, that the interference of the judiciary in the public budget is not only allowed, but also mandatory in the cases of violation of fundamental social rights. (highlights added) (CANELA JUNIOR, 2011, 103, 107/108, 111)

Observe with sharpness of detail, as stated by the author, that the law enforcement should never refrain from sanctioning the defaulting State, on the unfortunate grounds that the debtor meets its unsecured liability and, therefore, does not meet the conditions to fulfill the obligation.

Certainly the most unwary will defend the opposite position, on the grounds that the budget would serve precisely to delimitate public spending. However, the Constitution of the Republic of 1988 in this regard, that is, in the case of fundamental rights, leaves no room for discretions. In other words: The Major Law be fulfilled without delay. The rest is the rest.

However, it should be noted that the constituent legislator, under the discourse of a strict fiscal adjustment, culminated in the constitutional amendment, "EC", 95/2016 – the infamous "PEC of expenditure caps", how is known in Brazil – bringing harmful restrains to fundamental rights, which cannot (or should not) be at the mercy of political and economic contingencies, notably those of health, so sublime and expressly enshrined in art. 196 of the constitutional text.

Ricardo Antunes (2018, p. 293) gives us the exact dimension of the actual reason of being of the norm: "to guarantee the primary surplus necessary for the remuneration of the

financial system through the interest of public debt, which is one of the real scourges that plague the country". Naturally, it is not intended to look into the economic issue surrounding the amendment, but only to approach it with the purpose of demonstrating how taint constitutional management has been taint.

As can be seen, the imposition of a spending limit regarding to health and the seal of the breach in the Constitution, based on the Germanic model, under the heading of the "reservation for contingencies" which has already been said, has nothing to do with the situation exposed and debated here, is at the very least, infidelity to the options of the constituent legislator. It would be the equivalent of guaranteeing fundamental social rights, "as long as the dumb is full", which means, in practice, without any legal bond.

7 THE SETBACKS OF CONSEQUENTIAL DISCOURSE

Thirty years after the promulgation of the Brazilian Constitution of 1988, as if the elements that surrounds fundamental rights was not enough, it is urgent to bring up the recent publication of Law No. 13.655/2018, which, among other legislative changes to LINDB, imposed on the magistrate (art. 20, LINDB)[1] – excerpt that interests us in this study – the obligatoriness to consider the "practical consequences" when making their decision, which leads us to ask questions about this matter: i) what would be this prior analysis for the practical legal consequences of the decision? ii) would the judge be obligated to evaluate, e.g., what is the impact of the decision on the public system, the Brazilian "SUS"? It would be an actual futurology exercise, after all.

This new provision does not prohibit decision being made based of abstract legal values. However, every time it is decided on the grounds of abstract legal values, must be made a prior analysis of what the practical consequences of this decision will be, in other words, Art. 20 of the LINDB introduces the need of the judging body to consider a meta-legal argument when deciding.

Undoubtedly, there is a glaring attempt to mitigate the normative force of the principles. Well, the Constitution of the Republic itself is full of "abstract values". There are countless examples, here are some of them: "dignity of the human person" (Art. 1, III); "social values of work and free enterprise" (art. 1º, IV); "morality" (art. 37, caput); "social well-being and justice" (art. 193); "ecologically balanced environment" (art. 225).

Based on the normative force of constitutional principles, the Judiciary, in recent years, condemned the Public Power to implement a series of acts aimed at ensuring rights that were being disrespected, as can be seen from the appeal "RE" 429.903/RJ, which ordered the Public Administration to keep a minimum stock of determined medications, in order to avoid further interruptions in the treatment of serious diseases. Similarly, by the appeal "RE" 592.581/RS, the Government was ordered to carry out emergency works in prison facilities.

As can be seen, these decisions were uttered based on constitutional principles, that are all, in fact, "abstract legal values". What the legislator intended, therefore, was, indirectly, to try to prevent judicial activism in matters involving the implementation of rights.

It is as if the legislature introduces a condition for the normative force of the principles: they can only be used to substantiate a decision if the judge considers “the practical consequences of the decision”. It is, therefore, a retrograde reaction to the normative force of constitutional principles.

Souza (2018, p. 126/127) makes severe criticism about the innovations brought by the Law No. 13.655, of April 25, 2018, because he understands that the rule postulated in art. 20 of LINDB barely hides some form of idealism, as if the judge were given to see a complete range of the possible consequences resulting from his decision, which means to say that he would have to do a real exercise of futurology:

> When it is said that the judge should not decide based on abstract values (Article 20), it seeks to put an end on rhetorical argumentation, speech that uses common places and formulas stablished by its use. This explains, moreover, the recent changes of the Brazilian Civil Procedure Code (federal law “LF” no 13.105/15), particularly the reason for the norm of Article 489, § 1, I to III (SOUZA, 2016). (...) it is certain that each judge has his worldview, so that the person responsible for the “judicial control of administrative control” will make estimates that are in accordance with his worldview, while the person responsible for administrative control will value the need and adequacy of the invalidation of acts, contracts, adjustments, processes or administrative norms, as well as the measures imposed, according to a worldview of its own. (SOUZA, 2018, 126/127)

Morais and Zolet shows concern about the matter of the changes inserted in LINDB, notably in relation to legal (in)certainty:

> It is known, based on the regulatory provisions of LINDB, the possibility of decision-making by considering the practical consequences of the decision. However, it remains to be seen what the right amount, necessary or sufficient volume of considerations should be accounted by the judges in the context of their decisions. Because of this, it is expected that consequentialism is not just a new costume to dress an old habit: arbitrariness. (MORALS; ZOLET, 2018, p. 518)

Marçal Justen Filho, On the other hand, makes a mea-culpa:

> Every decision based on general and abstract norms presupposes a weighting process inextricably linked to the existing factual universe. This requires the consideration of practical consequences of a decision, including to avoid the consummation of irreparable damage to the values considered the basis for deciding. (JUSTEN FILHO, 2018, p. 23)

Despite the contrary understanding, it would not be excessive to point out that the new LINDB implicitly provides scope for rights to be removed, based on economic consequences, called “practical consequences”. Long story short, a real attack on fundamental rights.

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8 FINAL CONSIDERATIONS

Health rights remain precarious and fragile. They are the target of a constant attack – in the perspective of the erroneous application of the theory of the reservation for contingencies, whose German model resembles the fundamental rights discussed here.

The constitutional amendment, "EC" 95/2016, instituted a new fiscal regime, impacting directly and negatively the public health actions and services. Not only that, the legislature, in a recent legislative amendment to LINDB – notably with the inclusion of Art. 20 – made a new attempt against fundamental rights, by establishing that it will not be made decisions without accounting the practical consequences of the decision, in a glaring attempt to mitigate the normative force of the principles, with the uncontestable objective of stopping judicial activism. However, it cannot be overlooked that the area of failed effectiveness by the Judiciary is only the meta-jurisdiction, which is in the spotlight of the Legislative and Executive Branches, whose role of the Judiciary is to establish [or not] legal validity to the norm. On the other hand, the essential core – including fundamental rights to health – is precisely that area in which the judiciary acts for the effective fulfillment of the right, aiming the social effectiveness of the norm.

The effectiveness of fundamental rights, with regard to the right to health, in the paradigms of the Brazilian Constitution of the Republic of 1988, must be ensured by the State, being the Public Power responsible for implementing the norm.

In the attempts to find solutions for these impasses between the right to health, life, the dignity of the human person and the actual financial capacity of the State, there is a conflict between constitutional norms, making it necessary to resort to the principles established in the Federal Constitution.

It can be stated, this way, that the legal imposition to the judges to predict a range of consequences resulting from their decisions also decreases the normative force of the principles. It is to stop the action of the judge when, in fact, the constitution itself determines and expects that the opposite be done.

It is up to the interpreter, in an accurate manner, to validate the foundations inherent to the theory of the vital minimum, that is, whatever is related to the nuclear part of rights – by immediate application – as well as the weighting between the principles, observing the specific matter to the current social needs, the constitutional dictates and the pressing needs of those who postulate for the fulfillment of their essential rights.

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SPECIAL CIVIL FEDERAL JUDGES AND THE RIGHT TO HEALTH:
VALUE OF THE CASE, ABSOLUTE COMPETENCE, AND THE CONSENSUAL SOLUTION OF CONFLICTS

JUIZADOS ESPECIAIS FEDERAIS CÍVEIS E DIREITO À SAÚDE:
VALOR DA CAUSA, COMPETÊNCIA ABSOLUTA E A SOLUÇÃO CONSENSUAL DE CONFLITOS

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ABSTRACT

This research aimed to discuss the value of the case involving the right to health and the issue of absolute competence in the Special Civil Federal Courts (JEFs). It was also intended to reflect initially on judicial control of public health policies and the consensual solution of conflicts involving public health. The research used a deductive method and for collecting information, the main procedures were bibliographic and documentary. As a conclusion, we sought to warn of the importance of the correct definition of the desired economic expression with the cause filed in the courts, as well as the legal possibility of using technical expertise and the benefits of using alternative means of solution conflict. Finally, it was emphasized that the absolute competence of the JEFs and the high rate of judicialization of health claims in this microsystem

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indicate the need for verticalization of the issue in order to provide greater predictability regarding the interpretation and application of the respective procedural rules in this specific reality.

KEYWORDS: Right to health. Special Civil Federal Courts. Public Health Policies. Judicial Control of Public Policies.

RESUMO

A presente pesquisa teve por escopo discutir o valor da causa envolvendo o direito à saúde e a questão da competência absoluta nos Juizados Especiais Federais Civis (JEFs). Tencionou-se, ainda, refletir de forma inicial sobre controle judicial de políticas públicas de saúde e a solução consensual de conflitos envolvendo a saúde pública. A pesquisa utilizou método dedutivo e para o levantamento das informações, os principais procedimentos foram bibliográficos e documentais. À guisa de conclusão, buscou-se alertar para a importância da correta definição da expressão econômica pretendida com a causa ajuizada no âmbito dos juizados, bem como para a possibilidade legal da utilização de perícia técnica e para os benefícios da utilização de meios alternativos de solução de conflitos. Por fim, destacou-se que a competência absoluta dos JEFs e o alto índice de judicialização de demandas de saúde nesse microssistema indicam a necessidade de verticalização da questão a fim de propiciar maior previsibilidade quanto à interpretação e aplicação das respectivas normas processuais nessa realidade específica.

PALAVRAS-CHAVE: *Direito à saúde. Controle Judicial de Políticas Públicas. Juizados Especiais Federais Cíveis. Políticas Públicas de Saúde.*

INTRODUCTION

A diversity of social, political and cultural factors in the 20th Century gave rise to an increased judicialization of conflicts and of the law itself, strengthening the role of the Judiciary as a "[...] privileged institution in upholding rights in Brazil." (ASENSI, 2013, p. 192).

By bringing new substantive rights and procedural guarantees to both individuals and the collective, the Constitution of the Federative Republic of Brazil of 1998 has in effect considerably amplified forms by which individuals and collectives may have access to the Judiciary, highlighting the political role of this branch in Brazilian democracy, by investing it with the important mission of upholding the citizen's constitutional rights (SADEK, 2010).

Therefore, with the process of redemocratization and the constitutional guarantee of fundamental and social rights, including the right to health, the expression "judicialization of health" began to gain traction, so that, once the inefficiency of the State in the upholding of these rights was verified, many claims began to be brought before the courts, demanding that the State furnish material goods such as medicine, treatments, hospitalizations, among others. (FALAVINHA; MARCHETTO, 2016).

With that in mind, beyond the emblematic cases of dominant case law which helped direct judgements involving the subject in question, the National Council of Justice (CNJ) has sought to lead and stimulate the role of the Judiciary, seeking to establish a judiciary policy for public health, through strategies that go from the creation of the National Judiciary Health Forum to the establishment of State Health Commitees, along with recommendations about how judges should rule regarding the claims presented to them, with the intention of estab-

lishing parameters and directives for judicial actuation in matters of public health. (ASENSI; PINHEIRO, 2015).

This is because, faced with the phenomenon of judicialization of public health, an apparent lack of uniformity is found regarding the rulings on the matter, sometimes favoring more theoretical and generic fundaments, other times favoring diverse factual data that could influence the laws that could be applicable to the subject. (ALVES, 2017).

In this area of interest, it was observed that, among other factors, the granting of injunctive relief, eminently exceptional in Brazilian procedural law, had become a rote act in the field of judicial demands for public health, with significant impacts for the effectiveness of Brazilian health law. (VENTURA *et al.*, 2010).

It becomes, then, that debates take place not only regarding the extension of social rights to health, but also about the limits and possibilities of judicial control over public policy regarding such rights. In this context, the Judiciary Branch has sought developements so as to better service this growing demand, highlighting the importance of the role of Special Federal Courts (JEFs), which, guided by more practical and modern values, introduced new concepts to the means of conflict resolution.(BOCHENEK; NASCIMENTO, 2011).

Regarding the right to health, the Federal Supreme Court (STF) has reaffirmed case law about the solidary liability of federal entities in their duty of providing health assistance, in accordance with a decision uttered in the analysis of the Extraordinary Appeal (RE) 855.178 [4], under presiding judge Minister Luiz Fux, which attained recognized general repercussion via the Virtual Plenary.

In this setting, the handling of a public health claim against the Union falls under the jurisdiction of the Federal Justice, according to Article 109 the Federal Constitution (CF) of 1988 (BRASIL, 1988). It is important to note, however, the absolute power of special federal courts, that is to say, if such a court can be found at the respective judiciary section or subsection, the cases that do not go over the predicted jurisdictional limit (sixty minimum wage salaries) will be necessarily taken to the special courts instead of civil courts, even should those specialize in health matters.(ZEBULUM, 2017).

From the preceding considerations, the present paper attempted to analyze some of the peculiarities of the health-related claims and their procedural steps within the specific reality of the Special Civil Federal Courts (JEFCs). Because of this, this research made use of the deductive method, with the historical appropriation of concepts such as the right to health, special civil federal courts and the judicial control of public health policy. The main methods of data collection were bibliographic and documental. Regarding the bibliographic research, information was sourced from articles belonging to different databanks and indexers, published entirely in Portuguese, accessed for free. Furthermore, books and scientific magazines regarding the scope of Constitutional Law and Civil Procedure Law were selected using the following search keywords: Constitutional Law; Civil Procedure Law; Right to Health; Judicial Control of Public Policy and Special Civil Federal Courts. Let it be said that this paper sought to overcome rigid methodological postures, submitting the analysis to many contextual variables, be they legal, social, economic or political, so that black-and-white considerations and

4 See RE 855178 RG, Judge-Rapporteur: Min. Luiz Fux, judged in 03.05.2015, General Repercussion Electronic Procedure - Merit DJe-050, Disclosed 03.13.2015, Published 03.16.2015.

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scientific objectification might be avoided and a socially grounded investigation might be undertaken.

Considering the presented methodology, this paper was structured in the following manner: The first chapter and its developements analyze the value of a cause involving the right to health and the question of the absolute jurisdiction of special federal courts. This is followed by the second chapter, which analyzes possible actions for legal control of public health policy in the special federal court. The third chapter broaches the possibility of the production of forensic evidence in health claims within the scope of special federal courts. Finally, the last chapter discusses the possibility of the role of government in the consensual resolution of conflicts in public health.

1 VALUE OF CASE REGARDING RIGHT TO HEALTH AND THE QUESTION OF ABSOLUTE JURISDICTION OF SPECIAL FEDERAL COURTS

The value of the case is the fundamental subject when reflecting about the laws of health access. Before the chasm between codified law and fully realized rights, as well as the inevitable necessity of resource allocation for this area, the just distribution of said resources is a great challenge, demanding additional moral considerations when confronted with the fact that the market is still its primary criteria for distribution, by virtue of the correlation between social class and health, and, consequently, poverty remaining an obstacle for access to this right. (RAMOS, 2014).

According to Rawls' theory, health is mentioned as a natural good, along with vigor, intelligence and imagination. Such natural goods constitute, along with primary social goods, the general primary goods, presumed by the author as those desired by all, having use which is independent of the rational plans of each individual. (RAMOS, 2014).

Presented as broad categories, primary social goods correspond to rights, freedoms, opportunities, income and welfare, and thus are considered in virtue of their link with society's basic structure. "[...] freedoms and opportunities are defined by the rules of the most important institutions, and the distribution of goods and welfare is regulated by them." (RAWLS, 1997, p. 98).

In Rawls' hypothetical arrangament, primary social goods are distributed equally across society, while natural goods are not defined by their importance, nor defined in the way in which they ought to be treated or distributed across society. In this perspective, the author clarifies that, as long as these can be influenced by the basic structure, they are not under its direct control. (MARIO, 2014).

The principle of common interest would be applied to the natural goods, through institution-adopted measures, capable of promoting the objectives of all in a similar manner. (PARANHOS *et al*., 2018).

Through Rawls' formulation, Mario (2014) understands that the absence of health does not impact social injustice, since although it can be affected by a society's basic structure, it is not a concern of distribution in a well-ordered society (in conformity with the principles of justice), such that "[...] the individual has much more responsibility than the institutions belonging to the basic structure, for it must be considered that income, welfare, opportunities and liberties have already been equitably distributed." (MARIO, 2014, p. 5-6).

In the same manner, Rawls' idealization allows for the construction of a theory of justice for the simplest and most idealized case, one that is only posteriorly concerned with extensions towards more realistic contexts, in which not all people are normal. Idealized therefore towards active and patently cooperative members of society, his approach does not include a distributive theory for health care, since it spares no consideration towards illness. (DANIELS, 1985).

Regardless, Norman Daniels seeks, in Rawls' theory, the justification over why should health be understood as a matter of justice, proposing an extension of his theory of health (MARIO, 2014). To lay the foundations of a right to health in Rawls' theory, Daniels (1985) argues that one could merely add health care to the list of primary social goods. Such a solution, however, would bring its own, new set of problems, such as (DANIELS, 1985):

> a) it would demand comparisons of interpersonal utility, which Rawls hoped to avoid;
>
> b) the classification of these goods in comparison to welfare and income would depend on facts about the respective historical and social period;
>
> c) it would abandon the useful generality afforded by the notion of a primary social good, risking the generation of a long list of important needs.

In such a way, Daniels (1985) concludes that the best strategy to understand Rawls' theory would be to include the institutions and practices of medical assistance among the basic institutions involved in fostering a just equity of opportunities.

Daniels argues that if, according to Rawls' theory, one must take positive measures to increase the opportunities afforded to disfavored individuals and furnish a just equity of opportunities - eliminating formal or legal barriers, along with social factors such as family history or advantages in the natural lottery -, the use of resources do combat natural disadvantages introduced by illness should be equally relevant, though pointing out that illness is not only a product of the natural component of this lottery, since "[...] social conditions that differ by class, contribute significantly to the etiology of disease [...]" [5] (DANIELS, 1985, p. 46, our translation).

It is understood that the advent of simpler and more celeritous institutions for the guaranteeing of access to health care is an important and foundational element in the process of the advent of a just equity of opportunities. In Brazil, this important role is fulfilled by the special courts, among other institutions.

Since 2004, the number of demands brought before the Special Civil Federal Courts - JFECs has surpassed half of all claims brought before a federal court, which demonstrates the importance of studies regarding the peculiarities of this distinct jurisdictional activity, so

5 Original: "[...]social conditions, which differ by class, contribute significantly to the etiology of disease [...]." (DANIELS, 1985, p. 46).

as to assist operators of Law in the comprehension of inherent factors to the new macrosystem of jurisdiction. (ROCHA, 2012).

In the terms of Article 3 of the Law 10.259/2001, the Special Civil Federal Courts - JFECs have the jurisdiction to sue, conciliate, mediate and judge causes of Federal Justice jurisdiction with economic value of up to sixty minimum wage salaries, save in expressly described cases. (BRASIL, 2001).

On the 7th of November of 1984, the Small Claims Court (JEPC) was instituted, via Law 7.244/1984, the first to address the judgment of cases of smaller economic value, expressly inserting the principles of orality, simplicity, informality, procedural economy and celerity. Until then, all claims were taken before common courts, which discouraged many citizens from seeking the courts as a means of conflict resolution. (GONÇALVES, 2007).

Later on, in accordance to Article 98 of the Federal Constitution of 1988[6], the Special Civil Courts - JECs - were created, through the Law 9.099 of September 26th, 1995, revoking the Law 7.244/1984 (GONÇALVES, 2007). At a federal level, there was the inclusion of the Law 10.259 of July 12th, 2001, after the inclusion of Paragraph 1 in Article 98 of the Federal Constitution of 1988[7], initially through Constitutional Amendment 22/1999 and currently through accordance with Constitutional Amendment 45/2004, with the application of Law 9.099/1995 and the Civil Procedure Code (WAMBIER;TALAMINI, 2018).

Being a useful instrument for the expansion of access to the courts, this new way of approaching jurisdiction constitutes a legislative advance of the constitutional order, by attending to old societal grievances, especially those of the disadvantaged population, of a Justice System capable of delivering "[...] legal protection of courts in an informal, much more celeritous and truly effective manner." (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018, p. 63).

Differently to what is established by the Law 9.099/1995, the Law of Federal Special Courts - JEFs expressly states that the Special Civil Court's jurisdiction, in the forum where it is installed, is absolute, according to Article 3, Paragraph 3 of the Law 10.259/2001 (WAMBIER; TALAMINI, 2018).

With that said, it is not possible to modify its jurisdiction through connection or *continentia causarum*, making it impossible to gather connected procedures in a single procedural step, for instance, in the Common Federal Courts and the JFECs. In these cases, with one demand being prioritized over another, the suspension of the procedure would be a plausible alternative, supported by Article 313, Item V, Subitem *a*, CPC/2015 (CUNHA, 2009 *apud* WAMBIER; TALAMINI, 2018).

It must also be said that, in locations devoid of a Special Civil Federal Court - JFEC, the postulant can go to the Common Federal Courts or JEF in the closest jurisdiction. The case may not be taken before the Special State Court (JEE), in accordance to Article 20 of Law 10.259/2001 (WAMBIER; TALAMINI, 2018).

6 "Article 98. The Union, in the Federal District and in the territories, and the states shall create: I - special courts, filled by togated judges, or by togated and lay judges, with powers for conciliation, judgement and execution of civil suits of lesser complexity and criminal offenses of lower offensive potential, by oral and summary proceedings, allowing, in the cases established in law, the settlement and judgement of appeals by panels of judges of first instance; [...]" (BRASIL, 1988, n. p.).

7 "Art. 98. [...]: § 1º Federal legislation shall provide for the establishment of special courts within Federal Justice. " (BRASIL, 1988, n. p.).

Furthermore, as a consequence of this absolute jurisdiction of the JEFCs, a health care claim that does not exceed the limit of sixty minimum wage salaries (barring exceptions described in Article 3, Paragraph 1 of the Law 10.259/2001) cannot be taken before a Common Court, even should it specialize in matters of health care (ZEBULUM, 2017). Regarding procedural implications of the legal imposition of absolute jurisdiction, one can also highlight:

> a) the need to observe a jurisdictional rule, on pain of declaring the jurisdiction which has received the case records as improper, and the transference of the case records to a proper jurisdiction; and b) the possibility of effective control by the judge of the value of the cause attributed by the party in question. (GONÇALVES, 2007, p. 97).

Although the laws governing the JEFs state their jurisdiction as "absolute", such a trait differs in how classic civil procedure broaches the question, such that "[...] among other peculiarities, approves the possibility of modifying the jurisdiction, whether because of the party – *ratione persone* (*v.g* childhood and youth) –, or because of the subject – *ratione materiae* (*v.g.* family)." (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018, p. 118).

While in traditional civil procedure the role of monetary value in defining jurisdiction is relative and prone to being extended, the same does not happen in JEFs in the case of claims outside of its jurisdiction. Fittingly, the express exclusion of the JEFs' jurisdiction, whether by the nature of the subject or the party, makes it legally impossible to extend the jurisdiction. (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018). Therefore, the JEFs include many circumstances where the so-called "absolute jurisdiction" could be modified, altering the previously established jurisdiction.

On the subject of health care, there often arises doubt regarding the competent court to judge a claim seeking the furnishing of continuous-use medication for indeterminate periods of time. It is worth noting the impossibility of granting waivers to limit the economic benefits to the JEFs' value limits, since the right to life is inalienable and must be protected in these kinds of demands. (BOCHENEK; DALAZOANA, 2017).

In these cases, the Law of the JEFs expressly states in its Article 3, Paragraph 2, that the monetary value of the case must correspond to the sum total of 12 (twelve) installments not yet due and the eventual expired installments, so long as it does not surpass the limit of 60 (sixty) minimum wage salaries. Thus, in the case of supplying continuous use medication, its monthly cost must not surpass the value of five minimum wage salaries so that the case may be taken before a JEFC (ZEBULUM, 2017). As a way of providing examples and corroborate this understanding, it can be compared to this recent judgement of the TRF1:

> CIVIL PROCEDURE. NEGATIVE CONFLICT OF JURISDICTION BETWEEN FEDERAL JUDGE AND SPECIAL COURTS JUDGE. SUPPLY OF MEDICATION. SYNTHETHIC PHOSPHOETHANOLAMINE. **CAUSE VALUE. ECONOMIC BENEFIT SOUGHT BY THE PLAINTIFF. KNOWN CONFLICT. JURISDICTION OF THE SPECIAL FEDERAL COURT.** 1. The value of the cause must mirror the effective economic benefit that is intended by the plaintiff, and, if of an inferior value to sixty minimum wage salaries, according to the head provision Article 3 of the Law 10.259/2001 must be taken to the Special Federal Court. 2. According to the. STJ, **the Special Federal Courts have jurisdiction for the judgement of matter of furnishing of medication whose value does not exceed sixty minimum wage salaries.** Precedent: Conflict of Jurisdiction 0020641-48.2017.4.01.0000/DF, Federal Judge-Rapporteur Kassio Nunes Marques,

> Third Section, e-DJF1 15/09/2017. **3. Regarding the value of the cause, Article 292, Paragraph 2, CPC/2015 dictates that the value of the installments not yet due will be equal to one yearly installment, if it is an obligation requiring an indeterminate period of time or more time than 1(one) year, and, if by less than this period, will be equal to the sum total of installments. Otherwise, Paragraph 2 of Article 3 of the Law 10.259/2001 in regards to the obligations not yet due, within the jurisdiction of the Special Court, the sum total of twelve installments must not exceed the value referred to in the head provision of Article 3. 4. Regarding the case records, considering the very low cost of the substance referred in the header, it is possible to infer that the economic pretension in this discussion does not exceed the limit of 60 (sixty) minimum wage salaries, considering the period of 1 (one) year. 5. Known conflict to declare the 27th Court of the Judiciary Section of the Federal District as the one who raised the allegations.** The 3rd Section of the 1st Section Regional Federal Tribunal, by unanimity, gave cognizance of the conflict, to declare in favor of the jurisdiction of the 7th Court of the Judiciary Section of the Federal District. (BRASIL, 2017a, n. p., our highlight.).

In the cases of a buildup of cases demanding the award of moral damages, it is even necessary to provide a justification of the agreed amount for the purposes of appraising the jurisdiction of the courts. (BOCHENEK; DALAZOANA, 2017).

The identification of the receiver of the formulated requirement, understood as the figure of the State judge, accrues, therefore, great relevance, as it must correspond to the legal aspects of jurisdiction in all its forms (value, matter, territorial or hierarchical), "[...] under pain of, depending on the case, be opposed in response to the defendant or even the judge himself, *ex officio* [...]" (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018, p. 227).

Regarding the power to interrupt eventual conflicts of jurisdiction between a JEF court and another common court of the same judicial district, the Federal Supreme Court - STF recognized the Extraordinary Appeal - RE 590409 to the jurisdiction of the corresponding Court of Appeals. With this provision, there was the waning of the previous understanding that attributed this power to the Superior Court of Justice - STJ , issuing Precedent 428 of the STJ[8] (PEDROSO; ARAI, 2011).

If conflict occurs between JEFC judges, the incident must be brought before the respective Panel of Appeals, when belonging to the same jurisdiction. Otherwise, it must be brought before the corresponding TRF or the STJ. In the latter case, when composed of distinct Panels (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018).

The importance of the correct definition of a claim's value is therefore seen, so as to avoid the unnecessary prolonging of a claim and the consequent tardiness in the eventual concession of judicial relief, above all those relating to right to health care.

It must be said as well that not any party may be figured as defendant or plaintiff in a suit brought before a JEF, according to Article 6 of the Law 10.259/2001. For instance, the defendant must necessarily be the Union, a government agency, a foundation or a federal public company, while the plaintiff can only ever be a natural person, micro-compoanies and small companies. (WAMBIER; TALAMINI, 2018).

8 It is the TRF's jurisdiction to judge conflicts of jurisdiction between special federal courts and federal courts of the same judiciary section, according to Statement 428, Special Court, judged in 03.17.2010, DJe 05.13.2010, current ruling, according to information retrieved in the STJ's website (BRASIL, 2010).

This means that the JEF's jurisdiction regarding the party must be considered in two points: relating to the jurisdiction described in Article 109, Item I, of the CF/1988[9] as well as the positions occupied by the plaintiff and defendant in the procedural poles (BOCHENEK; NASCIMENTO, 2011).

In the specific case of suits regarding public health care, it must be highlighted that, in the specific case of claims involving public health, by virtue of the public healthcare system - SUS lacking legal personality of its own, it falls to the public and private entities that integrate it (the latter ones in a complimentary fashion) to have the "[...] responsibility for the managing, regulation and rendering of all actions and public health services." (DALLARI; AITH; MAGGIO, 2019, p. 11).

Another aspect of the JEFs that deserves mention is the fact that, within its scope, the Public Treasury lacks two of its main procedural prerogatives that it enjoys in common procedures, as deadlines are counted in simple format and there is no demand of necessary re-examination, in the terms of Articles 9 and 13 of the Law 10.259/2001, respectively (WAMBIER; TALAMINI, 2018).

Another matter is that within the JEFs, the unenforceability of an attorney's assistance is not subject to any value limit, unlike the JEE, where the presence of an attorney is optional only in the case of the claim's value not surpassing twenty minimum wage salaries. (WAMBIER; TALAMINI, 2018).

On that note, the Law of the JEFs goes beyond, so as to describe the figure of a judicial representative, a third party, designated by law, not necessarily an attorney, with powers of conciliation, transaction and discontinuance in claims of JEF jurisdiction, according to the head provision of Article 10 of the Law 10.259/2001 (BOCHENEK; NASCIMENTO, 2011).

Regarding that point, Alvim and Cabral (2018) clarify that competent parties can represent themselves, as long as they possess the option of being represented by another. The incompetent, however, must necessarily be represented by their proper legal representatives, while the relatively incompetent, though able to represent themselves, must be assisted by their legal representatives.

In addition, let it be said that, even though the Brazilian Bar Association has filed a declaratory action of constitutionality against this legal device, the Federal Supreme Court has decided for its constitutionality in actions of civil nature, in accordance with ADI 3168[10]EFS. (BOCHENEK; NASCIMENTO, 2011).

All these factors end up contributing not only to a greater ease of access to the JEFs, along with creater celerity in the handling of the claims, including those regarding health care.

9 "Art. 109. The federal judges have the competence to institute legal proceeding and trial of: I - cases in which the Union, an autonomous government agency or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankrupcy, of job-related accidents, and those subject to the Electoral and Labour Courts; [...]" (BRASIL, 1988, n. p.).

10 EFS. EFS. EFS. EFS. EFS. EFS. EFS. EFS. ADI 3168, Judge-Rapporteur: Min. Joaquim Barbosa, Full Court, judged in 08.06.2006.

2 JUDICIAL CONTROL OF PUBLIC HEALTH POLICY IN FEDERAL SPECIAL COURTS

In Brazil, it is observed that the right to health care has passed through a movement of juridification as well as judicialization. In the former case, conflicts to not pass through judicial appreciation and the enforcement of law occurs through legal institutions in an extra-judicial manner, especially in pre-procedural steps. In the case of judicialization, however, conflict is passed through the filter of the Judiciary Branch through some procedural instrument, such as in the form of a Public Civil Action (ASENSI, 2013). It is important for the aims of this research to highlight the judicialization of this social right, that is to say, the prompting of the Judiciary Branch in the enforcing of the right to public health care within the scope of the JEFCs.

The expression "Judicialization of Health" began to be used in the 1990s, with the process of redemocratization and the constitutional guarantees of fundamental and social rights, including the right to health. Considering the State's inefficiency, however, several claims arrived at the courts, demanding through judicial decisions that the State provide specific material goods such as medicine, treatments, hospitalizations, among others (FALAVINHA; MARCHETTO, 2016).

Until 1988, the achievements related to the right to health were divorced from the Judiciary Branch, being sought primarily through social movements, such as the sanitary movement initiated in the 70s. With the Judiciary Branch strenghtened and a more politicized legal system, the State was beset by claims to concretize the codified constitutional plan, originating a new logic to the pressuring of the constitutional branches, through the strenghtening of the "judicialization of politics" (FALAVINHA; MARCHETTO, 2016).

Before the great repercussions of the legal claims relative to health relief services, there came the expression of "Judicialization of Health", being possible to conceive that this term is derived from "Judicialization of Politics", regarding the capacity to influence the political landscape that such decisions had (FALAVINHA; MARCHETTO, 2016).

Borges and Ugá (2009) add that the study of the phenomenon of judicialization, constituted by the influence of the Judiciary Branch in political and social institutions, has not only begun to be considered after the promulgation of the 1988 Magna Carta, but also through strong influence of the work "The Global Expansion of Judicial Power"[11], coordinated by Neal Tate and Torbjörn Vallinder (1995), which, conceptualizing the expression "judicialization of politics", undertakes analysis of the determining influences for the occurrence of this phenomenon..

The authors highlight two foms of the expression "judicialization of politics" considered more notable by Neal Tate and Torbjörn Vallinder in the above mentioned work. One of them, called Judicialization *from within*, is characterized by the use of typically judicial procedures by the Executive and Legislative Branches, such as the administrative judges or courts and the Parliamentary Inquiry Committees (BORGES; UGÁ, 2009).

11 TATE, C. Neal; VALLINDER, Torbjörn. The global expansion of Judicial Power. New York: New York University Press, 1995.

The other, more common form, called Judicialization *from without*, is based on the Constitution and the mechanisms of checks and balances, resulting in the rule of the judicial sphere of influence with the objective of controlling the actions of the Legislative Branch and protecting society against the abuse of power by the Executive Branch, through revisions of legislative and administrative acts by the courts (BORGES; UGÁ, 2009). This is the type adopted by this research, since it seeks to analyze the peculiarities of judicial claims regarding public health, especially in the scope of JEFCs.

Within the Judiciary Branch, the theme of health care is presented as one of the most trodden paths by actions for damages. Causes for the increase of judicial claims include the lack of infrastructure in health care units, a consumerist legislation, the awareness of the population of their own rights, and even abuse practiced by the victim itself, in the so-called industry of damages (SILVA, 2009).

In this manner, the number of claims in this area have been exorbitant, reaching up to 62.291 claims in the five Regional Federal Courts (TRFs) in June 2014, as well as a grand total of 330.630 claims among all Courts of Appeals in the country in the same period. (CONSELHO NACIONAL DE JUSTIÇA, [2015]).

From 2008 to 2017, a growth of aproximately 130% in the number of first instance claims related to health care, a much higher number than the 50% growth of the full scope of first instance procedures verified in the same period, according to research presented in the Justice Research Propositve Analytic Report - "Health judicialization in Brazil: a profile of the claims, causes and propositions of solutions, year 2019" -, conducted by the Institute of Teaching and Research (Insper), contracted by CNJ, through the Public Call and Selection Notice (CONSELHO NACIONAL DE JUSTIÇA, 2019).[12]

In truth, the reality of the judicialization of public health could be even worse, if a share of the health relief services had not been granted to private enterprise, according to the constitutional provision in the latter part of Articles 197, and 199, of CF of 1988[13] (SABINO, 2016).

In effect, the State is not the only one to work with societal health care, thanks to the presence of complementary health care and supplementary health care, which are possible through agreements of the SUS with private entities, and, through contractual instruments with health plan providers, respectively. (FIGUEIREDO, 2018).

Though there is legislation about the conditions for the promotion, protection and recovery of health care, the organization and workings of the corresponding services (Law 8.080, of 09.19.1990), along with the law about public and private health care and insurance (Law 9.656, de 06.03.1998), there is no specific regulation regarding civil liability in the area of health care (SILVA, 2009).

12 The research obtained its basis for data collection through the Law of Access to Information (LAI), which allowed for the identification of 498.715 procedures of first instance, spread between 17 state courts, as well as 277.411 procedures in second instance, spread between 15 state courts (CONSELHO NACIONAL DE JUSTIÇA, 2019).

13 "Article 197. Health actions and services are of public importance, and it is incumbent upon the Government to provide, in accordance with the law, for their regulation, supervision and control, and they shall be carried out directly or by third parties and also by individuals or private legal entities. [...]. Art. 199. Health assistance is open to private enterprise. Paragraph 1. Private institutions may participate in a supplementary manner in the unified health system, in accordance with the directives established by the latter, by means of public law contracts or agreements, preference being given to philanthropic and non-profit entities. " (BRASIL, 1988, n. p.).

In the same vein, Barroso (2007) points out that in judicial claims regarding this matter, there are values that pit the right to life and health against the separation of Powers, with no "[...] easy legal nor morally simple solution for this question." (BARROSO, 2007, p. 4).

The right to health is a social right described in Article of the CF/88, granted to all through Article 196, which also establishes as a duty of the State to reduce the risk of disease and other ills through social and economic policy, along with the guarantee of universal and equitable access to the actions and services for its promotion, protection and recovery. (BRASIL, 1988).

In spite of this constitutional provision, the concept of health is one that eludes consensus. The present formulations in the international normative instruments demonstrate a high degree of heterogeneity regarding this right, from illness relief to the granting of an adequate lifestyle, basic services and medical assistance, which denotes the complexity of the conceptual configuration of this right. (RAMOS, 2014).

In this sense, the author states that, being a complex right that was conceived as universal in its application, the right to health implies a series of distinct yet interconnected elements, involving at the very least :

> a) the right of not having one's health harmed by third parties;
>
> b) the right to the establishment, by the State, of policies that protect public health through the environment and social security, therefore fostering the prevention of threats to the health of the people; and
>
> c) the right to sanitary assistance.

Until the second half of the 20th Century, medical knowledge had hegemonic influence as the legitimate discourse about health and illness. After this period, considering the difficulty of producing a satisfactory concept for "health", sociological studies began to anlyse the possible connotations that the words "health" and "illness" received in the social environment (AITH, 2017).

With this, three types of approach were born in the area of health-related policy making. (AITH, 2017):

> a) discussions about the individual as majorly responsible for their own health;
>
> b) reflexions regarding the influence of the social environment over the health of the individual; and
>
> c) the influences of luck, fate and even religion as a representation that part of the population attributed to health and illness.

As a social right, the right to health is classified as a Second Generation right, intimately linked to the principle of equality and the idea of the Social Welfare State, as it grants people not only a myriad of social rights, but also better conditions of labor, health and leisure (PANSIERI, 2012).

Historically, the rise of so-called social rights is related to reactions to the prevailing liberal model of the 18th and 19th Centuries, in the search for an alternative system that guaranteed protection to the economically disfavored (MEDEIROS, 2011). In such a way, social rights are identified as of recent formation, bringing to mind the 1917 Mexican Constitution and the 1919 Weimar Constitution (AUAD, 2008).

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One of the traits associated with these rights is its positive dimension, as they seek the intervention of the State to provide for the individual's many needs, instead of opposing its mismanagement in the area of individual liberties (CARVALHO, 2013).

Beyond this positive or assistential dimension, be it in ample terms as in the distribution of resources or the organization of health care procedures, as in a strict sense, such as the availability of doctors' appointments, surgeries and medication, the right to health holds yet a negative or defensive dimension, as it imposes the abstention of its unviability. (SILVA *et al.*, 2016).

In the same vein, the right to health possesses double fundamentality, formal and material, which envelops fundamental rights and guarantees, therefore being designated in such a manner in the Brazilian constitutional order. In that sense, while formal fundamentality is linked to the positive constitution right, its material conterpart refers to the relevancy of the of the legal interest which is protected by the constitutional order, such as an important right for the protection of human dignity (SARLET, 2007).

According to the nature of a conflict between the fulfillment of the right to health, one can opt for many types of procedures, depending on the peculiarities of each case. For the protection of this social right on an individual basis, for instance, the ordinary action and writ of mandamus (DUARTE, 2011). The defense of collective interests regarding a social right such as the right to health, however, can make use of a system that is thus configured:

> [...] actions for the collective defense of individual interests, such as the collective writ of mandamus and collective civil actions; actions for the defense of essentially diffuse or collective interests, such as public civil actions and popular actions ; actions for the defense of the constitutionality of laws and affirmation of rights before the Constitution (such as the concentrated and diffused controls of constitutionality pertaining to the laws and actions that seek the affirmation of constitutional rights for lack of regulation by the Legislative Branch). (CASAGRANDE, 2008, p. 78-79 *apud* DUARTE, 2011, p. 299).

For the epistemological break proposed by this research, it is important to take note of which of these actions are permitted within the JEFs, which propose to utilize criteria of orality, simplicity, informality, procedural economy and celerity, as described in Article 2 of the Law 9.099/1995, and, supplementarily applied to the JEF as stated in Article 1 of the Law 10.259/2001 (PEREIRA, 2006).

In this context, it is observed that the JEF law itself expressly excludes some of these procedural instruments, regardless of the value of the claim, due to their incompatibility with the proceedings of the JEFs, as they hold greater complexity or importance (WAMBIER; TALAMINI, 2018). So states Article 3, Paragraph 1, of the Law 10.259/2001:

> Article 3 - The Special Civil Federal Courts have the power to sue, conciliate and judge causes of jurisdiction of Federal Courts up to the value of sixty minimum wage salaries, as well as executing their sentences.
>
> Paragraph 1 - The Special Civil Courts do not have the power to judge:
>
> I - stated in Article 19, Items II, III and XI of the Federal Constitution, actions referring to the writ of mandamus, expropriation, division and demarcation, popular, fiscal executions and for administrative dishonesty, along with claims over homogenous diffuse, collective or individual rights or interests

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> II - the Union's real property, government agencies and federal public foundations;
>
> III - the anullment or cancellation of federal administrative acts, save those of pensionary nature and fiscal assessment;
>
> IV - that which seeks to impugn the dismissal of civil public servants or disciplinary sanctions applied to the military. (BRASIL, 2001, n. p.).

In this way, it can be noted that the writ of mandamus, for instace, so broadly utilized in the Common Courts, must not be filed in a JEF. In equal manner, the claims over homogenous diffuse, collective or individual rights or interests must not be judged within the JEFs, as per the above legal provision.

Regarding this point, it is worth noting the JEFs' jurisdiction regarding the defense of diffuse or collective rights or interests through individually proposed actions by rights holders or their procedural substitutes (BRASIL, [2017b]).

Regarding the right to health, such a caveat deserves mention, as, though there is resistance in classifying the right to health as collective or diffuse, the possibility of the role of the Public Prosecution and the Public Legal Defense through public civil action indicates the encompassing bias that the concept of health carries within itself (ALVES, 2013).

Futhermore, pertaining to the active standing to propose actions before the JEFs, the Public Prosecution and Public Legal Defense are not listed in the roster of those eligible by Article 6 of the Law. The STJ, however, recognizes the jurisdiction of these institutions when acting in favor of individuals in cases involving the furnishing of medication/medical treatment, whose value must not exceed 60 (sixty) minimum wage salaries. (BRASIL, [2017c]).

Equally, homogenous individual rights can be protected by the JEFs, as long as they are claimed by the rights holder or in an active facultative joinder of parties, which characterizes claims known as "mass actions", as they pertain to similar goals by an indeterminate amount of individuals (BOCHENEK; NASCIMENTO, 2011).

3 THE POSSIBILITY OF SUBMISSION OF NEW FORENSIC EVIDENCE IN HEALTH CLAIMS WITHIN THE SCOPE OF THE SPECIAL FEDERAL COURTS

The possibility of submitting forensic evidence has a divergent ruling in the Special State Civil Courts and the Special Civil Federal Courts, which can cause doubt or even confusion.

The State Courts do not allow this mode of evidence, since the necessity of submitting forensic evidence "[...] necessarily indicates that the cause is complex, and therefore cannot be known, processed and judged before the Special State Civil Courts." (WAMBIER; TALAMINI, 2018, p. 360).

Otherwise, the Federal Courts allow for the submission of a "technical examination" as expressly stated in Article 12 of Law 10.259/2001. This is a type of simplified forensic evi-

dence in which the judge designates a forensic expert to produce a technical report up to five days before the audience (WAMBIER; TALAMINI, 2018).

The existing technical examination in JEF procedures, so long as it also represents a form of clarification of a factual question, differs in many aspects of judicial forensics established in traditional civil procedure (BOCHENEK; NASCIMENTO, 2011).

The existing distinctions include (BOCHENEK; NASCIMENTO, 2011): the perspective that, within the scope of the JEFs, a judge may designate as an expert any person who possesses knowledge about the object to be evaluated, while the Civil Procedure Code (CPC) states a preference for professionals at university level, subscribed to a competent professional body with proven expertise in the matter. Furthermore, at the beginning of the procedure in the JEFs, the judge is able to select an expert, as long as the fundamental regularity and necessity of the examination is verified, which occurs in the CPC only after the presentation of a defense by the defendant.

It must also be considered that within the JEFs, the deadline for the elaboration of the examination and submitting of reports is reduced. In addition, within the Federal Courts, the legal fees must be paid in advance, while the CPC states that they must be paid in advance by the applicant party, even if not in full.

As corroboration to the possibility of submission of technical examinations in the JEFs, including in matters of health care, Court of Appeals Judge Carlos Moreira Alves of the TRF1 states:

> Substantial orientational precedent agrees with this Court and the Superior Court of Justice that in actions regarding the protection of the right to health, there included the furnishing of medication, whose economic content represents a value under the limit of 60 (sixty) minimum wage salaries established by Article 3, of the Law 10 259/2001, it must be recognized the jurisdiction of the Special Court, which was not invalidated by the degree of complexity presented by the demand or the necessity of technical examination. (BRASIL, 2018c, n. p.).

In spite of this statement, Federal Judge José Carlos Zebulum alerts that the JEFs' special procedures do not allow the postulant the same possibilities of evidence submission that exist in the common procedures, which often incur serious difficulties regarding the presenting of a summary decision, and implies, in most of health care related procedures, the concession of preliminary effects of urgent protection, based majorly in a simple medical prescription (ZEBULUM, 2017).

In actions that seek the protection of a health-related right, Luciana Gaspar Melquíades Duarte adds that probatory diligence oscillantes depending on the type of filed claim: if of first or second necessity (DUARTE, 2011). To the jurist, the expression "health demands of first necessity" designates the providing of essential aspects to the right to life, involving all those that, urgent or otherwise, are vital to survival. The "health demands of second necessity, in turn, constitute the search for health-related aspects that, disconnected from the perservation of life, otherwise contribute to physical, mental and social wellness (DUARTE, 2011). Therefore, regarding the probatory guarantee demanded in these actions, the author concludes that:

> It is certain that, in cases of urgency pertaining to urgent *health demands of first necessity,* probatory diligence must not be increased, but reduced, keeping in mind the risk of loss of life, which is much higher in the prevailing legal framework.
>
> On the other hand, before *health claims of second necessity*, the claim's instruction must be rigorous and eloquent, fit to convince the magistrate of the real factual necessity of that judicially-required relief. (DUARTE, 2011, p. 302, author's highlight).

It is also verified, depending on the case at hand, the possibility of submission of forensic evidence, as long as it is simplified, within the JEFs. It must be observed, however, the construction developed by Lazzari (2014, p. 82), who understands that the complexity of the case or necessity of forensical examination dos not diminish the jurisdiction of the Special Courts. According to the author, the criteria chosen by the legislator was the claim's value, which is of an absolute nature. It must also be remembered that this is the position adopted by the STJ, which considers the claim's degree of complexity or necessity of forensic examination to be irrelevant.

4 THE ROLE OF THE GOVERNMENT IN THE CONSENSUAL DISPUTE RESOLUTION REGARDING PUBLIC HEALTH

With the significant increase of the number of ongoing procedures within the scope of the Judiciary Branch, it has become imperative to allow the use and aplicability of the resolution of disputes by the parties, as an alternative to the institutions of justice in the resolution of conflict in its myriad forms, among them those involving the Public Administration. Mediation is understood as a consensual method of dispute resolution by the parties, capable of restoring dialogue between them, creating an environment that is receptive to agreement, becoming, therefore, an alternative to the current problems regarding the growing demand for conflict resolution.

It has been observed that the movement filed by the issuing of Resolution 125/2010, of the National Council of Justice, categorically marked a paradigm shift that was settled with the issuing of the new Civil Procedure Code (Law 13.105/2015) and, moreover, a new Law of Mediation (Law 13.140/2015). These acts of law institutionalized within the country a multi-door justice system. (VIANA, VIANA, 2016).

The role of the Public Treasury, within and without the courts, depends on the rule of strict lawfulness. In other words, means that a public administrator cannot act without being authorized by the law. The inalienability of public property and rights have often brought about the oposition to the possibility of conflict resolution by the parties in the Public Finances. To Viana and Viana (2016, p. 32), however:

> This point deserves revision. The notion of inalienability has been progressively relativized. The inalienability of a right must not be confused with it being intransigible, which happens only when the law forbids is transaction. Such is the case of Article 17, Paragraph 1, Law 8.429/1992 (Law of Administrative Dishonesty) – sole case of express forbiddance of transaction in the

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> Brazilian legal framework (SOUZA, 2012, p. 173). What is more, even should the right be inalineable, there is no alienation in the act of regulating it, allowing therefore that means of conflict resolution byt he parties be employed for such a goal (FACCI, 2015, p. 239-240).

It is noticed, therefore, that the legal framework has long admitted the submission of Public Finances to the possibility of adoption of conflict resolution by the parties[14], making it necessary that public entities, such as health administrators and prosecutors be more amenable to the policies of conciliation and mediation (SCHULZE; GEBRAN NETO, 2015).

Viana as Viana (2016) highlight that some public entities are still opposed to conciliation, under allegations of inalienability of the public interest. However, as long as it upholds the law, a transaction undertaken by the Administration does not represent a liberty taken with a right or interest, as taught by Fioreza:

> A thought that seems to be behind the denial of the possibility of conciliation by the Public Administration is that the transaction represents a liberty taken regarding a right or interest, which is not true. A private individual who is legally sued can transact, offering a sum of money to the plaintiff, solely to free him or herself of the moral inconvenience of responding to a judicial summons, though ignorant of the validity of the request and even considering this an action with a low chance of success. They will be, therefore, exercising the right to freely dispose of their property. The Administration cannot do the same, of course. It can, however, admit to the author's pretensions if the alleged right possesses legal fundamentation, which is substantially different from the attitute taken by the private individual in the above example, because the transaction, to the Administration, will not be based in the exercise of a right, but in the upholding of the will of the law. Furthermore, in cases such as this, the Administration has the duty of seeking conciliation, for it would otherwise be offending the principle of lawfulness stated in the head provision of Article 37 of the Federal Constitution, by not observing the legal provision in which the demanded right is sustained. (FIOREZA, 2010, p. 2 *apud* DELDUQUE; ALVES; DINO NETO, 2015, p. 579).

The Law of Federal Courts, for instance, expressly states the possibility of conciliation, transaction or voluntary discontinuance by the Union's judicial representatives, government agencies, foundations and federal public companies, as per the sole paragraph of Article 10, Law, constituting sentences that ratify the agreement as a judicially enforceable instrument, as pert the sole paragraph of Article 22, Law 9.099/1995, and Article 515, Item II, of CPC/2015 (WAMBIER; TALAMINI, 2018).

This authorization, however, is often ignored by these federal entities. The only one that has sought to act in this manner before the JEFs is the National Institute of Social Welfare (INSS), reaching agreements in claims with probable validity to the insured, which ends up sparing the Public Administration from paying the entire amount owed, along with delayed interest, monetary correction and damages fees in the case of procedures that are still within the Panels of Appeals, contributing to the recognition of the party's rights in a more celeritous manner (DELDUQUE; ALVES; DINO NETO, 2015).

14 Whether through the Chamber of Federal Administration Conciliation and Arbitration, whether through means of conduct adjustment described in the Child and Teenager Act, the Code of Consumer Defense, competition legislation, environment legislation, the Elderly Act and regulatory national law.

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Furthermore, in the absence of agreement, there is the possibility of establishing incidental arbitration, as long as it does not depend of judicial intervention, in accordance to what is allowed by Articles 24 to 26 of Law 9.099/1995, Law of the Special Civil and Criminal Courts, c/c Article 1 of the Law 9.307/1996, which deals with arbitration (WAMBIER; TALAMINI, 2018).

It must also be said that the permissions established by the Law 9.307/1996 were introduced by the Arbitration Law Reform, with the promulgation of the Law 13.129/2015, fulfilling the pre-requisite of specific legal authorization and eliminating controversies regarding the possibility of the Federal Government using arbitration to settle its conflicts with private persons (ROCHA; SALOMÃO, 2017).

With that said, judgements by arbitration according to the Law 9.099/1995, though having the essential nature of arbitration, must not be conflated with what is stated in the Law 9.307/1996. The choice of an arbitrator, for instance, is made among lay judges, and the acts practiced before a State judge are carried over. Within standard arbitration rules, however, according to the Law 9.307/1996, it is enough that the arbitrator be agreed upon by the parties, and the arbitration procedure is established independently from the suit, which will be dismissed, according to Article 485, Item VII, CPC/2015 (WAMBIER; TALAMINI, 2018).

Arbitration can be defined as a method of dispute resolution where a neutral third party, who does not represent the State, imposes a binding agreement between the parties. (BONATO, 2014).

Determined by the Law 9.307/1996, this dispute resolution technique occurs, therefore, through the intervention of one or more designated persons by private agreement, determined without the intervention of the State, through a decision with the same efficacy as a judicial ruling. (CARMONA, 2009).

On the other hand, conciliation prizes itself on the resolution of disputes involving only the affected parties, putting an end to conflict, while mediation seeks not only the resolution of a dispute, but also the restoring of social relations among the conflicting parties (CABRAL, 2017). The difference between these two can be seen in their contents, as:

> [...] in conciliation, the objective is the agreement, that is to say, the parties, even if adversarial in nature, must come to an agreement to avoid a judicial procedure, or put an end to it should it already exist. In conciliation, the conciliator suggests, interferes, advises, while in mediation, the mediator facilitates communication without spurring both parties to an agreement. In conciliation, conflict is resolved without analyzing it in depth. Often, the conciliator's intervention occurs in the sense of forcing an agreement. It is different, therefore, from mediation, due to the fact that its handling of conflict is superficial, often finding a result that is only partially satisfactory. In mediation, however, if there is an agreement, it represents total satisfaction of the mediated parties. (MORAIS, 2012, p. 115).

It is worth noting that conciliation is already described in the 1973 CPC, as well as other special laws, while the regulatory framework for mediation in Brazil was only instituted with the promulgation of the Law 13.140/2015. Furthermore, in the procedural scope, the new CPC also listed this mechanism as a means of social pacification. (CABRAL, 2017).

The legal framework of mediation - the Law 13.140/2015, approved in 06.26.2015 – also represented an important step, as it admitted the possibility of the Public Administration making use of this institution, even if within certain parameters. (ROCHA; SALOMÃO, 2017).

The law of mediation must be complemented by the March 16th 2015 CPC in what it is not incompatible with, since, being posterior and specific, would supercede the CPC/2015 in such matters (GRINOVER, 2016).

By the way, the new Civil Procedure Code - CPC A propósito, o novo Código de Processo Civil - CPC states one of its premises as the incentive to consensual methods of dispute resolution (judicial mediation and conciliation). Within the paragraphs of Article 3 is described the duty of the State to foster, if possible, the consensual resolution of conflicts, to be incentivized among all institutions linked to the practice of justice, before or after the procedure, determining, in its Article 165, the obligation of the Courts to create judicial centres for consensual dispute resolution, responsible for holding conciliation and mediation sessions and hearings and for the developement of programmes aimed as assisting, guiding and encouraging the resolution of disputes by the parties themselves. (GRINOVER, 2016).

As for the theme, the 2015 CPC expressly states that the conciliator may suggest resolutions for the dispute, while the mediator merely assists the parties finding consensual solutions by themselves, according to Paragraphs 2 and 3 of Article 165, *in verbis*:

> Article 165. [...]
>
> Paragraph 2 - A conciliator, who shall act preferentially in cases in which the parties have no prior relationship, shall be able to suggest solutions for the dispute, the use of any type of coercion or intimidation to force the parties to settle being forbidden.
>
> Paragraph 3 - A mediator, who shall act preferentially in cases where there is a prior relationship between the parties, shall help those who have an interest in the case to understand the issues and confliction interests, in such a way that they may, by re-establishing communication, identify, in their own, consensual solutions that generate mutual benefits. (BRASIL, 2015b, n. p.).

In this sense, some scholars affirm that while the conciliator takes on a significantly proactive role, the mediator has a more passive role in the process of putting together an agreement. In truth, however, the doctrine diverges over the difference between these two methods, sometimes treating them as different, sometimes as mediation in a broad sense. (ROCHA; SALOMÃO, 2017).

There are those who understand that in extrajudicial mediation, whose specific legal framework is the Law 13.140/2015, the mediator can also suggest solutions for the dispute, which would not transgress against the mediator's principle of neutrality, since mediation is also ruled by the principle of consensus-building, as per Article 2º, Item VI, of the same law (ROCHA; SALOMÃO, 2017).

Here it is worth mentioning the reflexion developed by Zanferdini and Mazzo (2015), when developing an important reflextion about the classic work Access to Justice by Mauro Cappelletti and Bryan Garth (1988), highlighting that the third restorative wave elevates the question of access to court representation to a broader concept of access to justice, offering new focus (ZANFERDINI; MAZZO, 2015, p.89) . Even when not forgetting the techniques fromt he two first restorative waves, the third wave seeks to be broader than its predecessors,

centralizing its attention in the general system of institutions and mechanisms, peoples and procedures as employed to process and avoid litigation, advising and encouraging a wide variety of reforms, encompassing modifications in the procedural forms, alteration in court structure, use of lay persons or paraprofessionals, as well as the adoption of private or informal mechanisms for the solution of litigation, among which mediation and conciliation stand out. To Zanferdine and Mazzo (2015, p. 89) in that moment "it is possible to comprehend the breadth of the expression access to justice as emplyed by authors Mauro Cappelletti e Bryant Garth (1988), which does not end at having access to the Judiciary, nor can it be studied in the strict limits of access to pre-existing judicial bodies".

In conflicts regarding the right to health, the adoption of alternative conflict resolution mechanisms, inside or outside of judicial procedure or even before their starting point, may reduce the SUS' vulnerability in the juducial scope before the allocation of resources as demanded by judicial rulings (DELDUQUE; ALVES; DINO NETO, 2015).

Conciliation, for instance, should be sought more often within judicial procedure, since it allows the parties themselves to establish the terms and conditions for the claim's resolution, with the direct participation of the parties, along with a much faster resolution than in litigation, even fostering the *undrowning* of the Judiciary Branch (DELDUQUE; ALVES; DINO NETO, 2015).

By the way, conciliation can be presented as an alternative to the slowness in the resolution of procedures regarding the protection of health, by virtue, for instance of frequent delays due to deadline extensions by the Government for the fulfilling of judicial decisions, or even because of the difficulty of accessing technical information due to a procedure's constant data flow (DELDUQUE; ALVES; DINO NETO, 2015)

In these cases, usually regarding when the parties request medication or treatment due to illness, this slowness can leave the protection of the plaintiff's health or even life itself unfulfilled. (DELDUQUE; ALVES; DINO NETO, 2015).

An agreement might for, for example, when a party judicially requires medication, surgical intervention or medical treatment not offered by the SUS, and the system possesses something similar that can fulfill these needs. In these cases, the party may be offered medical consultation with SUS doctors to analyze the adequacy of this alternative for this clinical condition, therefore offering quicker health relief if possible. (DELDUQUE; ALVES; DINO NETO, 2015).

There is the possibility of negotiation, when the treatment or furnishing of medication is duly stated within the SUS, but was not yet furnished to the plaintiff by some circumstantial factor, such as delays in bidding, lack of suppliers, delivery delays, among others. In these cases, the Government may propose a deadline for this error to be corrected, when possible (DELDUQUE; ALVES; DINO NETO, 2015).

The Public Administration itself benfits from these alternative methods, since an administrative or agreement-driven solution avoids the expenditure of resources with the payment of costs of loss of suit, delayed interest, monetary correction or even fines for the delay in the execution of judicial decisions or bad-faith litigation (DELDUQUE; ALVES; DINO NETO, 2015).

The perspective developed by authors can be expressed in numbers, as it must be considered that the Union's expenditures with judicial procedures related to health care, for

instance, jumped from R$ 70 millions in 2008 to R$ 1 billion in 2015, a growth of more than 1.300%, according to an audit by the TCU in Procedure 009.253/2015-7, Bench Decision 1787/2017 – TCU – Plenary (BRASIL, 2017d).

Along with the need for greater use of these alternative methods for conflict resolution, the CNJ has instituted the National Judiciary Policy for the adequate treatment of disputes in the scope of the Judiciary Branch, via Resolution 125/2010 from 11.29.2010, subsequently altered by Amendment 2 of 2016, establishing the creation of Courts for the alternative resolution of disputes (CABRAL, 2017).

Considering these incentives, one can observe the creation of progressively more judicial or extrajudicial centres/chambers that seek an amiable solution to disputes regarding the right to health, in the attempt of avoiding or mitigating the judicialization of these cases. Among them, it is worth mentioning: The Permanent District Chamber of Health Mediation (CAMEDIS)[15]; the Chamber of Health Conciliation of Salvador[16]; the Chamber of Health Conciliation of Alagoas (CCS/AL)[17]; the Chamber of Health Ligitation Resolution (CRLS), created by the Public Finances of the State of Rio de Janeiro (PGE/RJ)[18]; and the Interinstitutional Committe of Administrative Resolution of Health Claims (CIRADS), created by the AGU of the State of Rio Grande do Norte (DELDUQUE; ALVES; DINO NETO, 2015).

Finally, one can highlight the Chamber of Health Rights Mediation (Cameds), an electronic tool for the extrajudicial conciliation realized by federal judges of the Judiciary Subsection of Imperatriz, winning the "Conciliating is Cool" prize, promoted by the CNJ in the federal judge category, using the *WhatsApp* application to solve 250 cases in five months of operation (CONSELHO NACIONAL DE JUSTIÇA, 2017).

CONCLUSIONS

Standing before the growing protagonism of the Judiciary Branch in the enforcing of public health policy, the JEFs, guided by criteria of orality, simplicity, informality, procedural economy and celerity arise as an important instrument of access to justice to those who require protection regarding the right to health.

Relating to this fundamental constitutional right, the STF has already reaffirmed an understanding about the solidary liability between units of the Federation in the duty of fur-

15 As seen in: BRASIL. Public Legal Defense of the Union. Press Office. [Câmara de mediação em saúde...]. 2013b. Available at: https://www.dpu.def.br/legislacao/leis?id=10523:camara-de-mediacao-de-saude-e-instituida-no-distrito-federal&catid=79. Accessed in: Oct. 2nd 2018.

16 As seen in: CONSELHO NACIONAL DE JUSTIÇA. Câmara de Conciliação de Saúde resolve 80%... 2017a. Available at: http://www.cnj.jus.br/noticias/judiciario/85328-camara-de-conciliacao-de-saude-resolve-80-dos-casos-na-bahia. Accessed in: Oct. 2nd 2018.

17 As seen in: CONSELHO NACIONAL DE JUSTIÇA. Tribunal prepara câmara de conciliação em saúde em AL. 2017b. Available at: http://www.cnj.jus.br/noticias/judiciario/84350-justica-alagoana-planeja-camara-de-conciliacao-em-saude. Accessed in: Oct. 2nd 2018.

18 As seen in: PROCURADORIA GERAL DO ESTADO (Rio de Janeiro). Câmara de Resolução de Litígios de Saúde (CRLS). 2016. Available at: https://pge.rj.gov.br/mais-consenso/camara-de-resolucao-de-litigios-de-saude-crls. Accessed in: Oct .2nd 2018.

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nishing health relief, as per the decision proferred in the analysis of RE 855178[19], by Judge-Rapporteur Luiz Fux, which had recognized general repercussion, via the Virtual Plenary.

In this setting, one can highlight that the handling of a health claim with the Union as the defendant is the point of origin of the Federal Justice's jurisdiction, according to Article 109 of the CF/1988, mentioning, however, the absolute jurisdiction of the JEFs.

In this way, if there is a Special Federal Court in the respective judiciary section or sub-section, cases that do not surpass the defined monetary limit (sixty minimum wage salaries) will be necessarily proposed within the Special Courts, and not in the Federal Courts, even if those specialize in matters of health care.

With that said, the objective was to analyze some peculiarities in health claims made within the scope of the JEFCs, such as the criteria for the definition of the value of a health claim, the possible actions for the judicial control of public health policy in the JEFs and the possibility of utilizing forensic examination and alternative methods of dispute resolution in thses procedures.

As per the legal ruling of the absolute competence of the Special Civil Federal Courts, this research has sought to make light of the importance of the correct definition of the economic expression intended by the case, so as to avoid delays relating to the providing of health relief, due to errors springing from the incorrect handling of a case.

Furthermore, this research broached the legal possibility of the use of forensic examinations in these procedures, as long as in a simplified form, as well as about the benefits of the use of alternative methods for conflict resolution in this scope, bringing important judicial or extrajudicial centres/chambers that seek an amiable solution to conflicts regarding health care, in an attempt of avoiding or mitigating the judicialization of these cases.

The legal ruling of the JEFs' absolute jurisdiction and the high density of judicialization in health claims in this microsystem, however, indicate the need for a deepening of debate in this area, so as to allow for greater predictability regarding the interpretation and application of the respective procedural norms in this specific reality.

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19 According to RE 855178 RG, Judge-Rapporteur: Min. Luiz Fux, Judged in 03.05.2015, General Repercution Electronic Procedure - Merit Dje-050, Disclosed 03.13.2015, Published 03.16.2015.

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TRANSEXUALITY IN THE HEALTH CONTEXT: INFORMATION FOR CITIZENSHIP AND HUMAN RIGHTS

A TRANSEXUALIDADE NO CONTEXTO DA SAÚDE: INFORMAÇÃO PARA A CIDADANIA E DIREITOS HUMANOS

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ABSTRACT

Access to fundamental rights, such as health and information, allows all individuals, without discrimination, the possibility of developing all their potential, including that of participating actively, organized and aware of the construction of collective life in the democratic state, especially from the perspective of citizenship. Following this scenario, this article aims to propose a reflection on transsexuality in the health context, establishing a dialogue with the communication that informs citizenship and human rights. The problem investigates the extent to which communication, especially the right to information, can provide transsexuals with equity in the health field, based on a process of social inclusion. A bibliographic study was carried out, following the hypothetical deductive method. It was verified as essential the (re) organization of a public

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health system that welcomes everyone without distinction, however, without forgetting the individualities - after all, in this process communication for information is fundamental, both from the point of view of citizenship and human rights.

KEYWORDS: Communication. Citizenship. Human rights. Cheers. Transsexuality.

RESUMO

O acesso a direitos fundamentais, como saúde e informação, permite a todos os indivíduos, sem discriminação, a possibilidade de desenvolverem todas as suas potencialidades, incluindo a de participar de forma ativa, organizada e consciente da construção da vida coletiva no Estado democrático, especialmente sob a perspectiva da cidadania. Seguindo este cenário, o presente artigo tem como objetivo propor uma reflexão sobre a transexualidade no contexto da saúde, estabelecendo uma interlocução com a comunicação que informa para a cidadania e os direitos humanos. O problema investiga em que medida a comunicação, especialmente o direito à informação, pode proporcionar aos transexuais a equidade no campo da saúde, a partir de um processo de inclusão social. Realizou-se um estudo bibliográfico, seguindo o método hipotético dedutivo. Verificou-se como essencial a (re) organização de um sistema de saúde pública que acolha a todos sem distinção, porém, sem esquecer das individualidades – afinal, neste processo é fundamental a comunicação para a informação, tanto do ponto de vista da cidadania quanto dos direitos humanos.

PALAVRAS-CHAVE: *Comunicação. Cidadania. Direitos humanos. Saúde. Transexualidade.*

1 INTRODUCTION

Inequality, discrimination, rejection, prejudice and violence are daily challenges for transsexuals, who seek to recognize their identity, given the imbalance between biological sex and their gender identity. Transsexuality is not a disease, but some of the problems faced by transsexuals are precisely gender prejudice, which in the face of a society that thinks in a binary way - either male or female according to sex of birth - they see their heightened vulnerability also in the area of health.

The transsexual's biological sexual identity is not the same as his gender identity, and for this reason, the performance of a sex change surgery may mean a step towards his recognition of his identity as a citizen. But this process is difficult, both for access to information about their right to health, as well as for bureaucratic, psychological and obstacle issues that often start in the family itself, in which the transsexual is not accepted, as well as in society more broadly.

Thus, the hypothetical-deductive method was used to carry out the present study, using the exploratory type of research as methodology, through a review bibliographic, in which, in its design, data collection was used in bibliographic sources available in physical media and on the computer network.

Following this idea, the first part of this text presents transsexuality in its relation to gender, gender identity and sexuality, based on a scenario of reflections that deals with the subject's reinterpretation in modern times. Posteriorly, demonstrates the need to analyze transsexuality from the perspective of realizing the right to health, especially the process of non-pathologization of transsexuality and its implications for the public health system.

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Still in the context of debates on the theme of health, it follows, next, on the National Policy for Integral Health of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals, with the objective of to demonstrate and reaffirm the guarantee of health care for all human beings, without any distinction or discrimination. Finally, it analyzes the role that communication and the right to information play in contributing to greater equity in health, being an important element so that transsexuals can feel socially included, both from the point of view of citizenship and of citizens. human rights.

2 TRANSEXUALITY: THE REINTERPRETATION OF THE SUBJECT

Transsexuality is an identity experience that can be characterized by the construction of gender in contrast to the norms that establish intelligibility between body, identity and sexuality. It is, therefore, the possibility of reinterpreting the meanings of femininity and masculinity, contrary to the requirement that sex must be consistent with gender and, in this case, also surpass the idea that the biological female is the only one legitimated to carry the status of woman, while the male is the only one legitimated to carry the status of man, in a clear mention that biology does not it is destiny. "Transsexuality is an inevitable development of an order that establishes intelligibility in bodies" (Bento, 2006, p. 16). The puzzle solving ethnographic implies

> [...] be present in interactions situated within a context and try to explain the unmanifest logic that supports these same interactions - logic that allows people to act in certain ways that are considered natural, and allows people to say things to other people, with the expectation of being understood (KULICK, 2008, p. 35).

Given this, societies, of the so-called late modernity, are characterized by the 'difference', with different positions of subject, that is, different identities for individuals. However, they do not disintegrate because the different elements and identities can be jointly articulated, however, only partially, because the "identity structure remains open" (HALL, 2006, p. 17). We must keep in mind that all this displacement is positive, because it dismantles identities, considered in the past to be stable and opens the possibility of creating new articulations.

It can be said that transsexuals are in a position of fragility and vulnerability, fitting perfectly with the term *homo sacer* coined by Giorgio Agamben. According to that author

> [...] deprived of almost all the rights and expectations that we usually attribute to human existence, and yet, biologically still alive, they came to be situated in a limit zone between life and death, between the internal and the internal. external, in which they were nothing but naked life. Condemned to death and inhabitants of the countryside are, therefore, somehow unconsciously resembling sacri homines, a life who can be killed without committing murder. The interval between sentencing to death and execution, as well as the lager enclosure, delimits an extratemporal and extraterritorial threshold, in which the human body is disconnected from its normal political status and, in a state of exception, the most extreme adventures are abandoned. , where the experiment, like an atonement shot, can restore it to life (grace or pardon

> of the penalty are manifestations of the sovereign power of life and death) or deliver it definitively to the death to which it already belongs. What interests us here, however, is that, in the biopolitical horizon that characterizes modernity, the doctor and the scientist move in that no-man's-land where, once, only the sovereign could penetrate (AGAMBEN, 2015, p. 155) .

According to Goellner (2008, p. 245-260), each mark that the body shows "is not something given a priori, nor is it universal: it is provisional, changeable and mutant, susceptible to innumerable interventions [...] seen that it is also built from what is said about it ". These transformations, together with modernity, freed individuals from the bonds of tradition and structures. In this trend "Liberating" new identity categories emerge, composed of subjects who no longer find acceptance in the traditional conceptions of gender: they are the transvestite and transsexual categories (OLIVEIRA; GROSSI, 2014).

As for a concept, the Inter-American Court of Human Rights, through *Opinión Consultiva* OC-24/17 of November 24, 2017, requested by Costa Rica, ruled on it what it means to be transsexual. Thus, ccording to the Court, it is said to be transgender or trans person:

> When a person's gender identity or expression is different from that typically associated with the sex assigned at birth. Trans people build their identity regardless of medical treatment or surgical interventions. The term trans is an umbrella term used to describe the different variants of gender identity, whose common denominator is the non-conformity between the sex assigned at birth of the person and the gender identity that has been traditionally assigned to it. A transgender or trans person can be identified with the concepts of man, woman, trans man, trans woman and non-binary person, or with other terms such as hijra, third gender, biespiritual, transvestite, fa'afafine, queer, transpinoy, muxé, waria and meti. Gender identity is a different concept from sexual orientation (IACHR, 2017, p. 17 and 18).

Still, according to the same Court (CoIDH, 2017, p. 18) it can be understood by a transsexual person:

> Transsexual people feel and conceive of themselves as belonging to the opposite gender that is socially and culturally assigned to their biological sex and they opt for a medical intervention -hormonal, surgical or both- to adapt their physical-biological appearance to their psychic reality , spiritual and social.

As to the question of choosing a more appropriate gender, explains Butler (2009, p. 96) who,

> [...] choice it can include one or more of the following aspects: the choice to live as another gender, undergo hormonal treatment, find and declare a new name, secure a new legal status for your gender and undergo surgery.

However, there is tension when people trying to obtain legal legitimacy and financial assistance and those who seek to base the practice of transsexuality on the notion of autonomy come into debate. Because, "in fact, we can argue that nobody achieves autonomy without the assistance and support of a community, especially when making a courageous and difficult choice as is the choice for the transition "(BUTLER, 2009, p. 97).

Although the issue of transsexuality has been present in society for many years, especially in the 60s and 70s - when theoretical discussions were articulated with demands in

search of changes in the practices that regulate the human body, this debate about transsexualism only received visibility from the

> [...] the emergence of international associations, which organize themselves to produce knowledge aimed at transsexuality and to discuss the mechanisms for constructing the differentiated diagnosis of gays, lesbians and transvestites, [which at the same time] produces specific knowledge , appropriate models are proposed for the 'treatment' (Bento, 2006, p. 40).

Consequently, transgender people, or transgender people as some scientists prefer, according to Silva Junior (2011, p. 65): "[...] they are individuals who, in their particular way of being and / or acting, go beyond borders gender expectations expected / culturally constructed for both sexes". So, according to the same author, they are "men, women (and people who even prefer not to identify themselves, biologically, by no means) that blend, in their plural forms of femininity and masculinity, traits, feelings, behaviors and experiences that go beyond gender issues", as they are usually treated (SILVA JUNIOR, 2011, p. 65). Based on this concept, the expression "transgender" can include transvestites, transsexuals, drag queens, drag kings, crossdressers, transformers and others.

From these explanations, it is clear that in the subject's "interpretation" or "reinterpretation" - transsexuals, there is a recurring and controversial theme, which can (and should!) Also be approached from the perspective of the right to health.

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3 RIGHT TO HEALTH AND TRANSEXUALITY: A NECESSARY DIALOGUE

Transsexuality today is a very recurrent subject, including occupying pages of magazines, television programs and even chapters of soap operas. Despite this, "for most, the transsexual is still a stranger to everything and everyone, almost as if he were not human, which implies countless discomforts, leading them, almost always, to the margins of society [...]" (SCHEIBE, 2008, p. 11). And more, "all and any topic that is linked to the sexuality issue is still surrounded by numerous myths and prejudices that end up preventing them from being discussed in the large group" (STURZA and SCHORR, 2015, p. 11). If just talking about the subject is taboo, with the integration of transsexuals in society the problem is greater, as it does not occur effectively. And that's where the problem is, when it occurs, it is marked by several traumatic processes for transsexuals and for those who try to perform it.

Transsexuality already existed in times prior to modern and contemporary, having appeared in several historical periods, including in some primitive cultures in which there were people who lived as members of the opposite sex to their biological sex, by their own desire, and were even valued (MARTINI; SCHUMANN, 2017). There were also many myths involving the change of sex, which was also considered as a punishment, which appeared frequently in mythology.

The first case of a person who went to a doctor to affirm his status as a transsexual occurred in 1952, in the case of Christine:

> In 1952, an American soldier went to Denmark to seek medical help from the endocrinologist Christian Hamburger, who was doing hormone research. This is because, since 1935, Denmark had a law that allowed human castration when the patient's sexuality induced him to commit crimes or when it involved severe mental disorders. There, he told his story, completely invented, that it would be intersex, that is, hermaphrodite, and needed a surgical intervention to change her body, as she had always lived as a woman. As she had been taking hormones for years, she carried feminine characteristics in her body, while her masculine function was deficient. The lack of knowledge about transsexualism, coupled with its female silhouette, led the medical team to believe him. That's how he managed to root out his genitalia. However, there was still no thought of building a vagina. Returning to the United States, now as Christine, she sought out Dr. Harry Benjamin, to whom she related her story. Based on this experience, the doctor published an article, in 1953, talking about transsexualism. This is the turning point at which transsexuality enters the medical field (DIAS, 2014, p. 12).

From that case onwards, transsexuality was considered a disease and called "transsexualism". As with homo-affection, the "pathologizing moment served to move transsexuality away from the moral field, from the concept of perversion, to enter the field of disease. The transsexual citizen is no longer a wanton, perverted, but a 'sick' '(DIAS, 2014, p. 14).

And after several surgeries and studies, in 1980, she entered the DSM disease catalog, and entered the CID-10 in 1992" (DIAS, 2014, p. 13). Thus, "transsexualism, as a medical category, is born as pathological and, mainly, linked to a medical diagnosis that breaks down the experience of sexuality in some key points" (DIAS, 2014, p. 15). Thus, "a totalizing experience of transsexuality is constructed. That is, there is only one way to be transsexual: only those who fit the diagnosis of transsexualism will be considered transsexual, while the diagnosis will only suit a portion of the transsexual population "(DIAS, 2014, p. 15).

So that "Transsexual medicine developed mainly in global metropolises, that is, in Western Europe and the United States, where debates were also centered feminists about transsexuality, while "on the global periphery, there are also groups that change gender under different names" (CONNELL, 2016, p. 224). Thus, according to the International Statistical Classification of Diseases and Health-Related Problems (CID-10), transsexualism can only be diagnosed "if the individual remains for the minimum period of two years behaving as this, in addition to the need for a special diagnosis of the appearance of this behavior in severe pathologies, such as schizophrenia "(STURZA; SCHÖRR, 2015, p. 269).

Whereas, "in 1994 the DSM-IV Committee replaced the diagnosis 'Transsexualism' with 'Gender Identity Disorder' [...] in Childhood (302.6), Adolescence and Adult (302.85)" (BENTO; PELÚCIO , 2012, p. 572). Thus, the World Health Organization started to include transsexualism in the list of Sexual Identity Disorders, identifying it through Code F64.0. However, as Sturza and Schörr (2015, p. 269) say,

> [...] this classification as a sexual identity disorder, given by the WHO, is totally disapproved by transsexuals and by the doctrine scholars studying the subject, since it cannot be considered as a disease, but rather as a sexual identity different from that considered as normal, but unique ".

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According to Resolution No. 1955, edited in 2010 by the Federal Council of Medicine, the subject needs to go through a protocol that is found in it, which establishes in its Article 3 some criteria, which are

> Art. 3 That the definition of transsexualism will obey, at least, the criteria listed below: 1) Discomfort with natural anatomical sex; 2) Express desire to eliminate the genitals, to lose the primary and secondary characteristics of the sex itself and to gain those of the opposite sex; 3) Permanence of these disorders continuously and consistently for at least two years; 4) Absence of other disorders mental disorders (BRASIL, 2010, s.p.).

This protocol was created with the aim of setting descriptions and prescriptions about the most appropriate way to live transsexuality, that is, restricting and establishing limits so that the practice of interventions is carried out safely, so as not to cause more suffering these subjects. This protocol is part of the transsexualizing process, which "starts when the individual seeks the Specialized Care Service in the Transexualizing Process of the qualified hospital, where it will go through different professionals who will interview you and carry out a series of psychological and clinical examinations (MARTINI; SCHUMANN, 2017, p. 73) including "the real life test, in addition to go through consultations with the multidisciplinary team "(MARTINI; SCHUMANN, 2017, p. 73).

The transexualizing process can be conceptualized as "a set of assistance strategies for transsexuals who intend to perform bodily modifications of sex, due to a feeling of disagreement between their biological sex and their gender" (PORTAL BRASIL, 2015, sp) as a way of "complying with laws and medical opinions "(PORTAL BRASIL, 2015, sp). Whereas sex reassignment surgery or transgenitalization surgery "is the surgical procedure by means of which the person's genital organ is altered to create a neovagina or neofalo. Preferable to the old-fashioned term 'sex change' "(JESUS, 2012, p. 30). It is important, for anyone who has relationships or treats with transsexual people, "not to overemphasize the role of this surgery in your life or in your transsexualizing process, of which it is only a step, which can not occur "(JESUS, 2012, p. 30).

In this perspective, "the spectra of discontinuity and incoherence that turn into a pathology are, therefore, only conceivable in function of this normative system" (ARAN, 2006, p. 50). As a result, "certain types of gender identity seem to be mere developmental flaws or logical impossibilities, precisely because they do not conform to the norms cultural intelligibility "(BUTLER, 2003, p. 39).

However, it is still necessary to understand that the simple fact that someone does not identify with their gender of origin has nothing to do with a disorder of any kind, as stated by "researchers with homophobic purposes" (BUTLER, 2009, p. 69) . In this sense, when the subject is the process of characterizing transsexuality, the Federal Council de Medicina asserts that this non-identification with psychological sex cannot be confused with an anomaly, as it presents specific traits, of a continuous and permanent character (BRASIL, 2010). In the words of Butler (2009, p. 70)

> It is very important to state that this is not a disorder and that, in transgender life, there is a wide variety of complex relationships, such as: dressing according to the opposite gender, using homonyms and resorting to surgery, or even a combination of all these practices. All of this may or may not lead to a change in object choice

Following another line of thought, taking into account the various types of conflicts to which transsexuality can be an object, we must highlight the disorders linked to intra-individual tensions, that is, the individual with himself. Thus, they can be conceptualized as those that result from the crisis between gender identity and sexual identity, or better, between "body identity and identity of gender "(Bento, 2006).

However, the problem generated by the effects produced by the psychiatric diagnosis of this sexual condition (being transsexual) cannot be ignored, since, in most cases, the implications are stigmatizing and even discriminatory. Thus, it is necessary to go deeper into these psychic issues, considering that they are a prerequisite for individuals to be able to having access to available medical resources, in order to analyze whether this restriction on the autonomy of transsexual subjects is really necessary, whether it really protects them, and whether it is in fact effective and efficient.

As for the movement for the depatologization of transsexuality, aiming to remove it from medical disease manuals, CID-10 and DSM-IV,

> [...] more than 100 organizations and four international networks in Africa, Asia, Europe and North and South America that are engaged in the campaign to remove transsexuality from DSM and CID. The mobilizations are organized around five points: 1) withdrawal of Gender Identity Disorder (TIG) from DSM-V and CID-11; 2) removal of the mention of sex from official documents; 3) abolition binary normalization treatments for intersex people; 4) free access to hormonal treatments and surgeries (without psychiatric supervision); and 5) fight against transphobia, providing education and the social and labor insertion of transsexual people (BENTO; PELÚCIO, 2012, p. 573).

In Brazil, adherence to such a campaign began to multiply as of 2010. According to Bento and Pelúcio (2012, p. 574),

> Among manifestations, the publication of a manifesto and the production of promotional material for the Campaign by the São Paulo Regional Council of Psychology, 12 film shows, debates and seminars at universities, as well as the writing and publication of a manifesto13 signed by activists stand out , teachers / scientists and scientists from different countries that joined the Stop Trans Pathologizantion 2012 campaign.

Still, on the issue of depathologizing transsexuality, some / some activists feared for the loss of conquered rights, as, for example, in Brazil, the guarantee of free access to the transsexualizing process by the Unified Health System (SUS). It is believed that pathologization did not guarantee rights in fact, but imposed a model to think of transsexuality as a catalogable, curable experience. and subject to normalization, and only scientific knowledge is the only one capable of giving correct answers to experiences that challenge gender norms, which, on the other hand, authorizes the protection of the bodies and subjectivities of people who recognize themselves as transsexuals.

In these terms, when we are concerned with ensuring the recognition of the gender identity of subjects who do not if they fit the sexual normativity and their autonomy, we are defending the right to self-determination and to oppose any form of body regulation or the psychologization of the subjects who identify with their anatomical sex opposite to their anatomical sex. In the words of Amaral (2011, p. 88), the pathologization of transsexuality and the setting of medical protocols mean an imposition violence over trans bodies and subjec-

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tivities. Thus, treatment must be available, but psychiatric diagnoses cannot be seen as a condition of access to health or any other right, as all of this represents true authoritarianism and creates a condition of total vulnerability and exclusion for transsexuals.

However, "depathologizing transsexuality does not mean demedicalizing it, but to assist the subject in a regime of informed autonomy in which the main focus is his well-being "(AMARAL, 2011, p. 93-94). Whereas, according to the Spanish sociologist and trans activist Miguel Missé (apud BENTO; PELÚCIO, 2012, translated by the authors, s.p.)

> [...] fighting for depatologization is to defend that our identities are part of diversity and that we have the right to modify our bodies when we decide to do so. Claiming free access to hormones or surgery is the central part of the struggle, not a detail, it is not a second stage of the struggle: it is a struggle in itself.

While some advances and achievements can be glimpsed from the demands of these movements, albeit slow and always provisional. In the most recent of them, it is worth mentioning the positions of the Supreme Federal Court (STF) and the Superior Electoral Court (TSE). The Brazilian Supreme Court has unanimously decided to authorize transsexuals and transgender people to change their name and gender constant in the civil registry without the need to perform sex reassignment surgery (BRASIL, 2018a). The decision was rendered in the judgment of the Direct Action of Unconstitutionality (ADIn) 4275 that occurred on March 1, 2018 (BRASIL, 2018a). The lawsuit was filed by the Attorney General's Office (PGR) "so that Article 58 of the Federal Constitution could be interpreted Law 6.015 / 1973, which provides for public records" (BRASIL, 2018a, sp), in the sense that "it is possible to change the first name and gender in the civil registry through annotation in the original registry, regardless of transgenitalization surgery" (BRASIL, 2018a, sp).

Based on this decision, the National Council of Justice (CNJ) issued on June 23, 2018, Provision No. 73 which "Provides for the registration of the alteration of the first name and the gender in the birth and marriage seats of a transgender person in the Civil Registry of Natural People (RCPN)" (BRASIL, 2018b, s.p.). On August 15, 2018, the STF Plenary also granted Extraordinary Appeal (RE) 670422, applying the understanding already established in the judgment of ADI 4275, in order to "authorize the alteration of the registry civil service of a transgender person, directly through the administrative route, regardless of the performance of a sex reassignment surgical procedure" (BRASIL, 2018b, s.p.).

As for the TSE, this, in a decision made during the plenary session, also on March 1, 2018, guaranteed that transsexual candidates can use the social name in the electronic ballot boxes in the 2018 elections. The decision was made in response to a consultation with Senator Fátima Bezerra, who questioned the participation of male transgenders in the mandatory female quotas for the parties. The elections that took place in October 2018 had "53 candidates from trans people, ten times higher than in the 2014 election when the National Association of Transvestites and Transsexuals (Antra) registered five candidates for positions elective" (CAMPOS, 2018, s.p.). The "Antra survey includes both the applications of trans people who have already rectified their name in a notary's office, as well as those who registered their social name - how transsexuals and transvestites want to be socially recognized" (CAMPOS, 2018, s.p.).

For Maria Berenice Dias (2018, s.p.), analyzing the decisions "There is no other name to define the transformation that the STF has just provoked a significant number of people who just want to have the right to be." She goes on to say that: "When the mirror does not reflect your self, there is no need to change to live. No one else needs to certify changes to live in daylight, to be called the way they identify themselves." (DIAS, 2018, s.p.) For Dias (2018, s.p.) the trials ended up "removing from the segment the most vulnerable of the LGBTI population the stigma of fear, giving them the right to dignity, respecting their differences." Because as Carmem Lúcia said in her vote "the difference in appearance cannot serve as a reason to prevent equalization of all rights, especially the fundamental right to happiness" (DIAS, 2018, s.p.).

However, it was in June 2018 that one of the greatest achievements emerged worldwide related to transsexuals: the depathologization of transsexuality. (WHO, 2018 apud ANTUNES, 2018) When editing the CID-11, the World Health Organization removed transsexuality from the list of mental health problems and reallocated it as a gender incongruity in the category of conditions relating to sexual health (WHO, 2018 apud ANTUNES, 2018), in order to update and standardize the identity of gender. Gender incongruence is defined by the WHO as "marked and persistent incongruence between the gender experienced by the individual and that attributed at birth". (WHO, 2018 apud ANTUNES, 2018, s.p.) In an official note published on its website, WHO justifies that

> The logic is that, while the evidence is clear that [transsexuality] is not a mental disorder, it can in fact cause enormous stigma for people who are transsexual, and therefore there are still significant health care needs that can be met. better if the condition is coded under the CID (apud ANTUNES, 2018, author's translation, sp).

In the same sense, the understanding of the Federal Council of Psychology in Brazil was already presented, according to Resolution No. 1 of 2018, which deals with the performance of psychologists in relation to transsexuals and transvestites (BRASIL, 2018c). According to the resolution, professionals are prohibited from exercising "any action that favors the pathologization of transsexual and transvestite people" (BRASIL, 2018c, s.p.). Still are prevented from taking any action that favors prejudice, including "conversion, reversal, readjustment or reorientation of the gender identity of transsexuals and transvestites" (BRASIL, 2018c, s.p.).

Now what is expected is that the Brazilian Federal Council of Medicine will change its resolution on transsexuality, according to the understanding of the WHO, because at the moment the resolution of 2010 is in force with a still pathologizing position on transsexuality. Recalling that WHO established a deadline, January 1, 2022, for countries to adapt to the new CID-11 determinations. (WHO, 2018 apud ANTUNES, 2018, translation by the author, s.p.).

Finally, to raise the debate on the theme proposed in this article, to understand and seek effective mechanisms to end the pathologization of transsexuality, it is the duty of the State and of post-modern, multifaceted society, which, when reinventing itself daily, needs to look at the pain of the other and thus "raise the flag" of yet another cause, so dear to so many transsexuals who live in the skin. prejudice and social segregation at the moment when they choose to courageously face the transsexualizing process in Brazil.

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4 THE NATIONAL INTEGRAL HEALTH POLICY OF LESBIANS, GAYS, BISEXUALS, SHEMALE AND TRANSEXUALS (LGBT)

The 1948 Universal Declaration of Human Rights represents a milestone in the recognition and affirmation of Human Rights, revealing the universal character of the rights to equality, freedom and dignity, highlighting that there is no “distinction of any kind”, arguing that the reputation, honor and privacy are fundamental to the development of the subjects’ individuality and that, therefore, all human beings have this right. The rights listed in the Universal Declaration of Human Rights refer to the image of a generic, universal being, including, without a doubt, the LGBT population. In this sense, the free exercise of sexuality and the various forms of gender expression are fundamental requirements of “individual freedoms”, ensured in the Declaration highlighted here.

U.S The 1960s and 1970s saw the so-called Sexual Revolution, as well as the advances of the feminist movement and the black movement, which contributed to the fact that many people and socially segregated and stigmatized groups became subjects of policies, as well as health actions. which gained a more inclusive character, that is, according to the promotion and guarantee of human rights.

SUS, which was also created by the Constitution, is based on a set of principles and the first one is universality. This means that everyone is entitled to free access to their health services. It must be comprehensive, that is, it must offer all types of care that people and communities need: from promotion and prevention initiatives and actions to the most specialized. SUS must have the participation of the community, understanding that this is the way in which users express their needs and demands. In order to give concreteness to popular participation, health councils and conferences were created for the exercise of social control, aimed at analyzing and approving health and monitoring guidelines, plans and programs, evaluation and inspection of the management and execution of plans and programs (BRASIL, 2008).

The recognition of homosexuality as a sexual orientation only occurred in the 1970s. The studies of the philosopher Michel Foucault (1926-1984), among others, helped to change the concept of homosexuality, which began to be considered no longer a deviation or disease, but as an element of human sexuality (HEUSELER; LEITE, 2015).

The National Policy for Integral Health for Lesbians, Gays, Bisexuals, Transvestites and Transsexuals, approved by the National Health Council in 2008 and published by Ordinance N°. 2,836, of December 1, 2011, reaffirms that guaranteeing health care is a prerogative of all Brazilian citizens, respecting their specificities of gender, race / ethnicity, generation, affective and sexual orientation and practices, indicating the founding principles of the Unified Health System (SUS): integrality, universality and equity (BRASIL, 2013).

The LGBT Health Policy, through its nine articles, indicates the responsibilities of each sphere of management (federal, state and municipal) for carrying out actions aimed at guaranteeing the constitutional right to health by the LGBT population with quality, care and humanization (BRASIL, 2013).

According to Lionço (2009), the ideal would be cross-cutting initiatives between different health policies, in order to optimize the implementation of health actions already stimulated in SUS according to the specifics of transsexuals, not only between the gender cuts, but also including the issue of health in the prison system, the elderly, adolescents and young people, among others. The identity demand responds to a yearning for recognition, to the detriment of the complexification and qualification of health strategies and actions.

During the presentation of the National Men's Health Policy at the National Health Council, at the end of 2008, the transvestite segment also manifested itself contrary to the insertion of its specificities in this document, revealing that the demand for identity can compromise inclusive initiatives in progress (LIONÇO, 2009).

The challenge of promoting equity for the LGBT population must be understood from the perspective of their specific vulnerabilities, with political and operational initiatives aimed at protecting the human and social rights of these populations. There is a need to combat homophobia in SUS, based on the concept of health by the World Health Organization (WHO), for which the protection of the right to free sexual orientation and gender identity is not only a matter of public security, but also involves, in a significant way issues related to mental health and attention to other vulnerabilities regarding these segments (BRASIL, 2008). In addition, combat homophobia is a fundamental and structuring strategy for guaranteeing access to services and quality of care (BRASIL, 2008).

Facing the complexity of the social determinants of life and health of people and communities requires intervention on social exclusion, unemployment, as well as decent access to housing and food, including the recognition of factors that intertwine, maximizing the vulnerability and suffering of specific groups . In this context, all forms of discrimination, as in the case of homophobia, must considered as situations that produce disease and suffering. On the other hand, it is important to understand that homophobia does not occur in isolation from other forms of social discrimination: it goes hand in hand and is reinforced by machismo, racism, misogyny and other related forms of discrimination (BRASIL, 2008).

The National LGBT Comprehensive Health Policy is an instrument for the Control SUS, and for this purpose, Law 8,142, of December 28, 1990, provides for the formation of Health Councils and Health Conferences, as well as defining that Health Councils are legitimate instruments for the inspection of health policies and have deliberative role, besides representing SUS managers, workers and users. Still according to this law, the three SUS management spheres must prepare health plans and present them to health councils, with the objectives, goals and health actions to be carried out. The Councils can also set up Technical Chambers, Working Groups or LGBT Commissions to monitor, monitor and inspect the execution of the LGBT Health Policy in the three spheres of government. Another important space for social participation and management dialogue with social movements are the LGBT Integral Health Committees (BRASIL, 2013).

With the expansion of the current perspective of comprehensive health care in these Brazilian population segments, it is recognized that sexual orientation and gender identity are much more complex situations and are factors of vulnerability to health. Such recognition is due not only to implying practices specific sexual and social issues, but also because they expose the LGBT population to problems arising from stigma, discriminatory processes and

social exclusion, which violate their human rights, including the right to health, dignity, non-discrimination, autonomy and free development (BRASIL, 2008).

Likewise, the transsexual phenomenon, in the words of Castel (2011), in its version contemporary, reveals a dialectic that after being developed resulted in the creation of a disease, involving disputes and consensus between the various medical specialties - between medicine, social sciences, law and other knowledge, and organized movements. Therefore, it is necessary and urgent to open up possibilities to communicate, debate and dialogue to openly inform about these issues. that directly affect the human rights and citizenship of these subjects.

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5 TRANSEXUAL AND HEALTH: COMMUNICATION IN THE INFORMATION PROCESS FOR CITIZENSHIP AND HUMAN RIGHTS

The subjects' communication with society and the State, within a relationship of rights, obligations and active performance are part of the information process, constituting itself as fundamental for the consolidation of citizenship. Therefore, communication is a process that involves the exchange of information. For Bonavides (2009, p. 7)

> citizenship is the condition of access to social (education, health, security, social security) and economic (fair wages, employment) rights that allows citizens to develop all their potential, including that of participating actively, organized and consciously, the construction of collective life in the democratic state.

To communicate is to inform, from the perspective of citizenship and human rights, as it means first opening gaps and establishing the bridge to be able to then deconstruct, intervene and dialogue about aspects that are obscure and excluding regarding the LGBT population, especially with regard to health. There is a binary gender concept in place that needs to be deconstructed in order to be accepted and understood the various forms of masculinity and femininity that have been constituted socially and culturally. The first positive impact would be the non-direct association of the male and female gender with femininity and masculinity, as femininity is not only used by women or masculinity by men.

Thinking of a communication, which in fact reports to health in this dimension, includes breaks. Today is done communication is needed to break the bonds of old ways of thinking about how human beings can actually exercise their freedom to be what they actually know they are: bodies in which men and women live with their masculinity and femininity and their life stories. However, the world is experiencing a deep crisis of identity, references and representation, in which they gain a voice conservative values that combine with patterns of a binary gender conception spread mechanically by media institutions. These also operate at the level of an internal contradiction of representation of the social fabric, because at the same time that they reproduce conservative values, they open doors to parade, usually in fiction, examples of rupture of these patterns.

What's missing from this communication media is the exercise of its intervention for citizenship, so that the social role of the media is fulfilled, mainly those that are public concession and that must attend the interests of the citizens, in order to provide information that can really contribute to the process consolidation of rights. We still need to intervene to discuss the problems in a more profound way, looking for its root, debating the causes and consequences, listening to the affected citizen, letting him speak with the reason and emotions arising from the issue and not just conveying the point of view of the institution or authority. Communication must be of all to all, distributed, rhizotomic, that is, information that covers everyone. It is not enough, but it is also necessary to do this on the social network over the internet, potentially a more democratic territory, but also controlled and managed by economic groups that are at the tip of the iceberg articulating their interests while coexisting with what Castells understands as mass self-communication that is also a form of power talk about citizens

> the emergence of mass self-communication, as I call the new forms of network communication, increases opportunities for social change, without however defining the content and purpose of this transformation. People, that is, ourselves, are at the same time angels and demons and, therefore, our greatest capacity to act in society will simply openly project who we really are in each context temporal / spatial (CASTELLS, 2015, p. 26).

If communication informs and is an instrument of power, health must also be used to listen and speak. Paulo Freire (1978) speaks of a dialogical communication, Soares (2013) of educommunication and both of a vision of communication related to education. It is not a question of educating for health, but of placing health on the agenda. And when it comes to the health of a vulnerable population such as the transsexuals, this needs to be an issue in the media and an issue at school. But how can this be done, if the school is an institution controlled by a heterosexual majority, which biases the discussion of topics such as sexuality with prejudice? Perhaps it is not yet known how, but it is believed that at this point, the rupture and intervention by communication is a path - the path to and from information. Even with shyness, articulated social movements, journalists, teachers and citizens need to believe in the purpose of building bridges through dialogue or any forms of expression that are inclusive. Through interdisciplinarity between areas, educommunication since the early years of the 21st century is being understood as “a space for collective action, essentially focused on citizenship and beyond logic of the market” (SOARES, 2013, p. 185). It is a communicative ecosystem that results in the production of knowledge based on the understanding of the process and not the result and is potentially able to address the right to information and communication for health.

The right to information applies to health and is a requirement for citizenship and human rights. Access to health information for transsexuals it is as important as seeking equity in the field of health for all citizens. Equity is the right balance between all parties, without distinctions or prejudices, even if an agenda of priorities in the area of health is followed, regarding the type of coverage, breadth and assistance. The debate on these aspects is still superficial, but citizenship will hardly be exercised without the right to information, which must now be guaranteed by the State, now supplied by the mechanisms of information production. The right to health or health information is also a social construction, which takes shape in the set of relations between citizens and their needs, society and the State.

Information is present in communication and refers to a set of data or content that contribute to the subject's understanding, apprehension and questioning their reality. Communication is a broad system or code that allows the understanding of a set of information and also the way in which the information is conveyed. Communication is of the order of human and humanity. It's not the technological medium that produces communication and information. He's just the support. The form is the least important, because what can dominate or promote communication for health is the communication of the citizen to the citizen, the way in which he communicates and if there is space for everyone involved to speak. Authoritarian forms of communication produce incommunication (Wolton, 2010), that is, the absence of communication and popular sovereignty. The process needs to be two-way, sensitive reasoning, empathy, freedom of expression and even counterpower.

A communication that informs, in the paradigm of respect for citizenship and human rights, can begin, for example, with the way in which the doctor deals with transsexual patients in the office: listening to what they have to say, that vocabulary uses, what level of attention is given, how it manifests its non-verbal language (the look, the gestures) and how it conducts and monitors a procedure. Also, the journalist's communication, when dealing with the topic of transsexuality, requires care not only in relation to what he says, but in the forms of treatment and the choice of vocabulary, angle or details of the image, as this professional is reinterpreting a reality and fostering opinion on the topic. Therefore, they are choices that are not merely technical and objective, but of perspectives and paradigms not dissociated from a historical and social context, so they are choices that involve subjectivities (MORAES, 2015). Likewise, the school when it comes to the subject, scientific publications, documentaries, cinema and television promote discourses and arguments about transsexuality and health that can be the hallmarks of an authorized, authoritarian and conservative discourse, failing to contribute to an enlightened public opinion on the topic and to the very integration and inclusion of transsexuals, stimulating their citizenship.

Therefore, opinion-forming bodies, such as the media, the school and, today, content producers and mass self-communication managers have much more than the responsibility to inform, the duty to promote debate, to inquire, question, investigate and intervene through discourse. No speech is naive or disinterested, however, when there is plurality and diversity of discourses, citizenship is more likely to evolve, as something that is always on the move and never runs out. As beings, individuals are constituted by language and, thus, through it they can exercise their citizenship, identities and freedom.

6 FINAL CONSIDERATIONS

The theme of transsexuality is complex and in its relation to health, it is broadened, therefore, the discussions presented in this text integrate part of the concerns of the researchers of the theme and highlight the need for intensifying the debates around the issue, considering not only the inclusion of the transsexual in society, but in access to health and consequently to citizenship.

Thus, the main issues the right to health that significantly affect the lives of transsexuals are related to the process of non-pathologization of transsexuality and the entry of transsexuals in the transsexualizing process of the Unified Health System. Gays, Bisexuals, Transvestites and Transsexuals represents a major milestone in terms of guaranteeing care to health, highlighting health as a fundamental citizen's right. The LGBT Health Policy, through its provisions, indicates the responsibilities of each management sphere, highlighting, essentially, the need to welcome and respect all specificities of gender, race / ethnicity, generation, orientation and affective and sexual practices.

In this scenario, public policies are needed more efficient and informative communication for health and life, which works as a break with what is set in terms of prejudice, providing bridges of information and dialogue in society. The formation of public opinion today is not the responsibility of the media alone, but of a set of forces and powers resulting from tensions and demands between civil society, the State and citizens, whether they are transsexuals or not.

Communication and information for health, not only correspond to the education of society to understand health and its equity regarding the access of different genders, but also to establish criticism, oppose, investigate and make proposals that are in accordance with real problems and society's needs in this area. Promote the progress of this process would be to encourage citizenship and human rights, public participation in health policies for all, providing transsexuals with a sense of belonging and social inclusion. It is considered essential that the theme of transsexuality in its relation to health is present in the media, social networks, school, family and work, so that it is open dialogue, reducing prejudice against gender identities and enabling citizenship for all.

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SYSTEMIC (AND PARALLEL) VIEW OF THE PROCEDURAL PROCEDURES OF THE ADMINISTRATIVE DISCIPLINARY PROCESSES AND ACCOUNTABILITY OF LEGAL ENTITY, BOTH OF THE EXECUTIVE POWER OF MINAS GERAIS

VISÃO SISTÊMICA (E PARALELA) DOS TRÂMITES PROCEDIMENTAIS DOS PROCESSOS ADMINISTRATIVOS DISCIPLINAR E DE RESPONSABILIZAÇÃO DE PESSOA JURÍDICA, AMBOS DO PODER EXECUTIVO DE MINAS GERAIS

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ABSTRACT

The purpose of this article is to present the procedural aspects with respect to the Disciplinary Administrative Process and the Administrative Process for Accountability of Legal Entities, this originating from the

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Anticorruption Law, both from Minas Gerais, with sanctioning aspects and conducted by the Comptroller General of the State of Minas Gerais. These are processes with specific purposes within the scope of the State Executive Branch, with the former assuming to ascertain possible functional responsibilities of a civil servant in Minas Gerais and the latter the harmful acts practiced by legal entities. The intention is to realize a systemic and parallel vision between the institutes, that is, of the Minas Gerais Administrative Disciplinary Process, analyzing concepts and procedures, in relation to the Administrative Process of Accountability of Legal Entities. The methodology will be legal-dogmatic, using the hypothetical-deductive method. The aim is to improve the knowledge of the theme presented, which is fundamental in the fulfillment of rules that must be conducted under the bias of the Democratic State of Law, and which imposes in the administrative headquarters, both for public servants who carry out internal affairs work, as well as in the position of the accused. , in addition to the legal entity processed, including for the respective lawyers, when in technical defense, the knowledge held of such sanctioning processes, for the best performance of each function, at a specific time.

KEYWORDS: Disciplinary Administrative Process. Administrative Accountability Process for Legal Entities. Democratic state. improvement and State Executive Power.

RESUMO

O objetivo do presente artigo é apresentar os aspectos processuais no que tange o Processo Administrativo Disciplinar e o Processo Administrativo de Responsabilização de Pessoa Jurídica, este oriundo da Lei Anticorrupção, ambos mineiros, com aspectos sancionadores e conduzidos pela Controladoria-Geral do Estado de Minas Gerais. São processos com finalidades específicas no âmbito do Poder Executivo Estadual, sendo que no primeiro tem por pressuposto apurar possíveis responsabilidades funcionais de servidor público mineiro e o segundo os atos lesivos praticados por pessoa jurídica. A intenção é realizar uma visão sistêmica e paralela entre os institutos, isto é, do Processo Administrativo Disciplinar mineiro, analisando conceitos e trâmites, com relação ao Processo Administrativo de Responsabilização de Pessoa Jurídica. A metodologia será a jurídica-dogmática, utilizando o método hipotético-dedutivo. Busca-se aprimorar o conhecimento do tema apresentado, fundamental no cumprimento de normas que devem ser conduzidas no viés de Estado Democrático de Direito, e que impõe em sede administrativa, tanto para servidores públicos que exercem trabalhos de corregedoria, bem como na posição de acusados, além de pessoa jurídica processada, inclusive para os respectivos advogados, quando em defesa técnica, o saber detido de tais processos sancionadores, para o melhor desempenho de cada função, em momento específico.

PALAVRAS-CHAVES: *Processo Administrativo Disciplinar. Processo Administrativo de Responsabilização de Pessoa Jurídica. Estado Democrático de Direito. aprimoramento e Poder Executivo Estadual.*

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1 INTRODUCTION

This article proposes a brief analysis of the procedural steps related to the administrative disciplinary process and the process of liability of legal entities, both of which originate from the anti-corruption law, and are executed in the Executive Branch of Minas Gerais.

For this purpose, a study of each institute was propose, presenting concepts and procedures, through a parallel view between them.

The method used will be deductive, based on research and bibliographic review, based on doctrinal, institutional and jurisprudential positions.

In conclusion, the importance of the systemic knowledge of such processes for the improvement of the performance, being it of the server or manager, as well as of the defender of an individual or legal entity that is accused in the correctional sphere in Minas Gerais will be sought.

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2 PROCEDURAL ASPECTS OF THE ADMINISTRATIVE DISCIPLINARY PROCESS (PAD)

The administrative disciplinary process is an accusatory process, where the Public Administration has the competence to investigate possible authorship and materiality of functional irregularity.

No disciplinary penalty to public servants of Minas Gerais can be dispensed with administrative disciplinary process. It is not conceivable to the Public Administration, through the Democratic Rule of Law, to impose administrative measures that will provide consequences in the functional life, without the server manifests itself or defends itself previously. In this sense, Sérgio Ferraz and Adilson Abreu Dallari:

> The general rule is that no decision should be adopted without the competent and adequate administrative process [...]. [...], has multiple purposes: to guarantee respect for people's rights, to improve the content of administrative decisions, to ensure the effectiveness of decisions, to legitimize the exercise of public prerogatives, to ensure the correct performance of administrative activities, to get closer to the ideal of justice, to reduce the distance between the Administration and citizens, to systematize administrative actions, to facilitate the control of the Administration and to provide for the effective application of the principles that govern administrative activity. (FERRAZ; DALLARI, 2001, p. 121)

Conceptually, according to the teachings of José Armando da Costa, PAD is "[...] the series of procedural acts[3] which, formalized in obedience to certain rituals outlined by the

3 According to André Cordeiro Leal: "Fazzalari, by proposing a logical distinction between process and procedure (based on the attribute of the contradictory, a characteristic that distinguishes process and procedure), also develops a theory of provision as the resultant of the action of the process. For the distinction it comprises, it uses the contradictory as a special attribute of the process, an attribute that would allow tracing the demarcation line of the specific characteristics of the process within the gender procedure. [...]" (LEAL, 2008, p. 113)

norms and other sources of Law, propose to ascertain the real truth of the facts [...]" . (COSTA, 2004, p.151)

In another work, the same author states that:

> N In our Positive Disciplinary Law the ordinary disciplinary process is the most formal and demanding. Such procedure [...] is governed by the constitutional principles of due process, contradictory, broad defense and human dignity, among others. (COSTA, 2008, p. 489)

Léo da Silva e Alves provides that: "The disciplinary process, in turn, is the due legal process to examine the responsibility of the agent, from the comparison between the accusation and the defense". (ALVES, 2004, p. 29)

The aforementioned author also states that "[...] is the specific process for assessing the server's responsibility for the collection of evidence of functional misconduct. [...]" (ALVES, 2012, p. 21)

Egberto Maia Luz clarifies that "[...] which is intended solely and exclusively for the investigation of the misconduct of the public servant [...]" (LUZ, 1999, p. 181)

According to José dos Santos Carvalho Filho,

> [...] is any person whose object is the determination of a functional irregularity and, when applicable, the application of the respective sanction,whatever the expression adopted to denominate it.
>
> This is the administrative litigation, accusatory and definitive process that requires the application of the principle of ample defense and contradictory, and due legal process. This, and only this, allows the administrator to apply the appropriate penalty at the end when the occurrence of a functional infraction has been effectively verified. (CARVALHO FILHO, 2007, p. 850)

The power-duty to initiate administrative disciplinary proceedings arises from the imperative of the observance of a set of rules regarding duties and obligations contained in the Minas Gerais State Public Servant Statute, the State Law no. 869/52 (MINAS GERAIS, 1952), which imposes positive behavior and abstentions, delimiting the functional conduct of public servants in relation to the current legal order. The administrative process, including the disciplinary one, is also assured in art. 41, paragraph 1, item II of the 1988 Constitution.[4] (BRAZIL, 1988)

Regarding to disciplinary failure is that in which the public servant, in the exercise of his functions, by action or omission exercises a functional behavior contrary to what is required of the activity of the Public Administration.

If there is a violation of functional conduct, it is the duty of the authority to know the fact and take the measures for its investigation[5], which may still have effects, eventually, of damage to public funds. In this sense, the purpose will be to confirm the possible authorship, through the materiality and extent of the damage presented, if the latter exists. The effects may occur in the disciplinary field (penalty), with possible extension in the criminal, when it

4 "II - by means of an administrative process in which it is assured a broad defense; (Included by Constitutional Amendment no. 19, of 1998)". (BRAZIL, 2020)

5 Article 218 of the Minas Gerais State Law 869/52, which provides so: "The authority that has knowledge or news of the occurrence of irregularities in the public service is obliged to promote the immediate investigation by means of summaries, investigation or administrative process". (GENERAL MINES, 2020)

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will be the maximum authority to give notice to the Public Prosecutor, which will assess its receipt. It is reserved the compensation of the damage to the public treasury to the scope of Special Account Taking, a specific process for this purpose[6] and not the correctional, which does not prevent the server so processed in PAD, by spontaneous will, even to obtain the benefit of the TAD, if possible.

The administrative disciplinary process of Minas Gerais State is carried out in three phases: initiation, instruction and trial. The intention is to stick to the PAD intended for civil servants, as the military has its own regulations.

The commencement of the administrative disciplinary process is the responsibility of the Chief Executive according to art. 83 of the State Constitution (MINAS GERAIS, 1989); the Comptroller General of the State of Minas Gerais, according to item IV of art. 2 of Decree No. 47. 774, of December 3, 2019 (MINAS GERAIS, 2019); the highest authorities of the organs and entities of the State Public Administration, pursuant to art. 219 of Law no. 869/1952 (MINAS GERAIS, 1952), and those who received specific delegation for the act.

The process, currently, is through the Electronic Information System - SEIMG in accordance with the contents of the State Decree No. 47,228 of August 4, 2017 (MINAS GERAIS, 2017), which provides for the use and management of documents within the scope of the Executive Branch of Minas Gerais.

As the process is developed in the Entities or Bodies of direct administration, the documents are forwarded to the Controller-Sectional or Sector respectively, which will make it possible to forward them to the respective Nucleus of Administrative Correction (Nucad). As previously mentioned, the Expedient Evaluation (admissibility judgment) will be elaborated, which will be directed to the Organ or Entity's holder to dispatch the opening of the procedure, which in this case is the PAD. At this moment, in addition to the evaluation as to the correlation of the initial evidence to the possible functional irregularity, it is also concerned with verifying if the fact is not prescribed and about the existence of possible damage to the treasury. As for the prescription, it is of utmost importance to conduct the prior assessment under this approach, in order to comply with the principle of legal security [7].

The Disciplinary Power, as one of the powers of the Public Administration, although it seems to be the prerogative of the administration, must conform to the other rules and principles contained in the legal system in force, being essential its observance in a Democratic State of Law [8].

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6 See the Special Accounts Manual of the Comptroller General of the State of Minas Gerais. Available at: http://cge.mg.gov.br/phocadownload/manuais_cartilhas/pdf/manual-de-tce.pdf . Access on: May 9, 2020.

7 The counting of the term begins with the knowledge of the maximum authority of the Body or Entity, in the State of Minas Gerais, according to art. 218 of State Law 869/52. According to the CGE/MG's Manual for the Investigation of Crimes, the "[...] date of knowledge of the facts by the competent authority to initiate the disciplinary administrative proceeding. Such positioning is consolidated in the text of Technical Note no. 07/2015 [...]" (MINAS GERAIS, 2020, p.143). The prescription period will be according to the possible penalty to be applied: two years and 150 days for reprimand and suspension; four years and 150 days for resignation from office and five years and 150 days in case of dismissal and resignation in the public service. The request must be made by the interested party. There are two forms of prescription: from the knowledge of the fact to the publication of the ordinance of PAD, when it is interrupted, i.e., it starts from scratch (retroactive, example, two years plus 150 days, art.223 c/c art. 229 of Law 869/52) and from the instauration of the works by the publication of the inaugural ordinance until the conclusion (intercurrent, example, two years and 150 days, art.223 c/c art. 229 of Law 869/52). This control also serves for the inquiry. Under the terms of the 1988 Constitution, art. 37, § 5, the damage caused to the treasury is indefeasible. The State of Minas Gerais follows this understanding.

8 Article 5, Subsection LXXVIII of the Federal Constitution: "all, in the judicial and administrative sphere, are assured of the reasonable duration of the process and the means that guarantee the speed of its processing. (Included by Constitutional Amendment no. 45, of 2004)" (BRAZIL, 2020)

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After this decision by the holder of the Organ or Entity to open the process, Nucad will prepare the draft of the Ordinance, which will contain three effective servants, when one will be appointed to preside over the work, the name of the defendant, his admission, position held, Masp, irregular conduct (in thesis) and the related legal provision, and stipulating the initial period of sixty days for its conclusion, which may be extended for a further thirty days, in accordance with articles 221 and 223[9] of State Law 869/52. (MINAS GERAIS, 1952)

Once the extract from the inaugural ordinance of PAD has been published, the head of Nucad provides the electronic performance of the process and directs it to the designated Commission, within three days[10] of the publication of the inaugural ordinance, according to art. 223 of State Law 869/52 (MINAS GERAIS, 1952).

After receiving the process by the Commission, there will be the appointment of the secretary (a) and the opening of the works. At that moment, the instruction phase is passed.

Once the process is in order, containing all the information and evidence that led to the opening of the instruction, the Commission will cite[11] the servant being processed so that he or she may be aware of the facts imputed to him or her, and may appoint a lawyer, present an initial defense, with documents and a list of witnesses, within ten days, in accordance with the sole paragraph of art. 224 of State Law 869/52. (MINAS GERAIS, 1952)

The term will be counted in calendar days, when the starting day is excluded and the expiration day is included, extending to the first following business day the term due in a day when there is no workday, in view of article 280 of State Law 869/1952. (MINAS GERAIS, 1952)

If the previous defense is presented, the attorney's power of attorney, with the respective registration in the Electronic Data System - SEIMG, the Commission will seek an order on any preliminary defendant, informing the server and the respective attorney. While the process is in order, the witnesses' testimonies will be scheduled, heard first at the request of the Commission, if there is any, and then enrolled by the processed server. Taking all the neces-

9 As a matter of curiosity, in the administrative inquiry ordinance, the commission may have one or more employees, not necessarily stable, and with an initial term for the conclusion of their work of thirty days, which may be extended for another thirty days, according to art. 220, § 2 of State Law 869/1952. (MINAS GERAIS, 2020)

10 The extrapolation of the time limit for the assessment and the renewal of the works, in addition to that stipulated in the State Law of 869/52, do not result in the nullity of the process. The important thing is to register the justification, should it occur.

11 " In State Law no. 869/1952, reference is made to default in art. 226, which provides, as already stated, that, in case of default, "an official shall be appointed, 'ex-officio', by the president of the commission to be in charge of the defense". [...] .
[...]
The defense presented by a professional registered with the OAB is not considered inept, since there is a presumption that it presents minimal elements to be considered a technical defense.
[...]
It is understood that, since state law is silent on this issue, in order to guarantee the contradictory and broad defense, the understanding is adopted that the accused should be appointed as a defense when he does not present a defense and, when he does, it is considered inept.
[...]
In summary, the appointment of a dative or ad hoc defender when the accused or his or her attorney has been duly summoned to the act shall not be appropriate. For reasons of reasonableness and in order to ensure contradictory and broad defense, the accused shall be appointed a counsel who is technically and financially incapable of defending himself or herself and in cases where the defense is considered inept, provided that the accused declares this hypossufficiency in the records [...].
[...]
According to the understanding of the General Inspectorate of the CGE-MG in the Manual of Determination of Administrative Crimes, in order to guarantee a broad defense to the accused, the defense should preferably be a bachelor in Law, according to the understanding expressed in the Opinion of Extraordinary General Meeting no. 15.409/2014. Except for that, no other quality is required from the defense of the accused, since there is no express requirement in the law. [...]." (MINAS GERAIS, p. 293-297)

sary depositions, the processed server will collect its statement. In all these procedures, the presence of the attorney is mandatory, and the presence of the server is only allowed in the testimonies of witnesses.

Once the instruction is closed, the Committee will meet to evaluate the instruction of the process, to take a position on whether or not to prepare the indictment order, and if issued, the servant and his attorneys will be summoned to have knowledge of it and present the final defense in ten days, according to the delineation of the articles charged and the respective penalties.

Once the final defense is received, the Commission will evaluate the case files and prepare its conclusive (final) report, in accordance with the integrality of art. 127 of Minas Gerais State Law 869/52 (MINAS GERAIS, 1952), suggesting acquittal; dismissal; penalty, as well as measures that could improve the public service related to the PAD's object.

It will follow the reports to the Administrative Correction Center, which, together with the Sectorial or Sectional Controller, will issue the Technical Note, with recommendations. After such procedure, the records will be sent to the holder of the Body or Entity for decision in sixty days, in accordance with art. 229 of Minas Gerais State Law 869/52. (MINAS GERAIS, 1952)

The decision may be based on the suggestions contained in the Final Report, the recommendations of the Technical Note, but has the autonomy to disagree with both, with their reasons as to legality and administrative merit, according to the

> [...] principle of motivated free conviction, the judging authority may deviate from the report produced by the commission if it considers it contrary to the evidence produced. In this case, the authority may, with good reason, aggravate the proposed penalty, soften it or exempt the servant from responsibility. (MINAS GERAIS, 2020 , p. 309)

The decision will be published in the Official Press of Minas Gerais, within eight days, pursuant to art. 231 of Minas Gerais State Law 869/52 (MINAS GERAIS, 1952). When a penalty is applied, the server may submit its Reconsideration Request, within ten days, which must also have its decision published by the Official Press of Minas Gerais.

At any time, the State Governor may request a review of the process, according to art. 235 of Minas Gerais State Law 869/52, "[...] provided that facts or circumstances are presented which may justify the innocence of the accused (MINAS GERAIS, 1952).

The issue regarding the procedural process is as relevant as knowing how to consider the suggestion of a penalty to be presented by the Commission, in the final result of the work.

When the Commission prepares its Final Report, what is kept in mind is whether the defense arguments and evidence contained in the case file may disregard the authorship and materiality that, in thesis, were imputed to the server. In the Democratic State of Law, it is essential to exercise the principles of contradictory and broad defense, as well as non-surprise, in administrative disciplinary proceedings, paying special attention to the latter principle after the indictment.

With the dispatch of indictment, the Commission will evaluate the correlation of the possible irregular conduct of the servant to the conduct performed, which may be directed to the duties, obligations and prohibitions, according to articles 216, 217, 246, 248, 249 and 250,

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all of the Minas Gerais State Law of No. 869/52[12], with the possible penalties contained in articles 244 and 245, of the same normative body, and from this individualization the defense will present the final arguments. (MINAS GERAIS, 1952).

Once this is done, the suggestion of closing the lawsuit will have as a guideline to verify if the conducts said by irregularities and imputed in the indictment dispatch are proceeding or not, in accordance with the probative set assessed until the closing of the instruction and with the arguments presented in final defense.

The penalties are those set forth in art. 244, observing in the case of reprimand or suspension the integrality of art. 245, provisions contained in the Minas Gerais State Law 869/52. For this purpose, the gravity of the irregularity will be observed; that of the accused servant's intention to carry it out or of the procedures that he or she has operated that could discredit it; the servant's functional history, as well as if he or she is a recidivist[13] in PAD and the issue of damage to the treasury as a result of this conduct, which may also have consequences outside the administrative scope, when the maximum authority should be suggested to send the information to the Public Prosecution Service or another Body or Entity that may have an interest in knowing the facts (MINAS GERAIS, 1952).

3 PROCEDURAL ASPECTS OF THE LIABILITY PROCESS FOR LEGAL ENTITIES (PAR)

In the correctional area, in addition to administrative disciplinary proceedings against public servants, there are administrative proceedings for the liability of legal entities (PAR).

The Minas Gerais State Comptroller's Office's Manual of Administrative Offenses provides this:

> Within the scope of disciplinary procedures, which establish functional illicit practiced by public agents, the participation of legal entities in the irregularities may be verified. Thus, in the admissibility court (preliminary analysis) or in the course of disciplinary procedures (administrative unions, preliminary

12 “Furthermore, it is pointed out that the indictment is based on de facto accusations and the accused if defends against its imputation and not against the legal framework. Thus, in the act of judgment, the competent authority is free, if it deems it necessary, to adjust the legal definition and change the legal framework of the conduct, including judging to aggravate the penalty to be applied.
[...] .
Therefore, considering the evidence in the records, it is admitted that the judging authority decide in a different direction from that pointed out in the conclusions of the commission, as long as it does so motivation and according to the evidence in the file.
[...].” (MINAS GERAIS, 2020, p.310)

13 The recurrence ends with the adoption of administrative rehabilitation. Article 253 of the Minas Gerais State Law 869/52 provides so: “[...]
§ Paragraph 2 - The employee may request administrative rehabilitation, which consists in the removal, from the functional records, of the annotations of the reprimand, fine, suspension and dismissal sentences, observing the course of time so established:
1 - three (3) years for sentences of suspension ranging from sixty (60) to ninety (90) days or dismissal from office;
2 - two (2) years for sentences of suspension between thirty (30) and sixty (60) days;
3 - one (1) year for sentences of suspension from one (1) to thirty (30) days, reprimand or fine.
§ Paragraph 3 - The terms referred to in the previous paragraph shall be counted from the full compliance with the respective penalties». (GENERAL MINES, 2020)

> investigations and disciplinary administrative proceedings), the employees must pay attention to the involvement of these private entities in the illicit acts to recommend and/or promote the due forwarding. (MINAS GERAIS, 2020, p. 321)

That is why it is important to study the regulations that deal with the matter pertinent to accountability process of legal entities[14], even when acting in the correctional scope directed to Minas Gerais public servants.

The Federal Law of August 1, 2013, No. 12,846, presents the initial guidelines regarding the "administrative and civil liability of legal entities for the practice of acts against the public administration, domestic or foreign", with a view to objective liability, in view of the event of harmful acts listed in its Article 5[15], and may also, by exception, reach its partners in a subjective manner. These are independent responsibilities (BRAZIL, 2013).

Considering the list presented in the mentioned article 5, there is not the tried form[16], as well as the denomination of public agent, foreign public administration and its assimilation to international public organizations[17].

It should be noted that the fight against corruption, under the terms of Federal Law 12846/13, is not restricted to the federal sphere, through the Comptroller General of the

14 As provided for by the CGE/MG, through its General Inspectorate: "The Corporate Anti-Corruption Law provides for the administrative and civil liability of legal entities for the practice of acts against the Public Administration, whether domestic or foreign. Its enactment represents a normative framework to fight corruption and protect administrative morality, presenting a new paradigm in the relationship between the public and private sectors". (CGE/MG, 2020, p. 321)

15 Law 12846/13, art. 5: "For the purposes of this Law, all acts performed by the legal entities mentioned in the sole paragraph of art. 1, which violate the national or foreign public patrimony, the principles of public administration or the international commitments assumed by Brazil, as so defined, constitute harmful acts to the public administration, national or foreign:
I - promise, offer or give, directly or indirectly, undue advantage to a public agent, or the third person related to it;
II - prove, finance, sponsor or in any way subsidize the practice of illicit acts foreseen in this Law;
III - proven to use the interposition of an individual or legal entity to hide or hide their real interests or the identity of the beneficiaries of the acts performed;
IV - regarding biddings and contracts:
a) frustrate or fraud, by adjustment, combination or any other expedient, the competitive nature of a public bidding procedure;
b) prevent, disturb or defraud the performance of any act of public bidding procedure;
c) reject or seek to reject a bidder, by means of fraud or offering an advantage of any kind;
d) defrauding a public bid or contract arising out of it;
e) creating, in a fraudulent or irregular manner, a legal entity to participate in a public bid or to enter into an administrative contract;
(f) fraudulently obtaining an advantage or undue benefit from modifications or extensions of contracts entered into with the public administration, without authorization by law, in the act convening the public bid or in the respective contractual instruments; or
g) manipulate or fraud the economic-financial balance of contracts celebrated with the public administration;
V - hinder the investigation or inspection activity of organs, entities or public agents, or intervene in their performance, including in the scope of regulatory agencies and inspection organs of the national financial system.
[...]". (BRAZIL, 2013)

16 José Anacleto Abduch Santos, Mateus Bertoncini, Ubirajara Custódio Filho clarify: "The attempt may constitute a typical administrative fact, provided it is expressly provided for by law. The harmful acts (typical facts) that may be sanctioned based on Law 12.846/2013 are those listed exhaustively in art. 5. The legislator did not want to typify the attempt. It must be concluded, then, that the infractions legally foreseen do not admit the tempted form. The norm contained in inc. III under analysis assigns the possibility of attenuating or aggravating the sanction depending on whether the infraction has been consummated or not". (SANTOS, BERTONCINI and CUSTÓRIO FILHO, 2014, p.183)

17 Article 5 of Law 12.846/13: "[...]. § Paragraph 1. Foreign public administration is considered to be the state organs and entities or diplomatic representations of a foreign country, of any level or sphere of government, as well as the legal entities controlled, directly or indirectly, by the public power of a foreign country.
§ 2 For the purposes of this Law, international public organizations shall be deemed equivalent to foreign public administration.
§ 3º For the purposes of this Law, a foreign public agent is considered to be any person who, even if temporarily or without remuneration, holds office, employment or public function in organs, state entities or diplomatic representations of a foreign country, as well as in legal entities directly or indirectly controlled by the public power of a foreign country or in international public organizations».

Union[18] (BRAZIL. 2013). According to the authors Luiz Francisco Mota Santiago Filho and Louise Dias Portes, with Matheus Cunha as reviewer,

> And, in fact, Law no. 12.846/2013 does not condition its immediate application to its regulation, but to do so seems to us an essential provision for legal security and the guarantee of due legal process. In the scope of states and municipalities, the regulation is necessary to establish criteria of internal competence, such as which bodies are responsible for investigating infractions, applying penalties and negotiating leniency agreements, as well as establishing criteria for dosimetry of sanctions and procedural rules (e.g. deadlines, possibility of appeals, production of evidence, etc.). They may also establish requirements and evaluation parameters for Integrity Programs to mitigate possible sanctions. (SANTIAGO FILHO, PORTES, CUNHA, 2018, p.3)

In the State of Minas Gerais, in the scope of the State Executive Branch, the subject pertinent to the PAR was regulated by the State Decree nº 46.782/2015 and brought in its normative body characteristics that define and proceed (MINAS GERAIS, 2015), as will be discussed below.

Finally, it is noted that the sphere of responsibility of the legal entity includes the Preliminary Investigation, which will subsidize the decision of the Comptroller General for the establishment of the PAR or the filing of the file. It is confidential and not punitive. It is regulated by art. 4 of State Decree No. 46.782/2015. (MINAS GERAIS, 2015)

The Administrative Process for Liability of Legal Entities in Minas Gerais State area is regulated by State Decree No. 46.782/2015[19] (MINAS GERAIS, 2015), a norm published in the Official Press on June 24, 2015 and amended by Decree No. 47.752 of 12/11/2019, in force from 12/12/2019. (MINAS GERAIS, 2019).

The purpose of PAR is to ascertain possible harmful acts performed by a legal entity to the State Public Administration, in accordance with the conducts described in Article 5 of Law 12.846/13 (BRAZIL, 2013).

Within the Executive Branch, the Comptroller General of the State of Minas Gerais (CGE/MG) is in charge of the highest authority of the Comptroller General, pursuant to article 2 of State Decree 46782/15 (MINAS GERAIS, 2015). This means that it is not for the agencies or the indirect entities that make up the state agency to deal with the matter pertaining to the PAR.

What happens is that, many times, it is possible in SAI or PAD to verify signs of occurrence of acts consistent with art. 5 of Law 12.846/13 (MINAS GERAIS, 2013). It is also possible for the Irregularity Investigation and Penalty Indication sector to verify the non-fulfillment

18 States/regulations that regulated the execution of Law 12846/13, data collected until 29/01/2018: Tocantins: Decree nº 4.954/2013; São Paulo: Decree nº 60.106/2014; Paraná: Decree nº 10.271/2014; Goiás: Law nº 18.672/2014; Espírito Santo: Decree nº 3.727-R/201411; Rio Grande do Norte: Decree nº 25.177/2015; Minas Gerais: Decree nº 46. 782/2015; Maranhão: Decree nº 31.251/2015; Federal District: Decree nº 37.296/2016; Mato Grosso: Decree nº 522/2016; Alagoas: Decree nº 48.326/2016; Mato Grosso do Sul: Decree nº 14.890/2017; Santa Catarina: Decree nº 1.106/2017; and Pernambuco: Law nº 16.309/2018; Rio de Janeiro: State Law nº 7.753/2017 and Decree nº 46.366/2018; Federal District: Law nº 6.112/2018. "It is highlighted that the state of Amazonas, in spite of not having regulated the Anticorruption Law in the scope of the state executive power, counts with a resolution of the Court of Justice12 that establishes regulatory procedures for its execution and, in the state of Rio Grande do Sul, there is a provision of the Attorney General of Justice13 that regulates the Anticorruption Law in the scope of the Public Ministry". (FILHO; PORTES e CUNHA, 2018, p.4-5)

19 In its Article 1 provides: "Article 1 This Decree regulates, within the scope of the Public Administration of the State Executive Power, the Administrative Process of Accountability - PAR -, provided for in Chapter IV of Federal Law No. 12.846, of August 1, 2013, which provides on the administrative and civil liability of legal entities for the practice of acts against the public administration, domestic or foreign. (MINAS GERAIS, 2015).

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of a contractual clause that may give rise to the occurrence of acts corresponding to the mentioned article of the Anticorruption Law, when evaluating the procedure. In both cases, the matter and respective evidences are directed to the CGE/MG.

The PAR includes the following phases: admissibility judgment; initiation; instruction and judgment.

According to State Decree 46782/15, article 3, the Controller General "upon becoming aware of the possible occurrence of an act that could harm the State Public Administration, in the admissibility court and by means of a reasoned order" (MINAS GERAIS, 2015) will decide to continue the investigations, in the preliminary investigation modality, considering that that fact requires further clarification; to initiate the Administrative Accountability Process (PAR) or to file the analyzed facts.

Giving continuity to the study of the Decree Anticorruption of Minas Gerais, in its Article 4 clarifies what is the preliminary investigation, which is intended for a confidential procedure, not punitive and with investigative character, when will determine the materiality and possible authorship. Considering that this is a procedure of an inquisitive nature, it is initially salutary that the authorship should be based on contradictory and broad defense in the PAR, at an opportune moment.

In this case, since it is possible to indicate the materiality and possible authorship, the verification that has a legal term of thirty days (§1 of art. 4), "[...] the pieces of information obtained will be sent to the State Controller General, accompanied by a conclusive report about [...] acts harmful to the State Public Administration, for a decision on the establishment of the PAR" (§2 of art. 4) (MINAS GERAIS, 2015).

The instauration ordinance will consist of three stable servants, one of whom will be appointed to preside, such request being irrefutable. It will mention the name of the body or entity, the facts that will be ascertained, as well as the name of the legal entity and, if any, the CNPJ of the legal entity. This ordinance is published in its entirety and, in the course of the investigations, if there are other facts not mentioned in it, they may integrate the investigation without the need to add or complement the act of establishment, as long as guaranteed to the broad defense and contradictory. This fact will be mentioned in the ordinance in leniency agreement. These criteria are established in the body of Article 5 of State Decree No. 46.782/15 (MINAS GERAIS, 2015).

When the Comptroller General "in the event of evidence of serious damages [...], he may, as a precautionary measure and on a reasoned basis, order the suspension of bidding procedures, contracts or any administrative activities and acts related to the subject matter of the PAR, until their conclusion," pursuant to article 6 of State Decree 46782/15 (MINAS GERAIS, 2015).

The maximum authority of the agency or entity having knowledge of harmful acts provided for in article 5 of Federal Law No. 10846 of 2013 (BRAZIL, 2013), by means of denunciations, representations and occurrences, must make the State's Comptroller General aware of such involvement, and in the event of disobedience to such command, it may be subject to civil, criminal and administrative liability, pursuant to article 7 of State Decree No. 46782/15 (MINAS GERAIS, 2015).

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The instruction begins with the filing of the lawsuit. According to State Decree No. 47,222 of July 26, 2017 (MINAS GERAIS, 2017), which regulates Law No. 14,184 of January 31, 2002 (MINAS GERAIS, 2002), the PAR will be developed in the electronic media.

This notice shall contain all evidence and proofs already produced which, in thesis, are considered as harmful acts to the State Public Administration. However, the Commission is not prevented from carrying out the necessary steps, with impartiality and independence, in accordance with articles 8 and 9 of State Decree 46782/15 (MINAS GERAIS, 2015).

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Following the progress of the action, notification will be provided to the legal entity, containing the information listed in clauses I to VIII of paragraph 1 of art. 10 of State Decree No. 46.782/15 (MINAS GERAIS, 2015). If it is not effective, the notification will be published in the Official Press of Minas Gerais. In both cases, the legal entity will have thirty days to defend itself, when it will be able to present all the evidence admitted in court, being allowed its technical defense, according to articles 10 and 11 of State Decree 46.782/15 (MINAS GERAIS, 2015).

The Commission will evaluate, in a substantiated manner, the request as to the production of evidence, stipulating a deadline for doing so. The defense witnesses presented by the legal entity must appear independent of subpoenas and under penalty of exclusion, in hearings to be designated by the Commission. The Commission may, on a reasoned basis, reject evidence that is unlawful, deflatory, impertinent, unnecessary and untimely. Furthermore, having added new documents, the Commission will open for the manifestation of the legal entity in five days, according to articles 11 to 15 of the State Decree no. 46.782/15. (MINAS GERAIS, 2015).

Once the instruction phase is over, the Commission will issue the Preliminary Report containing the requirements of I to VI of article 16 of State Decree 46782/15 (MINAS GERAIS, 2015).

The analysis of "[...] information and documents relating to the existence and operation of an integrity program [...]" presented in defense will be verified by the Commission in the criteria of Chapter IV of Federal Law no. 12,846/2013 (BRAZIL, 2013), which deals with judicial accountability, "[...]. ...] for the dosimetry of the sanctions to be applied" and if there are facts that may be ascertained in PAD, the facts will be inserted in the preliminary report, in accordance with paragraphs 1 and 2 of art. 16 of State Decree 46782/15 (MINAS GERAIS, 2015).

Before preparing the final report, the Commission will summon the legal entity to present its final allegations within ten days, pursuant to article 17 of State Decree 46782/15[20] (MINAS GERAIS, 2015). The commission will have one hundred and eighty days to issue the final

20 Article with wording given by art. 9 of Decree nº 47.752, of 12/11/2019, in force from 12/12/2019. Before the amendment, in art. 19 it prescribed that: "Before deciding the process, the State Controller General shall summon the legal entity to present final allegations within ten days". This means that AGE/MG would manifest the legal entity consecutively before the decision of the Comptroller General of the State of Minas Gerais (MINAS GERAIS, 2020).

report, according to the sole paragraph of art. 17 of State Decree 46782/15 (MINAS GERAIS, 2015).

Afterwards, the process will be forwarded to the Attorney General of the State of Minas Gerais for manifestation within twenty days, and may be extended for the same period, according to the complexity of the ascertainment. From the analysis of the Extraordinary General Meeting, the records will be sent directly by this Entity to the Comptroller General for judgment, pursuant to article 17-A of State Decree 46782/15 (MINAS GERAIS, 2015).

According to the facts and grounds, the decision will be issued within thirty days, and may be extended considering the complexity of the matter, in the specific case. If the decision is condemnatory, the body of the statement of solution to be published shall contain, among other elements, the name of the body or entity, the name or corporate name of the legal entity, its respective CNPJ number and a summary of the violations practiced under Federal Law No. 12,846 of 2013, presenting the applicable legal provisions (BRAZIL, 2013).

The Comptroller General may comply with the decision and, if contrary to the evidence in the records, may aggravate the penalty, reduce it or exempt the legal entity from liability. The Comptroller may also close the case file if a conclusive report shows that the company has not committed an infraction. If there is an irreconcilable procedural act, total or partial, he will return the records and appoint another commission. The outdated judgment does not generate nullity, all these commands are contained in articles 20 to 23 of State Decree 46782/15 (MINAS GERAIS, 2015).

The legal entity will be notified of the decision and may appeal within ten days. If the Comptroller General does not reconsider the decision, the case records will be forwarded to the Board of Appeals for Administrative Suits of Accountability - JRPAR[21], for review and decision, and a collegiate body will be established to review such judgment specific, according to articles 24 to 29, all of the State Decree 46782/15 (MINAS GERAIS, 2015).

Decree 46782/15, articles 27 of the state decree state the disregard of the legal entity. This happens when, before the issue of the final report, the Commission finds that the managing partners or those with management powers acted in accordance with article 14 of

21 Article 26, §1: "JRPAR is composed of the following members:
I - State Attorney General, who presides over it;
II - General Consultant of Legislative Technique;
III - Secretary of State for Finance;
IV - Secretary of State of Government;
V - Secretary of State for Planning and Management.
§ 2 - The AGE will provide administrative support for the functioning of JRPAR.
§ 3º - The Attorney General of the State, or attorney-in-fact, delegated by him, will schedule and preside over the sessions of JRPAR.
§ 4º - In the previously scheduled judgment sessions, the holders of the rights referred to in § 1º may delegate, in a justified manner, the server of their agency, the competence to pronounce the vote on preliminary and merit issues.
§ 5 - Judgments shall be public and made in ordinary or extraordinary sessions, observing the following work order:
I - verification of the number of incumbents present and, if there is a quorum of absolute majority, opening session;
II - judgment of the proceedings included in the agenda by the vote of the majority of those present;
III - presentation of indications and proposals;
IV - conference and signature of judgments.
§ Paragraph 6 - The State›s Attorney General shall only vote in case of a tie.
§ 7 - The appeal shall have suspensive effect and shall be judged within thirty days, extendable for an equal period, according to the complexity of the cause and the other characteristics of the specific case.
§ 8 - Once the PAR is closed, the final decision will be published in the Official Gazette of the State of Minas Gerais, and the Public Prosecutor's Office will be informed of its content in order to determine any illegality, including the individual responsibility of the legal entity's officers or managers, or any natural person, author, co-author or participant". (MINAS GERAIS, 2015)

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Federal Law no. 12,846/13, that is, with "[...] abuse of the right to facilitate, cover up or conceal the practice of illicit acts provided for in this Law or to cause patrimonial confusion [...]", will be cited and scientifically identified that the same may be "[...] extended the effects of the sanctions applied to the legal entity [...], observing the contradictory and broad defense" (MINAS GERAIS, 2015).

Such inclusion of the managing partners or those with management powers in the passive pole may also be requested by the Comptroller General. They will have the same legal term to defend the legal entity and the decision on the disregard of the legal entity may be appealed pursuant to article 20 of State 46782/15 (MINAS GERAIS, 2015).

Articles 28 to 38 of State Decree 46782/15 provide for "simulation or fraud in merger or incorporation" (MINAS GERAIS, 2015). Considering the importance of the issue, if there are indications under §1 of art. 4 of Federal Law no. 12,846/13 (BRAZIL, 2013), the Commission may insert such finding in the conclusive report, but the principles of broad defense and contradiction must be observed, being also the object of appeal.

Also, the Decree under analysis provides for internal mechanisms and procedures (of the legal entity) of integrity and leniency agreement, according to articles 39 to 49 of State Decree 46782/15[22] (MINAS GERAIS, 2015). These mechanisms and procedures were instituted by Provisional Measure No. 703/2015 (BRAZIL, 2015), which has expired, but continues to be in force, in view of State Decree No. 46782/15, in its article 40[23] and item III of article 7 of Joint Resolution CGE/AGE No. 4, of November 12, 2019 (MINAS GERAIS, 2019).

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22 "Article 39. For the purposes of the provisions of this Decree, an integrity program consists, within the scope of a legal entity, of the set of internal mechanisms and procedures of integrity, auditing and incentive to denounce irregularities and the effective application of codes of ethics and conduct, policies and guidelines with the objective of detecting and remedying deviations, frauds, irregularities and illicit acts practiced against the public administration, whether national or foreign.
Sole paragraph. The integrity program must be structured, applied and updated according to the characteristics and current risks of the activities of each legal entity, which in turn, must guarantee the constant improvement and adaptation of said program, aiming at guaranteeing its effectiveness". (MINAS GERAIS, 2015)

23 "Article 40: I- commitment of the corporate senior management, including the councils, evidenced by the visible and unequivocal support to the program;
II - standards of conduct, code of ethics, policies and procedures of integrity, applicable to all employees and managers, regardless of position or function held;
III - standards of conduct, code of ethics and integrity policies extended, when necessary, to third parties, such as suppliers, service providers, intermediary agents and associates;
IV - periodic training on the integrity program;
V - periodic risk analysis to make necessary adaptations to the integrity program;
VI - accounting records that fully and accurately reflect the transactions of the legal entity;
VII - internal controls that ensure the prompt preparation and reliability of reports and financial statements of the legal entity;
VIII - specific procedures to prevent frauds and illicit in the scope of bidding processes, in the execution of administrative contracts or in any interaction with the public sector, even if intermediated by third parties, such as payment of taxes, submission to inspections, or obtaining authorizations, licenses, permissions and certificates;
IX - independence, structure and authority of the internal instance responsible for the application of the integrity program and supervision of its compliance;
X - channels for reporting irregularities, open and widely disseminated to employees and third parties, and mechanisms designed to protect bona fide whistleblowers;
XI - disciplinary measures in case of violation of the integrity program;
XII - procedures that ensure the prompt interruption of irregularities or infractions detected and the timely remediation of damages generated;
XIII - appropriate hiring and, as the case may be, supervision of third parties, such as suppliers, service providers, intermediary agents and associates;
XIV - verification, during the processes of mergers, acquisitions and corporate restructuring, of the commitment of irregularities or illicit or the existence of vulnerabilities in the legal entities involved;
XV - continuous monitoring of the integrity program, aiming at its improvement in preventing, detecting and combating the occurrence of harmful acts provided for in Article 5 of Law No. 12,846 of 2013; and XVI - transparency of the legal entity regarding donations to candidates and political parties. (MINAS GERAIS, 2015)

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Both the integrity mechanisms and procedures, as well as the leniency agreement, will be considered at the time of application of the sanction, according to the topic ahead to be developed.

The AGE/MG will act in the leniency agreements[24], in the phase of its negotiation, execution and follow-up processes, according to the Joint CGE/AGE Resolution no. 4, of November 12, 2019. (MINAS GERAIS, 2019)

The withdrawal or rejection by the legal entity of the proposal of the agreement shall not imply recognition of the exercise of the harmful act and the documents shall be returned, in accordance with clauses I and II of the sole paragraph of art. 10 of the aforementioned Joint Resolution (MINAS GERAIS, 2019).

Once formalized, the leniency agreement may be made public, except in "[...] legal hypotheses of secrecy, which must be observed by those who have access to the evidence by virtue of the investigative leverage activities or other action resulting from the leniency agreements". The negotiation commission will be formalized in a Joint Ordinance between CGE/AGE, having two stable Auditors and a State Attorney. (§2 of art. 4 and 5, both of the CGE/AGE Joint Resolution no. 4/2019) (MINAS GERAIS, 2019).

According to item II of art. 7 of the aforementioned Resolution, the Commission must evaluate whether the legal entity will "[...] cooperate with the determination of a specific harmful act, when such circumstance is relevant, obeying the chronological order of priority of the manifestations; b) admit its participation in the administrative infraction". Furthermore, if it "[...] commits to completely cease its involvement in the harmful act", as well as to contribute to the investigations and the administrative process, identifying "[...] public agents, employees and individuals involved in the administrative infraction" (MINAS GERAIS, 2019).

Leniency agreement that will require the legal entity to collaborate in an effective solution of the process; to make changes aimed at ending or reducing the occurrence of new harmful acts; to create or improve its integrity program; to monitor the obligations entered into in this leniency agreement; and, finally, to repair the damage or not to require it, in accordance with subsection V of art. 7 of Joint CGE/AGE Resolution no. 4/2019 (MINAS GERAIS, 2019).

Finally, in case of non-compliance with the agreement, the legal entity will lose its benefits and will be prevented from making a new agreement with the Public Administration for three years. Moreover, it will have the anticipated maturity of its installments related to the damage and illicit enrichment, with the application of an updated fine, discounting the installments that may already be settled, being the noncompliance registered in the National Register of Punished Companies - CNEP by the CGE, according to art. 10 of the mentioned Joint Resolution (MINAS GERAIS, 2019).

24 "Article 2 The leniency agreement shall be entered into with the legal entities responsible for the practice of the harmful acts provided for in Federal Law No. 12,846, of August 1, 2013, and the administrative offences provided for in Federal Law No. 8,429, of June 2, 1992. 666, of June 21, 1993, and in other bidding and contract rules, with a view to exempting or mitigating the respective sanctions, provided that they effectively collaborate with the investigations and with the administrative process, and should result from such collaboration: I - the identification of the others involved in the illicit act, if any; and II - the prompt obtaining of data, information and documents that prove the illicit act under investigation". Device in accordance with the JOINT RESOLUTION CGE/AGE No. 4, OF NOVEMBER 12, 2019. (GENERAL MINES, 2019)

The sanction as to the administrative responsibility of the legal entity occurs through the fine and extraordinary publication of the condemnatory decision [25]. Article 6 of Federal Law No. 12,846/13 (BRAZIL, 2013) and Article 29 of State Decree No. 46,782/15 (MINAS GERAIS, 2015) are cited.

The application of the fine will be evaluated through the requirements contained in Article 7 of Federal Law No. 12,846/13. These are the requirements:

> " I- the seriousness of the infraction; II- the advantage gained or intended by the infractor; III- the consummation or not of the infraction; IV- the degree of injury or danger of injury; V- the negative effect produced by the infraction; VI- the economic situation of the infractor; VII- the cooperation of the legal entity in the determination of the infractions; VIII - the existence of internal mechanisms and procedures of integrity, auditing and incentive to denounce irregularities and the effective application of codes of ethics and conduct within the scope of the legal entity; IX - the value of the contracts maintained by the legal entity with the body or public entity injured; [. ...]" (BRAZIL, 2013)

The gravity of the action is detachable due to its systemic character, that is, the harmful effects that the corruptive acts have in the Public Power, when they end up involving levels of the public administration and the legal entity.

The advantage gained must be proved, by manual registration or e-mail, or even by confession, considering that it is inconceivable its intuitive imputation, because the responsibility to be relapsed under the legal entity is the objective and the desired "quantum" must be duly proven.

As already studied, there is no attempt in the cases listed in Article 5 of Federal Law No. 12,846/13 (BRAZIL, 2013). However, the graduation of the sanction will vary depending on the stage of the act in which it is found. For example, a promise of payment for a future illicit act. The act itself has already been consummated, but there is a mere combination; the effective payment and the obtaining of the favor. When the penalty is applied, it will be evaluated in which stage the harmful act that is subject to punishment was at. The act has already been consummated with the combination, and the other procedures are exhaustive, giving the connotation of the causes of graduation of the sanction. The non consummation may give rise to an attenuating cause, depending on the understanding of the authority that will decide.

The degree of injury[26] (or danger) is the public good damaged, as for example, in the case of health, when in the middle of a pandemic, a product considered essential, which would serve in the control of diseases and deaths, having its use prevented or distorted, this would give rise to a very high degree of injury or danger.

Considering the negative effect of the infraction, José Anacleto Abduch Santos, Mateus Bertoncini and Ubirajara Custódio Filho clarify:

25 Administrative penalty: 1) Fine: 0.1 to 20% of gross revenues from the last year prior to the establishment of PAR, excluding taxes (art. 6, item I) or from R$ 6,000, 00 to R$ 60,000,000.00 (art. 6, §4); and 2) Extraordinary publication of the condemnatory decision, according to art. 6. Provisions contained in Federal Law 12.846/13incis II. (BRAZIL, 2013)
Civil sanctions (art. 6, II, of Federal Law 12. 846/13): "I - forfeiture of assets, rights or values that represent an advantage or benefit directly or indirectly obtained from the infraction, except for the right of the injured party or bona fide third party; II - suspension or partial interdiction of its activities; III - compulsory dissolution of the legal entity; IV - prohibition to receive incentives, subsidies, grants, donations or loans from public bodies or entities and public financial institutions or those controlled by the public power, for a minimum term of one (1) and a maximum term of five (5) years". (BRAZIL, 2013)

26 "In other words, the measurement of the injury depends on the degree of damage caused to the public good achieved."(SOUZA, 2018. p.11)

> Negative effects can be related to an immaterial dimension, such as the loss or shake of credibility of institutions, or to a material dimension, such as interruption of the continuity of public services or public activities, direct or indirect damage to communities benefiting from public policies, increased costs of administrative action or delay in implementing administrative actions. (SANTOS, BERTONCINI and CUSTÓDIO FILHO, 2014, p.184)

As for the economic issue of the offender, this data is of great importance because the fine should not appear derisory and not so high that it could have the character of confiscation, seeking to preserve the social function of the legal entity, considering the jobs generated, source taxes payment, and even as a factor of cultural and economic development of the region where the legal entity is located. In this sense, the fine does not have the capacity to cause the "break" of the legal entity or its insolvency.

The cooperation of the legal entity in the investigation of infractions takes place independently of the leniency agreement, and it is necessary that the legal entity first expresses its interest in cooperating. In this understanding, cooperation can influence the dosimetry of the fine.

In the case of the leniency agreement, according to item II of art. 6 of Federal Law no. 12,846/13 (BRAZIL, 2013), there may be an exemption from the publication of the conviction or the reduction of one to two thirds of the applicable fine and, according to item VIII of art. 47 of State Decree 46782/15 (MINAS GERAIS, 2015) and art. 17 of Federal Law 12846/13, "[...] shall exempt or mitigate the administrative penalties established in arts. 86 to 88 of Law 8666 of June 21, 1993". (MINAS GERAIS, 2013). If the leniency agreement is proposed after the establishment of the PAR, the reduction will be a maximum of one third, according to §3 of art. 47 of State Decree 46782/15. (MINAS GERAIS, 2015)

In both cases, the fine, if applicable, must be paid within thirty days and the defaulting will result in the enrollment in active state debt, "[...] with subsequent registration in the State of Minas Gerais' Register of Default - CADIN-MG -, pursuant to Decree No. 44.694, of December 28, 2007," according to art. 37 of State Decree No. 46782/15. (MINAS GERAIS, 2015)

In case of disregard of the legal entity, the managing partners and managers will also be on the passive side, next to the legal entity, as debtors in the active debt bond.

The statute of limitation as to the penalty to be applied in this matter is counted from five years of the infractions, having as initial date the knowledge of the facts, "[...] or, in case of permanent or continued infraction, on the day it has ceased", in accordance with article 25 of Federal Law no. 12. 846/13. (BRAZIL, 2013)

Both in Federal Law 12846/13, articles 22 to 29 (BRAZIL, 2013), and in State Decree 46782/15, articles 50 to 53 (MINAS GERAIS, 2015), it has the National Register of Punished Companies - CNEP, where the sanctions applied will be registered.

Finally, it does not prevent the establishment, enforcement and application of sanctions arising from PAR[27], even if the legal entity already has a penalty due to Administrative Improbity, Federal Law No. 8.429/92 (BRAZIL, 1992) ; and illicit acts arising from Federal Law No.

27 "Therefore, for the incidence of the dosimetry device, it is sufficient to assess the occurrence in the specific case of the legal hypothesis described as a factor for calculating the fine and then, in order to determine its percentage, within the minimum and maximum limits foreseen, it is necessary to ascertain its relevance, that is, to what degree the form of conduct or circumstance contributed to the success, perpetuation, aggravation or mitigation of the illicit practice". (SOUZA, 2018, p. 31)

8.666/93[28] (BRAZIL, 1993), according to Federal Law No. 12846/13, art. 30 (BRAZIL, 2013), and State Decree No. 46782/15, art. 54. (MINAS GERAIS, 2015)

Verifying illicit acts arising from the economic order, i.e., that demean the defense of competition, according to Federal Law No. 12,529 of November 30, 2011, "[...]will inform the Administrative Council of Economic Defense - CADE - of the establishment of PAR, and may provide information and evidence obtained, without prejudice to the confidentiality of the leniency agreement proposals[...]" (BRAZIL, 2011), as provided in art. 56 of State Decree No. 46782/15 (MINAS GERAIS, 2020) and in art. 16, paragraph 6 of Federal Law No. 12,846/13 (BRAZIL, 2013).

4 CONCLUSION

The approach to the normative procedures of corrective, disciplinary and unfavorable administrative processes are of utmost importance, considering the active participation of all procedural subjects, in order to provide a transparent and isonomic process.

Following this understanding, the accused servant, as well as the legal entity, must be aware of the procedural specificities, since they cannot claim ignorance of the laws, as well as the one who defends them, for a better technical performance.

Therefore, even with differentiated purposes, such processes have a punitive connotation and each one has its relevance in the administrative field, with social repercussion, because the integral and positive functioning of the public machine and its integration to society, in an honest relationship, strengthens the State and brings more credibility to the nation

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LEGAL PLURALISM AND THE CONSUETUDINARY LAW OF INDIGENOUS COMMUNITIES WITHIN THE BRAZILIAN LEGAL ORDER

O PLURALISMO JURÍDICO E O DIREITO CONSUETUDINÁRIO DAS COMUNIDADES INDÍGENAS FACE AO ORDENAMENTO JURÍDICO BRASILEIRO

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ABSTRACT

The present work aims to analyze the customary law of the indigenous communities as a result of the legal pluralism within the Brazilian order. Legal pluralism is based on the idea that the Modern State is not the only legitimate agent to carry out the legal framework of the various forms of social relations. This perspective is opposed to the doctrine of legal monism, in which only the State has a monopoly for the production of legal norms, recognizing the multiplicity of sources and relations of law within the same legal system. The customary law of indigenous communities appears as a product of this multiplicity of sources and legal relations represented by the Federal Constitution of 1988 and the infraconstitutional rules. With this, the general objective of the research is to investigate the concept of legal pluralism, and as a specific objective we have the analysis of customary indigenous law as an element of the multiplicity of legal relations recognized by the Federal Constitution of 1988. In the end, we answer the questioning about customary law of indigenous communities as an expression of legal pluralism in the face of the national legal system. Therefore, from a bibliographic and qualitative survey, the descriptive and exploratory study of the theme was developed using the hypothetical deductive method of scientific approach.

Keywords: Legal pluralism. Customary indigenous law. Indigenous communities. 1988 Constitution.

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RESUMO

O presente trabalho visa analisar o direito consuetudinário das comunidades indígenas como resultado do pluralismo jurídico face ao ordenamento brasileiro. O pluralismo jurídico fundamenta-se na ideia de que o Estado Moderno não é o único agente legitimado a realizar o enquadramento legal das diversas formas de relações sociais. Essa perspectiva se contrapõe a doutrina do monismo jurídico, no qual apenas o Estado possui monopólio para a produção de normas jurídicas, reconhecendo a multiplicidade das fontes e das relações de direito no interior de um mesmo sistema jurídico. O direito consuetudinário das comunidades indígenas surge como produto dessa multiplicidade de fontes e relações jurídicas representada pela Constituição Federal de 1988 e as normas infraconstitucionais. Com isso, o objetivo geral da pesquisa é investigar o conceito do pluralismo jurídico, e como objetivo específico tem-se a análise do direito consuetudinário indígena como um elemento da multiplicidade das relações jurídicas reconhecido pela Constituição Federal de 1988. Ao final, responde-se ao questionamento acerca do direito consuetudinário das comunidades indígenas enquanto expressão do pluralismo jurídico face ao ordenamento legal pátrio. Para tanto, a partir de levantamento bibliográfico e qualitativo, o estudo descritivo e exploratório do tema desenvolveu-se por meio do método hipotético dedutivo de abordagem científica.

Palavras chaves: *Pluralismo jurídico. Direito consuetudinário indígena. Comunidades indígenas. Constituição de 1988.*

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INTRODUCTION

Legal pluralism is a school of thought contrary to the doctrine of legal monism, by which the creation and legitimization of law is the sole prerogative of the state (WOLKMER, 2001, p.123). This opposition to a state monopoly arises from the cultural diversity present in all societies, understanding that said cultures include social, mythological, religious, symbolic and judicial elements apt to establish means of self-expression and interpretation of the surrounding world (CURI, 2005, p.100).

It is in this context that indigenous communities begin to configure an important contribution to the multiplicity of legal sources and relations in the Brazilian legal order. One notes that in the most recent census carried out by the Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística), known as the IBGE, 12.5% of Brazil's national territory is indigenous territory.

In these territories indigenous communities emerge as notable representatives of legal pluralism within the Brazilian legal system, for indigenous social organization and customs configure their own social dynamic and create a legal system of their own, within the national legal system. The concept of an indigenous legal system made up of indigenous customary norms demonstrates the coexistence of two or more legal systems within the same geographic space, meaning that there may be a multiplicity of laws, by right of the recognition of differences. As such, pluralism legitimizes the diversity of legal sources coexisting within the same system.

In accordance with Rouland (2003, p.158-159) there are two ways to define legal pluralism. The first is considered the weaker concept, by which it recognizes the existence of different judicial mechanisms to handle the same situations within the same geographical space. The second is regarded as the stronger concept, based upon the existence of different social

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groups, who go beyond the state's law, indicating, therefore, a multiplicity of legal orders that may coincide or diverge.

All the more, legal pluralism has as its chief objective demonstrating that the modern state is not the sole agent empowered to guarantee the legal relevance of the diverse new social relations that emerge. In this way, pluralists defend that legal pluralism does not intend to deny state law, but rather to legitimize other legal mechanisms existing in society.

As regards the legal systems of the indigenous communities, the acceptance of customary law was adopted by the Federative Republic of Brazil through the recognition of indigenous social organization, customs and traditions in the Federal Constitution of 1988, specifically in Chapter VIII, in the Statute of the Indian (Estatuto do Indio), as in the Convention 169 (Convenção 169) of the International Work Organization (Organização Internacional do Trabalho - OIT), ratified nationally by the Decree number 5051, dated April 19th 2004. Accordingly, constitutional recognition of the uses, customs and traditions of the indigenous, foreseen in the caption of article 231, and other rules that compose the national legal system, make possible the expression of legal pluralism dubbed independent, by which the internal organization of a given community is ruled by non-statal laws, which are the very customs of the indigenous communities.

Based on these legal clarifications, the present study has as objective the investigation of the concept of legal pluralism, and as a specific objective the analysis of customary indigenous law as an composing element of the multiplicity of legal relations recognized by the Federal Constitution of 1988, inquiring: does the customary law of the indigenous communities represent legal pluralism in the national legal system?

To that end, from bibliographical and qualitative research, the descriptive and exploratory study of the topic was carried out by means of the deductive-hypothetical method of scientific inquiry.

1 THE CONCEPT OF LEGAL PLURALISM

The concept of legal pluralism arose from the dialogue between anthropology and legal studies, furnishing an interdisciplinary approach denominated the anthropology of law or legal anthropology. For Korsbaek and Vivanco (2009), the anthropology of law is similar to the sociology of law, in that both study the law as a social phenomenon, seeking to identify the wellspring of law as an element of the social dynamic of which it is part.

Pluralism's points of reference regard the fact that a plural reality points to a factual inequality, which manifests itself in all facets of everyday life, even when the values comprising the conceptions of the different existing groups arise within the boundaries of the same country and share historical origins. (KOSBAEK; VIVANCO, 2009, p.156).

In this light, the Sociology of Law (SANTOS, 2010, p.100) has researched legal pluralism and identified the existence of the Law in multiple places, such as in rural areas, marginalized urban neighbourhoods, in sport, in church, in businesses, in professional organizations, without necessarily having their source in the activity of the legislature, but deriving rather

from the everyday and informal social interactions. The norms of this new Law, according to Santos (2010), are given the mark of infrastatal, informal, non-official and more or less customary. In this sense, the multiplicity of sources of Law is due to the existence of a living Law, reflected in social relations, habits and customs.

The legal system considered as that exclusively foreseen in legislation, in legal science or in case law becomes an arbitrary and fictitious law (EHRLICH, 1913 *apud* SÁNCHEZ-CASTAÑEDA, 2006). Understanding that the origin of the Law isn't necessarily a product solely of the state, but also of the different social relations apt to, additionally, be treated as an ensemble of rules that determine the position and function of individuals within a social group.

According to Bobbio (2007) it is possible to identify two phases of legal pluralism: the first phase refers to the conception and development of legal historicity, by way of the Historical School of Law, which affirms that rights emanate directly or indirectly from the common consciousness. As such, national legal systems are varied, given that there are many nations, each one with their own statal order. This first form of legal pluralism is characterized as statal.

The second phase refers to the institutional stage which has as a precondition the existence of a legal system, where an institution exists, translating into an organized social group. The consequence of this constitutional theory is the fragmentation of the universal idea of the Law and an enrichment of the existing problems between legal systems (BOBBIO, 2007, p.123).

Harmoniously, Woodman (1998) recognized the existence of a statal legal pluralism and a pluralism outside of state law. In the first scenario, there would be instances of plurality within the state system, such as, for example, different rules and means of judging commercial contracts. These contracts enjoy a certain independence in the determination of their rules but, at the same time, are obligatorily in harmony with state law that are above and contemplate these transactions. It would be a type of pluralism of control. The other form of pluralism would be unattached to the state, dubbed independent pluralism, in which the internal organization of a given society is governed by non-state laws, such as, for example, the autochthonous laws of the indigenous communities (WOODMAN, 1998, p.145).

2 LEGAL PLURALISM AND INDIGENOUS COMMUNITIES

In the indigenous communities legal pluralism is introduced in a solitary fashion. In statal society the state creates rules for the individual, whereas in indigenous communities the rules are communal, operated and recreated in reference to the collective (CURI, 2005, p.153). This collective is regarded as a subject of rights and obligations, which guarantees the self-determination of indigenous peoples are a group right to administer their society and determine their own destiny.

From this perspective a limit of interference is imposed upon the authoritative and centralizing state law. Accordingly, the state assumes the role of mediator of conflicts and interests, but no longer the role of intervener. The autonomy of the collective as a subject

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commands respect in political, administrative, economical, cultural and judicial terms, both inside and outside of the indigenous community.

In this sense autonomy implies (KORSBAEK; VIVANCO, 2009, p.67): in the possibility of deciding about matters that affect your community, without interference and/or pressure from external legal mechanisms; in full participation in the democratic apparatus of the nation; in the use and administration of the resources available in your territory, in accordance with your own legal systems and in the recognition of the society relevant in your territory in the cosmogonical and material sense.

This autonomy of the indigenous communities that, as seen, implies in the right to their self-determination, many times enters into conflict with the current written law and the native rules of the indigenous communities. In this context, the position of the state may be to relativize the autonomy of the indigenous peoples by establishing rules derived from the values of the representatives of the national legislature. Conflicts arise with greater frequency in the matter of criminal law, in cases classified by the state's law as crimes against life, for these compose an ensemble of values considered superior to any other interest (CURI, 2005, p.157).

This because the western legal system is founded upon human dignity, which places a dignified life, a subjective cultural concept, as an universal value, legitimizing overt state action to restrain what the state itself has classified as an illicit act against life. Based on this, the state compromises the promotion of just treatment that should be allowed in criminal cases to the indigenous, their family members and, at times, their communities, for it ignores their cultural, social organization and value system (YAMADA; BELLOQUE, 2010, p.87).

Despite the Brazilian legal system recognizing the social organization of the indigenous communities, it is necessary to highlight that the intervention of state law in the communities is not yet adequately defined. If on the one hand legislation defined by the state must be applied throughout the national territory, on the other, the same state law guarantees different ethnic groups the right to live according to their uses and customs, which includes the collective right to define their internal rules. In relation to the indigenous peoples, this perspective of legislation - broad and, at the same time specific - is clear in the 1st article, single paragraph, of the Statute of the Indian, which establishes that the protection of the laws of the country extend to the indians and their communities, safeguarded their uses, customs and traditions (Law 6001/1973, Brasil).

It is also necessary to highlight the 9th article of the 169th Convention of the International Labour Organization (ILO), ratified by the Brazilian state, which establishes the following:

> 1. In so far as they are compatible with the national legal system and with internationally recognized human rights, all methods traditionally employed by these peoples for the punishment of crimes committed by their members must be respected.
> 2. Authorities and tribunals called upon to judge criminal matters must take into account the customs of these peoples about the subject matter (CONVENTION 169, ILO, BRASIL).

Convention 169 of the ILO guarantees respect for internal laws meant to stop crimes committed by indigenous people and places national legal systems and internationally recognized human rights above cultural rights. Collective rights must be observed, but must not

enter into conflict with the value system of the ruling society. This means that present legislation recognizes cultural diversity, but also continues to assume ethnocentric values, indicating that the realization of legal pluralism is still under construction, apt to spark doubtful interpretations and errors of judgement in relation to indigenous rights (CURI, 2005, p.160).

3 CONSUETUDINARY LAW

Consuetudinary law is defined as the aggregate of traditional social norms, spontaneously created by a people; unwritten and uncodified. The term “consuetudinary” means something founded upon customs, denoting a kind of customary law. Consuetudinary law is differentiated from written law, by right of the latter being legitimized by a constituted political authority, the state, from which all power emanates. Meanwhile customary law holds force and has effect independent of the existence of such an authority (CURI, 2005, p.140).

One must point out that, according to Manuela Carneira da Cunha (1990), customary law only exists in relation to written law and, thus, cannot be considered as anterior or autonomous before the state. Customary law, in this sense, only exists in opposition to written law and its own content is, partially or by contrast, informed by the existence of the state.

Customs represent important sources of Law, given how great a parcel of norms are structured in accordance with a society's way of life. On the other hand, current written law tints customs with a secondary value, framing customary law as something inferior or delayed, as if representing a bygone period prior to the constitution of the normative, written law emanating from the state (CURI, 2005, p.141). This view derives from evolutionary theses, which justified their theories with the idea that all of humanity successively passes through, in a single direction, a passage from simplicity to complexity, from irrationality to rationality, comprising three stages of development: savagery, barbarism and, at last, civilization.

The idea of the ruling society, which converts its culture into an universal paradigm, is that these people deemed “primitive” do not possess a legal system, for the absence of a state and written laws demonstrate their backwardness and the simplified character of their social structure. In the common parlance of this society, the indigenous peoples do not possess law, art or religion, but, at best, customs, craftwork and superstition (WOLFF, 2004, p.230).

In the same sense, traditional legal theory is unanimous in considering that codified law provides greater certainty to the Law than customary norms, this being the very reason that the law is placed above custom, affirming, moreover, that as societies evolve they abandon consuetudinary form and are transformed, progressively, into codified law (NADER, 1988, p.124).

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4 THE CONSUETUDINARY LAW OF THE INDIGENOUS COMMUNITIES

To say the indigenous do not have laws is a common assertion in the legal world, this being the position found in common sense and among more conservative jurists (CURI, 2005, p.147). This understanding has its origin in the supposed "primitivity" of the social relations of indigenous communities. By such thinking, these conservatives affirm that traditional communities do not admit the characteristics of Law. Nevertheless, this consensus is based upon the evolutionary line of anthropology, which considered the indigenous a primitive stage of social evolution (CURI, 2005, p.150).

The cited evolutionary view became outdated within modern legal anthropology, thanks to studies which demonstrated that each society possesses its own organization, which does not serve as criteria to determine superiority or inferiority of social evolution. In this sense, Davis (1973), observes that "in every society there exists a body of cultural categories, of rules or codes that define the legal rights and duties between people; in every society disputes and conflicts arise when these rules are broken and, for the resolution of these divergences, there exist institutionalized means of reaffirming and/or redefining legal rules" (DAVIS, 1973, p.10).

Indigenous law is characterized as a consuetudinary or customary law, possessing the following specific traits: it finds itself immersed in a social body bound by all other aspects of culture, forming a unit; and their foundation is derived from communal strength and tradition, expressed through uses and customs. For the indigenous communities, customary law serves a worldview based on ancestral principles related to the natural order of events (CUEVAS GAYOSSO, 2000, p.111).

Rules are accepted and applied by indigenous societies by virtue of a collective consciousness that says these are good for men. The applications of these rules do not demand their inclusion in normative texts, for what legitimizes them is the common consciousness of the group that, knowing the general principles which determine their conduct, maintains the rules necessary for the resolution of specific problems (CURI, 2005, p.148). From this it is possible to see the difference between the customary law and written law of modern societies, which is the lack of separation between the social aspect and the legal aspect.

In the indigenous communities, the law acts submerged in the social body, in the shared uses and customs, involving oral tradition, hierarchies, and magical-religious reasonings that constitute the particular worldview of the community. And on the other hand modern societies separate these two aspects, the social and the legal, creating a dichotomy between form and content. In indigenous communities, customary law is a rule of communal organization founded upon their understanding of the cosmos, which makes possible the flexibility and profundity of indigenous consuetudinary law (CUEVAS GAYOSSO, 2000, p.112).

The term employed to define consuetudinary law is "rule", it being understood that it lacks the stringency of the term "legal norm", used for written law. The first permits adaptation within the society in which it manifests, in the measure that the second, present in a diverse context, is rigid and has its application in the imposition of the referent norm of conduct upon social phenomenon. Rules adapt themselves to the characteristics of society, converting into a common expression of an established group and with an inclination to upholding essential

values and principles. In this perspective, Cuevas Gayosso (2000) highlights the fundamental origin of customary rules, denominated “cosmological view".

The cosmological view is responsible for creating the diverse sources of consuetudinary law of the indigenous communities. In these, what creates the Law is not the will of the legislature, but the daily activities connected to the worldview of diverse social groups, which result in the creation of customary rules that are informally legitimized to discipline life in society. Thus, it also integrates customary law, which, despite being unwritten and uncodified, holds sway without the presence of the state (CURI, 2005, p.140).

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5 THE RECOGNITION OF THE CONSUETUDINARY LAW OF THE INDIGENOUS COMMUNITIES BY THE BRAZILIAN LEGAL SYSTEM

The previous chapters discussed the concept of legal pluralism and the consuetudinary law of the indigenous communities. As such, the present chapter seeks to analyze the recognition of consuetudinary law by the Brazilian legal system represented by the Federal Constitution of 1988, and infra-constitutionally by the Statute of the Indian, the Law 6001/1973. The recognition of the consuetudinary law of the indigenous is given by article 231 of the 1988 Constitution, which recognizes the indians as regards social organization, customs, language, beliefs and traditions.

The Federal Constitution of 1988 inaugurated the constitutionalization of indigenous laws, recognizing the indigenous in accordance with their uses, customs and traditions, breaking with the assimilationist or integrationist paradigm. The non-recognition of the ethnic identity of the indigenous in previous Constitutions made the state conceive of them as a transitory reality, which would disappear to the degree that they were integrated in the national community. One highlights that the foundation of past constitutional texts were that the indigenous represented a primitive state of social evolution, as such it would be required that national society, ahead of them on the evolutionary scale, bring them out of the primitive stage (CUNHA, 1992, p.67).

This argument is derived from evolutionism, a strain of anthropology which arose in the 18th century, which cast the Indians as “good savages”, witnesses of paradise lost and with the aspect of what westerners would have been in times past (ROULLAND, 2000, p.76). In the 19th century, began the second great phase of western colonization, during which evolutionary concepts became harder, creating the idea that colonization would serve the good of those peoples deemed primitive, helping them out of their evolutionary slowness (KAPLAN, 1975, p.167).

The first phase, known as unilineal evolutionism, exercised the greatest influence upon Brazilian constitutions in respect to the normative treatment rendered to Indians until the Constitution of 1988. Under this perspective, traditional societies live in a delayed state of human development, finding themselves in the infancy of so-called civilized society, the national community. As such, constitutional diplomas considered the indigenous as a transi-

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tory reality, which would be incorporated into national society, the most advanced stage of social evolution, leaving behind their uses, customs and traditions (CURI, 2005, p.27).

With the recognition of indigenous laws, with their uses, customs and traditions the Constitution broke with evolutionism, which justified assimilation and began to recognize the indigenous in accordance with their ethnic identity. Throughout the whole constitutional text indigenous laws are recognized, however the 8th Chapter - Of the Indians demonstrates this most sensibly. As such, it is possible to extract various rights regarding the indigenous from article 231, the most evident being the right to their ancestral lands, but the recognition of uses, customs and traditions in the first part of the referred article brings the right to self-determination and the right to otherness, as well as the recognition of the consuetudinary law of the indigenous communities.

Consuetudinary law is not expressed in the text of article 231's caption, alongside the right to self-determination and the right to otherness, which is the right of the indigenous to live according to their uses, customs and traditions, and exercise them (BRASIL, 1988). Nevertheless, the respect for the internal (or customary) laws of the indigenous communities is affirmed intrinsically, for there is no means of recognizing the Indian's social organization without recognizing their own judicial systems.

The Statute of the Indian, the Law 6.001/1973, precedes the Federal Constitution of 1988 and thus conceived its normative policy under the auspices of unilineal evolutionism, whereby the indigenous were considered inferior to the national community and needful of incorporation into more advanced society. Consequently, the statute carried the contradiction of simultaneously protecting and incorporating the indigenous. The Constitution of 1988 adopted a different stance to the Statute, recognizing indigenous rights, such that all dispositions seeking their assimilation into the national community were revoked (LIMA, 2016, p.100). Nevertheless, the articles which sought the protection of indigenous rights remain in force, as does the protection of indigenous customary law:

> It befalls the Union, the States and the Counties (...), for the protection of indigenous communities and the preservation of their rights: to respect (...) the peculiarities inherent to their condition; to assure the indians the faculty of freely choosing their means of living and subsistence; to respect (...) the cohesion of indigenous communities, their cultural values, traditions, uses and customs (article 2, items III, IV and V). (Law 6001/1973, BRAZIL).

6 ILO's CONVENTION No. 169 AND INTERNATIONAL RECOGNITION OF THE CONSUETUDINARY LAW OF TRADITIONAL COMMUNITIES

The 169th Convention of the ILO (C169) becomes important in this context of legal pluralism and the recognition of the consuetudinary law of the indigenous communities by the Brazilian system, given the Federal Republic of Brazil ratified it by means of the decree numbered 5051, dated april 2004. The cited convention, together with the Constitution of 1988, legitimized the right of the indigenous to live according to their uses and customs. As

such it was also recognized that the indigenous and their traditional organizations should be involved in the planning and execution of development projects that affect them.

This materializes based upon the principles of respect towards the cultures, ways of living and consuetudinary law of these communities (CONVENTION 169 ILO, BRAZIL). Among the mechanisms used to legitimize indigenous rights adopted by the convention, two fundamental points are repeatedly cited to guarantee them: the necessity of consulting indigenous communities, through appropriate procedures, when legislative or administrative measures might affect them directly; and the right to define their development in accordance with their aspirations and own way of life, that is, the right to choose their priorities and further their own economic, social and cultural development (CONVENTION 169 ILO, BRAZIL).

In regards to the consuetudinary laws of the indigenous peoples, the C169, in its 8th article, determines:

> When it comes to applying national legislation to the concerned peoples, due consideration will be given to their customs or their consuetudinary law. These peoples will have the right to preserve their customs and own institutions, so long as these are not incompatible with the fundamental rights defined by the national legal system nor internationally recognized human rights. Whenever necessary, procedures must be established for the resolution of the conflicts which may arise in the application of this principle (CONVENTION 169 ILO, BRAZIL).
> In light of this provision, one verifies that the internal laws of the indigenous peoples, called consuetudinary law by the written law, are as recognized by the international system as by the Brazilian system. However, this recognition is with reserve, for the consuetudinary law of the indigenous cannot be incompatible with the fundamental laws of the States and international human rights. This is what the following chapter will analyze.

7 THE CONFLICT OF RULES BETWEEN THE WRITTEN LAW AND THE CONSUETUDINARY LAW OF THE INDIGENOUS COMMUNITIES

The Brazilian system is founded upon the Democratic State of Law and has as its fundamental principle the dignity of the human person. In this sense, the principle of human dignity serves as a foundation for the whole legal order, permeating the entire constitutional text. The dignity of the human person is listed as one of the bases of the Federal Republic of Brazil in the 1st arcle, item III, but also in other parts of the constitutional text, such as the caption of article 170, which states “the economic order, based on the appreciation of human effort and free initiative, has as its finality the assurance of dignified existence, in accordance with the dictates of social justice”. In the 7th paragraph of article 226, it is expressed that family planning must be founded upon the principles of the dignity of the human person and responsible parenting (BRAZIL, 1988).

Human dignity may be defined by two elements: the intrinsic value of all human beings and the autonomy of every individual, being that said autonomy may be limited by some

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restrictions in the name of social values, or state interests, and for communal values (BARROSO, 2013, p.72). The intrinsic value represents the characteristics inherent to human beings, which differentiates them from other species. This characteristic occasions various fundamental rights guaranteed by law, chief of which is the right to life. Autonomy is the right of the individual to make their own choices, which in the legal sphere is ruled by private autonomy and public autonomy. Communal values represent the role of the state in the institution of goals to be met collectively, as well as restrictions imposed upon individuals in name of the greater good (BARROSO, 2013, p.73).

The three defined elements become important in order to understand eventual conflicts of rules between written law and the consuetudinary law of traditional communities. As previous chapters demonstrated, the Federal Constitution of 1988 recognized indigenous rights, inaugurating the constitutionalization of traditional laws (BARBIERI, 2009, p.69), even though consuetudinary law was not mentioned *ipsis literis* it is possible to infer it from the recognition given to the indigenous of their uses, customs and traditions in the caption of article 231. In this sense, where consuetudinary law does not violate human dignity, that is, does not violate the right to life nor place it under risk, it can be inferred that the written legal order will recognize it, for it composes indigenous identity and is recognized by the constitutional text.

The recognition of the consuetudinary law of the indigenous by the written Brazilian legal order, when it does not violate human dignity (the right to life) represents materially the consolidation of the Democratic State of Law. This consolidation materializes in the conjugation of a pluralist, free, just, fraternal and solidary society (SILVA, 2016, p. 345), which recognizes and protects the social differences existing in as diversified a society as Brazil. With this, it becomes necessary to highlight the notion of human dignity in its negative aspect, for this aids the comprehension of consuetudinary law of the traditional communities.

The negative aspect means that each member of a society must be respected and esteemed by state and by the other members of society in their individual greatness, without any chance of abasement, exploration, discrimination, exclusion or inhumane treatment. In this sense, and in the context of the consuetudinary law of the traditional communities, it may be understood that the legal body of the social organization of the indigenous will prevail insofar as it respects the human being, and its dignity, given these integrate their individual greatness. Therefore, written law may regard it given this consuetudinary law integrates indigenous ethnic identity.

CONCLUSION

As analyzed, legal pluralism does not admit a state monopoly on the elaboration and legitimization of rules. This opposition is due to the cultural diversity existing inherently in any society, and how said diversity involves social, mythology, religious, symbolocal and legal aspects apt to construct modes of self-expression and interpretation of the surrounding world. Thus, traditional communities represent an important element among the multiplicity of legal sources and relations within the Brazilian order. All the more given how indigenous

communities and their social organization were recognized and legitimated by the Federal Constitution of 1988, which dedicated Chapter 8 especifically to indigenous rights.

By recognizing the social organization of the indigenous communities, the constitutional text admitted their consuetudinary law, configuring legal pluralism in existence and effect. In this way, indigenous communities are governed by collective rules, which are respected, recreated in the person of the collective and accepted by the written Brazilian system in the measure that it respects the human dignity of those involved. The crucial difference between written and consuetudinary law is that the former creates rules for the individual, whereas indigenosu communities establish rules for the community. Considering that this collective figure of the "community" is understood as a subject of law, this makes possible the right of the indigenous to self-determination and government in accordance with their own rules.

With this the Brazilain state assumes the role of mediator in conflicts and interests of the consuetudinary law of the indigenous that arise, when it collides with human dignity, and intervenes with its written law only in order to protect the right to life. When the consuetudinary law of the indigenous communities does not threaten life, as well as human dignity, it may be affirmed that it will prevail, once the Statute of the Indian already foresaw this protection alongside the constitutional text. In the said statute it is clear that it befalls the federative entities to respect the peculiarities inherent to their condition; as well as securing the indians the possibility of freely choosing their means of life and subsistence, and respecting the communal cohesion inherent to their cultural values, traditions, uses and customs.

The recognition of the community laws by the Brazilian system was once again affirmed by the ratification of the ILO's Convention 169 (C169). The international document recognized indigenous human rights on an international level, one of these being the consuetudinary law of the indigenous. According to the convention the consuetudinary laws of the traditional communities must always be considered, for these compose their traditional social organization. The customary law of the indigenous, which involves their customs and institutions, must be respected when compatible with the fundamental laws and human rights based upon the protection of human dignity. And when conflicts eventually arise between the rules of written and consuetudinary law, the one which most protects human life and dignity must be taken into account.

All the more, the Federal Constitution of 1988 broke with the assimilationist paradigm that orientated previous constitutional texts by recognizing indigenous rights, basing itself upon the dignity of the human person that is one of the pillars of the Democratic State of Law. Thus, this essential principle of the Brazilian state is ratified as one of its foundations, which makes the existence of legal pluralism possible; on the one hand there is the written legal system and, on the other, the system of the consuetudinary rules of the traditional communities. In this sense, the consuetudinary laws of the traditional communities coexist within the written system of the Brazilian state when they show themselves compatible with human dignity and life.

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THE DEMOCRATIC FALLACY OF THE CRIMINAL JURY IN BRAZIL

A FALÁCIA DEMOCRÁTICA DO TRIBUNAL DO JÚRI NO BRASIL

Rafael Blusky Pinto dos Santos[1]

ABSTRACT

The criminal jury is referred by many as a bulwark of democracy, mainly in view of its historical importance as a response to the dominion of the absolutist state in relation to the Judiciary, being a mean of direct popular participation in this branch of state administration. However, the hypothesis assumed by the present essay is that both in its generic form and in the specific form in which it operates in Brazil, the criminal jury doesn't seem to be in accordance with what currently would be characterized as democratically appropriate. Therefore, the present essay was done via qualitative theoretical research and uses bibliographic content analysis procedure having as aim the examination, through an *ad hoc* theoretical matrix characterized by the interdisciplinary analysis of different areas of the human sciences, of the problem of the compatibility between the criminal jury of Brazil's formal structure with the current nature of democracy that is expected of it, as well as to propose that its present form in the country does not match what nowadays is conceived as democratic.

Keywords: Criminal Jury. Criminal Process. Democracy.

RESUMO

O Tribunal do Júri é tido por muitos como um baluarte da democracia, principalmente em vista de sua importância histórica como resposta ao domínio do Estado absolutista em relação ao Poder Judiciário, sendo um meio de participação direta do povo neste ramo da administração estatal. Porém, a hipótese assumida pelo presente artigo é a de que tanto em sua forma genérica quanto na forma específica em que opera no Brasil, o Tribunal do Júri parece não estar de acordo com o que atualmente se caracterizaria como democraticamente apropriado. Por conseguinte, o presente artigo foi realizado por meio de pesquisa teórica qualitativa e usa o procedimento de análise de conteúdo bibliográfico tendo como objetivo o exame, por intermédio de uma matriz teórica ad hoc caracterizada pela análise interdisciplinar de diferentes áreas das ciências humanas, do problema acerca da compatibilidade da estrutura formal do Tribunal do Júri no Brasil com a atual natureza da democracia que se esperaria dele, assim como propor que sua presente forma no país não condiz com o que hoje se concebe como democrático.

Palavras-chave: *Tribunal do Júri. Processo Penal. Democracia.*

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1 INTRODUCTION

The central theme to be addressed by this article is the adequacy of the Jury Court in Brazil to what is expected of an organ with training and performance guided by the dictates of a democracy in its modern conception, because the popular courts did-if most needed in times and places whose understanding of democracy was not as developed as it is today, since they were essential elements to lessen the reach of absolutist state power. Therefore, in a context where the same problems that caused the need for an organ like the Jury Court are missing, the problem arises: in the face of more recent assumptions of democratic action, the Jury continues to showif appropriate and convenient to the Brazilian judicial administration?

Countries that intend to be truly considered as democratic states under the rule of law have a duty to administer justice based on a "democratic primer"establishing criteria to ensure the hygiene of the system itself and providing protection to an extensive list of guarantees and fundamental rights, generally stipulated by a charter of rights such as a constitution, which must be fully respected in favour of popular sovereignty. However, the hypothesis adopted is that the Court of the Jury in Brazil, despite being ultimately governed by constitutional norms with democratic bias, does not seem to agree with what would currently be characterized as democratically appropriate.

Bearing in mind that a logical fallacy is the expression of a reasoning whose conclusion does not logically follow from its premises and forms propositions merely endowed with verisimilitude, the relevance of this work is due to the analysis about the fallacious potential of the defense of the Brazilian Jury as a fundamental institute for the support of a democracy, so that possibly only seems to be connected to precepts of a democratic regime.

This is a theoretical, qualitative and methodological approach to the analysis of bibliographic content to meet the general objective of by means of an ad hoc theoretical matrix characterized by interdisciplinary analysis of different areas of the human sciences, to ascertain the compatibility of the formal structure of the Court of the Jury in Brazil with the current nature of democracy that would be expected of it, then proposing that the present form it assumes in the country does not match what is now conceived as democratic.

2 THE LUDIC AND AGONAL VISIONS

It is so remarkable the prevalence of gambling in human culture that Johan Huizinga devoted considerable part of his studies to the playful character of culture and the idea that the very established notion of culture, from the beginnings of civilization to the present day, necessarily supports elements of play in its foundation. Following the reasoning, the Jury Court, being a product of human culture, could not be different.

Inspired by the work of Huizinga (1980), Ana Schritzmeyer (2012, p. 49) theorizes that the sessions of the Jury constitute games of manipulation of the imagery dimension about the social rules that concern the killing power of an individual in society, but they do not aim to dwell on the power to kill as an action - which here serves only to constitute the fact that

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leads the case to the analysis of lay judges -, but rather to judge the circumstances that make the use of this power legitimate or illegitimate. In other words, depending on how the deaths are reported and made into images during the jury session, the use of the killing power of the individual in question will be legitimized or not by society.

It is necessary to highlight, however, that the playful nature of the procedure does not necessarily prevent serious action during its course. In fact, there is no lack of passion and enthusiasm in the debates, marks of commitment on the part of the members, who are often ravished when they fulfill the roles that have been assigned to them (SCHRITZMEYER, 2012, p. 68).

In turn, Huizinga (1980, p. 77, 78, our translation) exposes how the style and language that permeate modern court proceedings, which often show a sporting passion for the pleasure of arguing and counter-arguing, sometimes in a highly sophistic way, made a magistrate friend of his to remember the Javanese adat, who in their culture uphold the tradition that speakers must stick a small stick to the ground to every argument judged as well performed, so that whoever stuck more rods is had, in the end, as the winner of the contest.

By making a comparison with the jury's procedure, the adat rods would be in the possession of the accuser and the defender, who by his words, gestures, and permitted means of proof, seek to sensitize the sentencing board to agree to their allegations in the metaphorical attempt to stick the rods in the ground. The result of the dispute would only be revealed after the vote of the questions, at which time it will be possible to know who managed to "stick the most" (SCHRITZMEYER, 2012, p. 70).

It is no wonder that the Jury Tribunal can be compared with an archaic tradition of argumentative dispute, because the values that guide plenary debates bear considerable resemblance to those of judicial proceedings of ancient civilizations. At this point it should be pointed out how the structure of the Brazilian popular court, in general, resembles the structure of cultural manifestations that are still present in our society due to the jury, despite being outdated.

In the wake of Huizinga (1980, p. 78, 79, our translation), the conception of justice in modern societies cannot dispense with the notion of abstract justness, however weak the conception of what this may be. Moderately, the judicial process is a dispute between assumptions about what is right or wrong, and thus victory or defeat play a secondary role. It is precisely this concern with ethical values that must be abandoned to understand the justice of archaic civilizations, because for them, the idea of right and wrong, in its ethical-juridical conception, lies in the shadow of the idea of victory and defeat, which represents an agonistic vision, combative. The archaic mind does not care about discussions behind abstract themes such as certainty or error, but rather the concrete need to win or lose, to the point of victory to define what will be taken for granted. We are faced with a mentality that states that the decision by oracles, divine judgment, ordeals, divination, or, for example, by game, are fused with the notion of decision by judicial judgment, in a complex network of reasoning that prescribes that the result establishes what justice is.

For the Germans, there is etymological connection between the word for judgment, urteil, and the word for ordeal, gottesurteil (judgment of God). Divine judgment would be given by the ordeal, but it is not easy to determine what the ordeal meant to the archaic mind, although

at first glance it seems that primitive man believed that the gods indicated who was right or in which direction fate should go, which was thought to be the same thing by the result of a test. For the ancients, the idea that proof of truth and right comes with victory in competition causes trials to arise for this purpose, but the ordeal only arises specifically as a means of revealing divine justice in the more advanced phase of religion. Thus, the result of previous competitions was seen as a decision of the gods, and in some way we still follow this same line of reasoning when we establish the majority popular vote as a consecrated means of decision (HUIZINGA, 1980, p. 81, 82, our translation).

The saying Vox Populi, Vox dei (the voice of the people is the voice of God), recorded from the time of ancient Greece and Rome to the present day, indicates very similar thinking to the above, in particular about the broad use of majority decisions in democracy. It is possible that the preference for the representation of a social majority as a means of resolving the questions of the group is precisely an attempt by the ancient peoples to materialize the divine will, making perceptible the influence of teleological determinism based on religious creed, that when viewing the abstract dimension of justice as a value, it always does so in a secondary way, necessarily linked to victory, is of little importance when seen as an end to be achieved because of moral imperatives.

In relation specifically to the judicial process, it remains in essence a verbal battle, even after having totally or partially lost its playful quality thanks to the progress of civilization. However, the main reference to be made to this dispute for words is the way it was taken in its archaic phases, in which the agonal factor presents itself more intensely, and the idealized foundation of justice would be weakened. Here, the confrontation consists almost exclusively in the effort of each party to prevail over its counterpart, resorting mainly to sharp criticism to achieve such a result. Therefore, it was not the best-uttered or well-concatenated legal arguments that had the best chance of winning, but rather the most scorching and stiolante insults directed to opponents (HUIZINGA, 1980, p. 84, our translation).

Once again, we can see the enormous importance given to the result of a contest, in contrast to the little merit given to the definition and fulfillment of basic criteria of what could be considered justice, as a preferable means for the resolution of disputes. In addition, at least judicially, there is a lack of protection of values that would serve to guide conflict resolution procedures with the aim of protecting what would be considered the integrity of the civilization of that time and its citizens. In other words, the obsessive quest for victory allowed a code of conduct for disputes to be settled fairly by today's standards not to be stipulated or enforced.

Sample of this is the example brought by Huizinga (1980, p. 85, our translation), who seeks to demonstrate the intimate connection between culture, game, and society, draws attention to the significance of drum or singing duels for the Eskimos of Greenland. This custom is relevant both because it lasts until today, despite being almost lost (CHEMNITZ, 2017, our translation), and because of the function that for that society when it was described, in which the jurisdiction was not separate from the playful sphere.

An Eskimo who has a complaint against another challenges him to a drum and singing dispute, to which the entire clan or tribe joins on a festive occasion. The participants then proceed to attack each other in shifts by means of infamous songs accompanied by the rhythm of the drum, in which one disapproves the conduct of the other, without making

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a distinction between well-founded accusations, satirical statements aimed at entertaining the audience, or pure slander. Verbal hostilities could be accompanied by physical indignities, whose steps of licitness vary between tribes: at one end, some allowed pounding, while at the other, others only allowed the attachment of the opponent. Between these two boundaries, there were tribes with intermediate stages of acceptance of the use of offensive actions, and during pauses, the competitors talked in friendly terms. The sessions of these disputes could last for years, during which the parties always thought of new songs and new reprehensible behaviors to be denounced, with the final decision on the winner being up to the viewers, who generally decided in favor of those who most amused them (HUIZINGA, 1980, p. 85, our translation).

It is quite true that, even in the Classical Age, neither Greeks nor Romans had fully surpassed the stage in which judicial oratory hardly distinguished itself from confrontation of insults. Legal eloquence in the golden age of Athens, despite all cultural and educational development, was still primarily a quality relating to rhetorical dexterity and allowed for any persuasive artifices. In Rome, too, practices aimed at ruining the opposing party in the debates were considered lawful for a long time: the speakers, among other things, appeared covered in mourning garments, burst into tears, loudly invoked goodness-be common, or fill the court with witnesses and clients in order to make the performance more impressive, in short, doing much of what is still done today in the dramatic performances before the Jury Courts. Only when Stoicism came into vogue was there efforts to liberate the legal eloquence of the playful characterization it possessed, purifying it according to the rigid demands of the Stoics in relation to truth and dignity (HUIZINGA, 1980, p. 87, 88, our translation).

Despite the correlation that can be traced between the quoted Stoic values and the principles that permeate the Brazilian criminal legal system in general, apparently the roots of the Jury Court speak louder when the subject of the discussion is the search for truth, then seen as less important than victory, which to be achieved ultimately depends on the ability of tribunes to obtain the consent of jurors.

3 THE PROCEDURE FOR MANIPULATING THE SOCIAL STRUCTURE OF THE JURY

Following the logic of maximum effectiveness for acting in the Jury Court, it is natural that the parties seek to know as much as they can about the jurors soon after their summons, both to draw up the list of peremptory refusals, how much to be able to address intentionally any of the possible components of the ruling council, creating with them a bond of empathy during the performance in plenary (PIMENTEL, 1988, p. 283).

Used by the parties also to create a more favorable configuration of the collegiate body, the immotivated refusal, according to Schritzmeyer (2012, p. 119), is based on a “fulminating psychosocial analysis that promoter and defense make of jurors”, which the author called “wild sociology”. These actors of the jury, making use of the information obtained and the behavior that the jurors present, ponder for a few seconds about variables such as profession,

gender, ethnicity, age group, appearance, and characteristics of the case in order to decide whether to consent to the jury in question acting in the capacity for which it was summoned.

With this in view, consideration should be given to the permissibility and appropriateness of establishing which prosecution and defense play such a decisive and authoritarian role in the composition of the sentencing board, when they are the most interested in a training that benefits them as much as possible at the time when the judges meet to vote on the issues of the case in question.

Consideration should be given to the possibility of the existence of "hatreds, dislikes, or founded or born only of preventions, prejudices that cannot be explained or less proved" that influence or annoy the representatives of the parties, in addition to obscure reasons that should not be externalized by their nature offensive to social interests as reasons for this prerogative to be granted (BUENO, 1922, p. 163 apud BONFIM, 1993, p. 314). The intensity of language may vary among proponents of this type of refusal, but in general, they claim that a person could be prevented from exercising his or her citizenship because of a hunch - probably prejudiced - that his or her performance in trial will be too damaging to any part of the process.

It is also argued that, if exercised appropriately, the right to immotivated refusal has the power to improve the activity of the Jury (BONFIM, 1993, p. 315)but there is no legitimate effort on the part of the legal community to allow some form of immotivated rejection of togated judges. In fact, what occurs is the opposite, judging by the existence of procedural devices, such as the arts. 285 et seq of the Code of Civil Procedure (BRASIL, 2018), with the function of avoiding the possibility of choosing one magistrate over another, who are randomly selected by a system of distribution of demands among competent judges.

According to Schritzmeyer, the manipulation of the composition of the ruling board seeks to perpetuate a simplistic model of society within the Jury Court, in which social groups commonly seen as good jurors (middle-class citizens, housewives, liberal professionals, civil servants, etc.) are called upon to use common sense in the judiciary to deal with complex criminal and social phenomena, often resorting to misconceptions such as that virtually all mulatto or black favela residents are delinquents, or that the police are largely corrupt, violent, and unjust. Thus, the lay judges end up serving as mass maneuver within a persuasive process that reiterates prejudices, orchestrated by promoters and advocates. This form of savage sociology is the basis of the "theatrocracy" of the Jury, more importantly even than the norms laid down in the legislation. In an interview with the author, a lawyer states that the jurors show penalty or fear of defendants with the stereotyped profiles mentioned above, and that while he seeks to explore the aspects that give them pity, the prosecutor explores the aspects that give them fear (SCHRITZMEYER, 2012, p. 168).

Another form of manipulation uses the imagery dimension to appeal to the judges, with which it is possible to construct the idea that there are victims of homicide who did not deserve to have their lives or their values preserved, or that the case in question was dealing with a life definitively withdrawn in an illegitimate way. This procedure would be based on the "production of images, the manipulation of symbols and their organization in a ceremonial framework", instead of the rational justification expected from an environment inserted in a legal context (SCHRITZMEYER, 2007, p. 16, 17).

For the discursive action focused on the need for persuasion of certain subjects and supported in the imagery dimension, it is also useful that the targets are completely immersed in the case under consideration, inserting them not only in the judgment, but also in all the rest that involves it, such as family and social relations, violence and crime, and even religion. This immersion aims to generate illusory degree of closeness between the members of the sentence board and the crime committed, so that it is possible to arouse certain emotions, such as indignation, fear, or guilt, and confuse the perception of the judges between what is real and what is illusion, involving them in a myriad of sensations in order to prevent as much as possible the use of reason and wisdom within the reach of a decision (LIMA, 2006, p. 75-77).

In a trend similar to that of Schritzmeyer, Roberto Lorêa (2003, p. 30) indicates that the trial session in the jury has as its central focus of dispute not the justice or the truth, but the complicity of the jurors. This thought is in conjunction with the work of Pierre Bourdieu (1989, p. 212) on symbolic power, in which he notes the legal field as a field of struggle for the "monopoly of the right to say the Law", in which agents have as their goal the recognition of their interpretation of the juridical order as the legitimate and just interpretation of the world. In this way, they are implicitly placed in a higher hierarchical level than the jurors due to the technical-legal capacity and the social prestige they have, generating in them a sense of complicity, an effect similar to the logical fallacy of the argument of authority.

More than simply acknowledging their particular views on law and society, legal actors also use language to build and reconstruct social values and images by directing jurors in the way that suits them best. Thus, the reality that before was simple and only credible becomes true, endorsed by a certain group of people due to the skilful way in which the proposition was presented by those who act in plenary. This is made possible by the process of crystallizing the worldview very often seen in jurors, who are usually citizens unaware of how their ideological rigidity undermines the rational analysis of a case to be tried, and that such convictions are harmfully exploited from stereotypes, clichés, or other aspects referencing them, in order to generate subsunctive agreement between the ideas presented by the speaker and the set of creeds of the audience to which he addresses. Achieving the agreement of the jurors in this way, instead of exercising their convictions, they begin to repeat the reasoning of the defense or the accusation at the time of voting in the secret room (LIMA, 2006, p. 39, 40).

Lenin Streck brings a more in-depth approach to the dynamics of symbolic power specifically within the Jury Court, stating that the prevailing discourse in legal practice, and in particular in the space of the People's Court, consists of intricate set of symbols, used to gain or maintain a superior position in power relations. However, because this discourse is the result of the imaginary of the agents of the juridical field, it is necessary that the listeners are persuaded to accept it, with the aim of producing relations of mere verisimilitude and construction of a "judicial reality", which does not necessarily agree with the social reality in which both legal actors and jurors are inserted, but is referenced and reiterated as if it were appropriate (STRECK, 2001, p. 126).

One of the reasons he points to the subsistence of such a dynamic is the need that the dogmatic juridical has to perform its function only by means of ceremonial procedures, fertile field so that the complicated ideological sets presented are covered up by mythical discourses, leading society to accept them as necessary for justice to be done. By its mas-

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sive ceremonial nature, this is even more evident within the Jury Court (STRECK, 2001, p. 126, 127).

The spontaneous consent of the dominated acts in an auxiliary way in its process of domination, which occurs more easily when the control is exercised in disguise in the form of a service rendered by the dominators, giving it a regular appearance and making the controlled feel they have a duty to collaborate. This consent requires, however, that both parties hold (or appear to hold) similar ideals, so that from this the recognition arises that the dominator is a legitimate representative, and that the power he carries with him is beneficial and necessary. By the process of manipulation of symbolic power, jurors lose their status as judges, leaving them only the role of supporting actors in the judicial process after having their consent extorted (GODELIER, 1981, p. 193).

It is interesting to point out that the more unconscious the connivance of the dominated, the more subtly the consent will be extorted from the targets of manipulation, thus increasing the effectiveness of this influence based on complicity, pointing to a reason why this procedure is so effective to control in a way that is smooth and difficult to detect (BOURDIEU, 1989, p. 243).

Due to the current stage of development of Law, based on technique and science with the aim of enabling as much as possible impartial and fair decisions, it is natural to resort to rationality and logic so that discourses, objectives, choices and decisions are subject to the limits of what is reasonable for contemporary legal technique and reason. The procedure of the jury, however, it requires contradictory behaviour of accusers and advocates in relation to what is established by society - which establishes specific canons such as those appropriate for the resolution of certain types of conflict - by creating a situation in which tribunes are able to pass the impression of having authority when exploiting the imaging dimension, irrational and symbolic of things, dramatizing and personalizing power relations and social structure for their particular purposes (BALANDIER, 1982, p. 66, 67; SCHRITZMEYER, 2007, p. 26).

Therefore, it can be seen that the use of scientific technique and law was relegated to a subsidiary position of prestige in the cases of the popular court. In order for power to be confused with the figures who wield it, the actors must be able to generate the illusion of complete mastery of the means by which they operate to the point of seeming to be holders of power, and not merely reproducers of it, what the jury can do by resorting to the imagery and linguistic dimension, rather than the legitimacy derived from the law.

Luiz Figueira (2007, p. 218) has the understanding that, if it is the law that prevails in the judiciary as a whole, in the jury such a predominance is morality, having the positive right clearly as its subordinate. This view is shared by Schritzmeyer (2012, p. 198), who states that it can be concluded that in the Jury Court, what is legally prescribed has secondary importance in the face of both the formation of a ruling council with a composition as favorable as possible to the theses to be presented, and the emotional maneuvers used to create alternative realities, in which one is convinced (rather than convincing) any dissenters by erecting an ad hoc social structure that is hierarchically hierarchical in power relations between tribunes and jurors.

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In view of this, it is necessary to reflect on the reasons for the political-legislative choice of jurisdiction of the Court of the Jury. If there are serious crimes that also deal with the withdrawal of human lives, such as robbery, that undergo procedure based primarily on the postulates of technique and reason, abolishing the contradictory behavior described above, questions the justification for allowing the continuation of the illusory games of power seen in the debates in the plenary session of the Jury, governed by a procedure that, given the present conditions of legal and judicial action in Brazil, can already be labeled as anachronistic.

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4 DEMOCRATIC ORGANIZATION

Although the concept of democracy has existed for so long, Robert Dahl proposes that this fact, instead of having led to the solidification of what is meant by the term, generated greater disagreement about its meaning and scope, since "democracy" has come to mean different things depending on who, at what time and at what place they speak about it. The author cites the example of James Madison (one of the Founding Fathers and President of the United States, having lived during the 18th and 19th centuries), who distinguished a pure democracy of a republic by its size or management model: the first would be a society with few citizens who personally administer the government, and the second would be a government with representation system (DAHL, 2001, p. 13, 26). Today, Madison's differentiation would probably not make sense, as the two definitions are fully embraced by the semantic breadth that the term "democracy" has come to bear.

In an attempt to define in a more specific and current way what a democratic organization would consist of, Dahl (2001, p. 49, 50) begins by stating that it is necessary for at least five criteria to be met in order for all members of a group to be considered equal when conducting an association: 1) effective participation, the equal possibility for all members to have a chance to make others aware of their ideas; 2) equal voting, for which all members' votes have the same value when making a decision; 3) enlightened understanding, the right of members to, within a reasonable period of time, they can learn about the different possibilities and consequences of the decision in question; 4) control of the planning program, the prerogative of all members to decide which matters will be judged and how this will occur; 5) inclusion of adults, permission for all adults to participate in the process, or, given the existence of incapacitating circumstances, at least a considerable majority of them.

By comparing the characteristics of the ruling board of the Jury (also an association that proposes to take collective decisions) with the criteria that Dahl theorized as necessary for equality between participants when conducting a democratic organization, the only aspect fully compatible is equal voting, because for the purpose of counting the result of the vote of the questions there really is equivalence of the arithmetic value of the individual manifestations of its members.

The inclusion of adults is only partially compatible, since the criterion of notorious suitability, provided in art. 436 of the Code of Criminal Procedure (BRASIL, 2017), which guides the formation of the annual jury draw list, allows for arbitrariness during the eligibility process

of possible members, preventing unreasonably a considerable number of people from exercising the right to be part of the state administration.

There is no effective participation in the Brazilian Jury, because jurors do not have a chance to discuss their ideas about the case because they cannot establish communication between themselves. The possibility of enlightened understanding is severely reduced by the fact that lay judges do not have adequate access to the file of the case, and the legal hypotheses dealing with the clarification of the jury's doubts seem to have dubious effectiveness, because in addition to interrupting the trial, lengthening it (something against the will of the participants themselves, who sometimes perform the function for days in a row)It is possible to come across jurors afraid to appear ignorant in an environment where they feel pressured to convey the image that they understand everything that is necessary.

Finally, the control of the planning program does not apply to the popular court, because it exists only to try crimes against life, and the questions formulated about the process, which are specificities of mandatory analysis in each case, are legally established by art. 483 of the Code of Criminal Procedure (BRASIL, 2017). However, it is important to note that the lack of applicability of this criterion is natural in a judicial context and therefore does not appear to cause harm.

When he opines that political institutions are necessary for a country to be considered democratic, Dahl (2001, p. 97-99) admits not to be concerned about the institutions necessary for units much smaller than a country (as a committee or the ruling board of the Jury Court) would need to have so that they could be considered as democratic. However, it states that some of the criteria presented as essential for large-scale democracies (elected officials; free, fair and frequent elections; freedom of expression; diversified sources of information; autonomy for associations; inclusive citizenship) are even to measure the democraticity of a considerably smaller association.

Contrasting such requirements with the characteristics of the Brazilian jury, it is averígua that fully accommodates the existence of elected officials, therefore jurors, judges, lawyers and prosecutors have constitutional backing to participate in the Jury Court by making decisions relevant to the procedure; and reasonably accommodates inclusive citizenship, since in theory any adult can be jured, provided that it presents the requirements established by the law in art. 436 et seq., of the Code of Criminal Procedure (BRASIL, 2017), which, with the exception of the notorious suitability, seems to be reasonable in the face of what is expected of a popular representative.

Partially accommodates free, fair and frequent elections, criterion compromised due to the possibility of unintentional refusal of jurors, but compatible with the form of choice of judge president, prosecutor, public defender (who are sworn in by public competitions tests and titles)legal counsel and assistant prosecutors (authorized to act in the process through the constitutionally legitimized choice of legal professionals).

It does not accommodate freedom of expression, because the Code of Criminal Procedure (BRAZIL, 2017) determines that, after the draw, and until the presiding judge releases them from their commitment, the jurors cannot communicate with anyone about the trial (art. 466, §1º) except the judge who presides the session itself (art. 473 et seq.); nor sources of

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diversified information, since to seek more information, jurors can only address the judge in a very limited way (art. 480).

Finally, the criterion of autonomy for associations does not apply to the judicial context of the Jury, since it deals with the right of citizens to organise themselves in associations with some degree of independence, such as a political party (DAHL, 2001, p. 100)A scenario foreign to the logic of forming the sentencing board.

While admitting that democracy in small units requires fewer criteria than democracy in a country (DAHL, 2001, p. 105), problems in effective participation and enlightened understanding of jury members, more specifically the absence of freedom of expression (crucial aspect, by the way, for a democratic rule of law) and absence of diverse sources of information, certainly prevent the Court of the Jury from being regarded as a fully democratic institution according to the model taken here as the basis.

5 PROCEDURAL ASPECTS UNDERMINING DEMOCRACY

Although the Jury Court is considered as one of the great institutes representing democratic culture, it cannot be said the same thing as the form taken by its proceedings in the Brazilian legal system. Even after 20 years since the enactment of a constitution that is deeply concerned with maintaining the democratic momentum that the country has been struggling to achieve, the reform carried out in the normative system of this special procedure in 2008 continued to allow the existence of antagonistic particularities to what is considered moderately necessary for the support of the democraticity of an organization.

5.1 SELECTION OF JUDGES: SOCIAL REPRESENTATIVENESS AND REFUSAL WITHOUT MOTIVATION

Since the democratic process is closely linked to the broad and equal participation of the members of an association in its management, it is desirable that all capable stakeholders be eligible to deal with the group's affairs. For this, no discrimination based on personal characteristics of the associate should be a determining factor of its possibility of participation, an understanding adopted with the objective that the defense of the rights and interests of minority groups is not harmed. However, this is not what is observed in the popular court pages.

Streck (2001, p. 100, 101) opposes the method of selection of the jurors who will be drawn for the formation of the sentencing[2] board , with the main problem being that the notorious suitability of the citizen is one of the criteria of choice, because it is a subjective concept that allows personal conceptions of those responsible for the formation of the annual list of judges, listed in the art §2°. 425 of the Code of Criminal Procedure (BRASIL, 2017), arbitrarily

2 Although at the time of his work the procedure was slightly different from the current one, the criticisms made remain pertinent, as the main change in the selection process refers to who will primarily lead to the nomination of citizens to the list of the Jury Court, and not the criteria with which they will be chosen, which is at the heart of the jurist's disagreement.

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define the extent of what would be acceptable for popular participation purposes. The consequences of this involve both undue imposition of a specific standard of normality on society (enlisted citizens become nationally approved representatives of the notorious reputation of society) established by mere auxiliaries to the judiciary, how much mistaken influence on the outcome of the conclusion of the process, because the evaluative and axiological beliefs of the selectors change the definition of who is considered compatible for the activity of the lay judge, which in turn affects the possibilities of composition of the ruling council in a different way than would be expected of a democratic and plural state.

The method of selection of the judges of a process influences the result of this, because naturally different people will have different conceptions about the most varied themes and possibly different interpretations about the same fact. According to Alessandro Baratta (2011, p. 177, 178), it is noticeable the influence that the social differentiation between judges and defendants brings to the procedural analysis, informing that judges unconsciously tend to have diversified conceptions about the criminal behavior of the accused according to the social class of the accused. The actions of people of higher layers are routinely valued more positively than those of people of lower layers, because these, according to a common misconception, would naturally be more prone to transgressions, while they would take more appropriate attitudes to the laws in general.

For Streck (2001, p. 130), this does not occur only when the judge is from the higher social strata, since the introduction of values, habits and behaviors produced by the dominant ideology would cause even citizens of lower social strata to protect the values of those who have as their superiors.

However, social differentiation is not limited only to a socioeconomic issue, as reported by Jodelet (2001, p. 60, 61), who points out that this categorization naturally tends to group people with similar characteristics, because our possibilities of world perception are structured in such a way as to highlight the affinity between similar objects and divergence between different objects. This process can generate unwanted understandings for the interpreter when he needs to face situations from a neutral state of reason (such as the analysis of facts related to possible criminal conduct in a judicial context)because it can unreasonably create favorable views to the groups with whom it identifies itself and prejudices unfavorable to the groups with whom it mostly does not share characteristics.

According to the report, the human being tends to value society based on particular biases, which also occurs in the case of the enlistment of the Court of the Jury in Brazil. Those responsible for selecting citizens gravitate around profiles that mirror what is appropriate according to their personal views of normality and fitness, reflecting a particularist and negatively prejudiced view of society. Therefore, it is clear how the criterion of notorious good repute hurts the democratic legitimacy of the decisions of the ruling council, as assigning to civil organizations the choice of jurors arbitrarily segregates the legitimate opinion of social plots devoid of representativeness.

This notion is opposed to the ideal of democracy that is intended to achieve with the maintenance of popular collegiates, because although it allows the people to participate in the administration of justice, their participation is limited by obstacles to the rights of the weakest, precisely when guaranteedIt is necessary to improve the degree of popular expressiveness. Despite the democratic nature attributed to the Jury, its procedure admits the

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action of discriminatory and marginalizing conceptions, operating from the listing of eligible individuals to the function, until the time when jurors must reach a resolution.

Bringing example of the law compared, from the late 1960s, with the Jury Selection and Service Act of 1968 (or "Jury Act", compiled in U.S. Code title 28, §1861 [3]and so on), the United States of America abolished the choice of jurors made between "men of recognized intelligence and probity", and began to do so in order to ensure, as a right of those who litigated before the jury, that jurors were elected at random, designated on the basis of representative portion of the community in which the court was. (ABRAMSON, 2000, p. 99, 100, our translation).

United States rules also state that all citizens should be allowed to be considered for this exercise of citizenship, as well as the obligation that all should serve as jurors when summoned to do so. To reinforce the need for social coverage in jury selection, §1862 informs that no citizen should be excluded from jury duty due to his race, color, religion, sex, national origin or economic status. Subsections "a" and "b" of§1863, among other things, determine that each district court shall create written plan for the random selection of judges, which shall be constructed to achieve the objectives of§§\1861and 1862, and that the plan should also specify whether jurors will be selected from electoral registration lists or from real voters in the district, in addition to prescribing additional sources of enlistment if necessary (UNITED STATES, 1968, our translation)[4].

To quote yet another example, section 1 of the British Juries Act has rules on general eligibility for jury service in England and Wales, provided that certain objective requirements are met, such as being over 18 and under 70. Section 3 establishes that the basis of the selection of jurors is made by the registration of voters, which should be sent as soon as possible to the authority responsible for summoning jurors (UK, 1974, our translation).

Although the American and British systems for the choice of jurors are open to criticism for a variety of reasons, they have definitely taken further steps towards a more democratic system. The fact that such reforms took place around 40 years before the last restructuring of the jury in Brazil generates the feeling that there was not enough will in the transformation of our procedure into something that privileged popular sovereignty in a clearer way.

The way in which lay judges are chosen in Brazil makes it seem that only those who are considered "normal" are eligible for this service, a concept whose breadth is defined by a small portion of the population. Paulo Rangel (2005, p. 101) even states that this method is unconstitutional because it hurts the fundamental objective of the Republic to promote the good of all without any prejudices regarding personal characteristics, present in art. 3º, IV of the Federal Constitution (BRAZIL, 2017). In contrast, countries said to be of remarkable social development adopt an idea of democracy based on the broadest equality and inclusion that can be offered.

It is also argued that the prerogative of the prosecution and defense to refuse jurors immovably violates democratic precepts, because in addition to violating the constitutional

3 The United States Code (commonly abbreviated to U.S. Code, or U.S.C.) is a consolidation of federal standards in the United States. The symbol § (signum sectionis), used in Brazil to reference a paragraph, is used in the United States to indicate a section.

4 The supplemental source is usually a vehicular record list, as in the Local Civil Rules 47.1 "and" of the State of Oklahoma (2016, our translation) and the Jury Selection Plan, section "B" of the District of Columbia (2012, our translation).

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device cited above, it is the exercise of "invisible power", a phenomenon considered by Norberto Bobbio (1997, p. 83-86) as inappropriate to democracy, because nothing relevant to the general public should be operated in a mysterious way. The invisible power being that exercised in secret, without the knowledge of the people, would only be excusable in situations where the immediate publicity put at risk the effectiveness of the action, which must be revealed as soon as the risk disappears. Since the juror can also be refused motivated, as arts. 448 e 449 do Código de Processo Penal (BRASIL, 2017), should not be allowed secrecy to the reason for the refusals.

For Rangel (2005, p. 235), it is common that the profile of the juror - how to join the Armed Forces, profess religious faith that prevents him from convicting another person, or be female in crimes involving women -, his manner of dress and even his appearance are relevant factors to be considered by the tribunes in the choices for the sentencing board. However, in theory they have nothing to do with the characteristics a judge must possess to properly analyze legal facts and make reasonable decisions based on this.

5.2 INCOMMUNICABILITY IN PLENARY

It is not enough for democracy that only a few elected representatives can produce speeches and arguments, which only members of the prosecution and defence are allowed to do in the jury, as it is necessary for all concerned to be adequately covered by this prerogative, but jurors are excluded. The democratic rule of law should not be restricted to legal dictates of dubious democraticity, but should allow the discussion of the widest possible range of ideas concerning topics and facts debated by society, because granting this right only to political agents (or tribunes) could imply tacit acceptance of the thesis that other people's arguments should not even be considered (MENDES; OYARZABAL, 2009, p. 199).

In "The Future of Democracy", Norberto Bobbio states that his arguments could only be valid in a context that presents at least what he called the "minimum definition of democracy", which consists of a group of procedural rules intended for collective decision-making, which must necessarily enable all interested parties to participate as extensively as possible. However, following the reasoning, it indicates that the mere participation of large numbers of individuals and the precision of rules for decision-making are not enough, even if it is a minimum definition. To these characteristics must be added the real possibility of choice among the options put to the table by the democratic regime, guaranteeing decision-makers the power to utter their own convictions in an environment of individual or collective freedom of expression (BOBBIO, 1997, p. 12, 20).

However, it is widely known that the Court of the Brazilian Jury denies jurors free expression during the procedure, a measure established by the law itself in the form of art. 466, §1º of the Code of Criminal Procedure (BRASIL, 2017), which states that after the draw, the members of the sentencing board shall be prohibited from communicating with each other or with other persons, impediment that extends to any form of expression of opinion about the process until the end of the trial session, whose punishment is the exclusion of the board from sentencing and payment of a fine.

For Jürgen Habermas (1997, p. 21), the main aspect of the democratic process, deliberative politics, depends on the establishment of efficient channels of communication and

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the opposition of the constitutionalized discourse to public opinion, which arises in an informal way. Faced with this communicative need, restricting the possibility of dialogue between those who need to decide on someone else's life does not seem to match either democracy or a rational group decision-making process.

The incommunicability among the representatives of the people comes from an authoritarian root, because the Code of Criminal Procedure in Brazil was inspired by the reform of its Italian counterpart idealized by Alfredo Rocco, Minister of Justice of the Mussolini regime, that had censorship and silence always present in the background of the exercise of power, in disregard of fundamental rights and guarantees (CARVALHO, A.; CARVALHO, S., 2005, p. 84 apud MENDES; OYARZABAL, 2009, p. 196).

The imposition of silence on jurors affronts the democratic rule of law, mirroring not the modern doctrines of guarantees, but a past reality of times of repression. As a curiosity, ratifying the premise that incommunicability among jurors is the result of a period influenced by totalitarian ideals, it is possible to check that in art. 270 of the Code of Criminal Procedure of the imperial period (BRAZIL, 1832) is allowed to confer among the members of the "Sentence of Justice" to arrive at the answer of the questions of the case. Conceived in 1941, the impossibility of communication between jurors was not removed from the jury nor with the 2008 reform, perpetuating contempt for democratic ideology, which largely depends on the possibility of communication and participation of all in the widest possible way for there to be the legitimization of a popular government.

One of the arguments in favour of popular courts is that a decision taken by a plurality of judges is more difficult to contain errors, but this stems from the discussion of opinions among those present, since the communication allows a better identification of the positive and negative points of the ideas under discussion. However, this does not apply to the Brazilian jury, whose collegiate body delivers seven individual judgments, in which the most repeated ruling prevails instead of a ruling voted in agreement by the majority. Habermas (2003, p. 162) states that a deliberative process only has the ability to self-correct through discursivity, a characteristic through which it produces rationally acceptable results. In a procedure in which there is reduced possibility regarding the merits of decisions, they need to go through a process that gives them the greatest possibility of being right, requiring for this purpose full communication between judges.

5.3 ENCOURAGEMENT OF JUDICIAL SOLIPSISM

For Figueira (2007, p. 219, 220), jurors are targets of ideological domination held so that their decisions are influenced to the maximum by what is passed by the tribunes, in order for the judges to become mere reproducers of the interpretations of the representatives of the parties to the proceedings, an effect worsened by the incommunicability imposed by law. Despite this, there is a possibility that they are entirely unaware of the existence of facts or evidence presented during the submissions in plenary, as well as the requirement to take them into account for legal decision-making, time when they will decide primarily according to their own conscience, as determined by the art oath. 472 of the Code of Criminal Procedure (BRASIL, 2017) provided by citizens at the time of formation of the sentencing board.

However, warns Streck (2013, p. 25-27) that the Law is not and cannot be the result of a particular perspective of its interpreters, because the contrary would lead to the relegation of the importance of tradition, coherence and integrity of the Law, thus establishing the possibility of a "zero degree of meaning" in the legal interpretation, in which nothing that was built prior to the decision on screen would have the capacity to influence it, generating undesirable judicial discretion.

It should be noted that the discretionary criticism in the legal field should not be seen as an attempt to prohibit the natural interpretative process of law, as a way of avoiding the idea that the legal rule produced by the judicial decision is the result of the mere opinion of the judge. The judgment of the judge cannot be dependent on the partiality to which he belongs, because such activity is characteristic of the Legislative Power, not of the Judiciary, and the permission for this phenomenon to occur indicates collusion with a form of violation of the separation of powers - one of the consequences of the democratic rule of law -, by authorizing judges to act effectively as legislators (STRECK, 2013, p. 95).

Criticism of "decisions according to the conscience of the judge" therefore takes as a basis the notion that the legal decision should not result merely from a choice of the judge among the possible alternatives for the conflict to be resolved, because necessarily the decision maker needs to develop its verdict in order to take into account the precepts of the legal order in which it participates, resulting from a complex web of subjectivities, and not from a single interpreter (STRECK, 2013, p. 108, 117).

Although judicial solipsism is not the exclusive trademark of the Jury Court, and is also a recurring phenomenon in judgments handed down by togated judges, the fact that it is a legally stimulated behavior to the sentencing board creates the need that, at least in relation to this collegiate body, be combated more vehemently, because the State should not foster a set of attitudes that contradicts its own legal structure, let alone instituting them in its own laws.

5.4 IN DUBIO PRO REO DISRESPECT

As Aury Lopes Jr. (2014) , the prevalence of the defendant's interest in the existence of doubt over his conviction is a pragmatic criterion for resolving judicial uncertainties, reinforcing the requirement that the accused should be acquitted when on his guilt there rests certainty. It is a corollary of the presumption of innocence, a guarantee established by art. 5th, LVII of the Federal Constitution (BRAZIL, 2017), which determines that the guilt of the accused is only decreed from the moment that sentence condemning in his disadvantage becomes final. The consequence arises from the idea that if someone cannot be found guilty before the end of his trial, he should be presumed innocent until the last trial decides otherwise, which requires proof of the accused's guilt beyond all uncertainty.

In a similar thought, Gustavo Badaró (2003, p. 285) states that the presumption of innocence can be observed by a technical-legal, in that it functions as a procedural commandment to be invoked in favor of the accused at any time that there is dubiousness about a fact pertinent to the conviction. Therefore, in view of the existence of a democratic rule of law which considers an accused innocent until proven guilty, there is a need for the certainty of

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the condemnatory decree to be fully established during the judicial proceedings, beyond a reasonable doubt.

Because it has central importance within the Brazilian criminal justice system, its preservation in the proceedings of an organ considered to represent popular sovereignty should be seen as an objective of great importance. However, the art. 489 of the Code of Criminal Procedure (BRASIL, 2017) informs that the decisions of the sentencing board will be taken by means of a simple majority, constituting violation of the benefit of the doubt in favor of the defendant in cases where they are given in a non-unanimous way to condemn, since such a hypothesis does not respect the need for certainty of the judge as to the punishment ordered.

For his part, Marcelo Barazal (2012, p. 582) added that, for example, in a conviction by four votes in favour and three against, the defendant would be convicted because he was found slightly more guilty than innocent, and the violation of the presumption of innocence was clear. It is important to note that in this hypothesis four out of seven votes represent little more than 57% of the total, only slightly above half of the numerical representativeness of the judging body. The plaintiff argues that when the jury's decision does not reflect the certainty expected of the decision in a criminal case, the accused should be released, as it would only be "almost guilty"a victim of a state that has not even been able to produce sufficiently convincing evidence to demonstrate beyond a doubt its guilt to all members of the sentencing board.

Regardless of the procedural aspect of the violation, both in dubio pro reo and the presumption of innocence are necessary parts of a fair and democratic process, and the violation of these precepts characterizes serious injury to the criminal procedural system and the Federal Constitution.

6 CONCLUSION

Considering its historical importance and the fact that it is a body through which the people can participate directly in the judicial administration, most of the population and jurists of Brazil seem to affirm that the Jury Court is a great representative of democracy. However, the allegation is misleading when attributed to the body of this country, because it suggests that it is structured in a way that corresponds to modern democratic theories, or that at least it would respect the Federal Constitution originated in the most recent period of Brazilian democracy, which turned out to be untrue.

For these and other reasons the Jury can be easily compared to archaic forms of judicial probation, inadequate to the current stage of development of law or democracy. Its playful and agonistic aspects originate from the period before the advent of democratic states under the rule of law, and therefore, seeking the truth in plenary session or ending a just decision under the eyes of the law are secondary goals in the face of victory, which is normally obtained through the subtly extorted legitimization or otherwise of jurors as to a criminal act.

Based on a study on democracy, it is concluded that the Court of the Brazilian Jury does not present a suitable structure to provide what is currently considered to be an appropriate

process of collective decision-making among members of an association, as it does not (or only partially) present various characteristics that are deemed necessary for an institution to be appropriate to the modern democratic character.

The affronts to democracy are also present in the Jury's own procedure, as it allows eligible citizens to be selected for a citizenship duty by means of the arbitrary criterion of notorious suitability; prevents effective communication between judges after being selected, disregarding that democracy is a management method based on the establishment of dialogical relations between participants; introduces in its own normative system the prerogative of judges to use their own conceptions about what the Law should be, being able to go against what was built historically in the legal sphere without at least raising the reasons for it; and authorizes, for example, that in a normal way in its action are violated fundamental guarantees as the rule of in dubio pro reo, which stems from the presumption of innocence, a rule of constitutional nature.

It is hoped that this work has clearly shown these problems, as there will be better possibilities to resolve them in the legislative field after the precise finding that the current form of the jury in Brazil affronts modern notions of democracy, in addition to violating the Federal Constitution itself.

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JUDICIAL INSURANCE GUARANTEE AND EFFECTIVE PROTECTION OF LABOR CREDIT: PROPOSAL OF DYNAMIC AND FLEXIBLE INSURANCE MODEL

SEGURO GARANTIA JUDICIAL E PROTEÇÃO EFETIVA DO CRÉDITO TRABALHISTA: PROPOSTA DE MODELO SECURITÁRIO DINÂMICO E FLEXÍVEL

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ABSTRACT

Developed in the field of security guarantees in labor trials, the article started from the recognition that the current regulatory framework, rigid and precarious, does not provide a balanced composition of legitimate interests of creditor and debtor. In view of this problem, was assumed as a primary objective the construction proposal of a model capable of providing effective and efficient protection to credits from employment relationships. For that, as a method, it started with the structural and functional analysis of judicial guarantee insurance from a procedural and contractual perspective (positive law system analysis); then, was examined the correlation between the times of the process and the effectiveness of the right of credit, performed in statistics and jurisprudence fields (data and cases analysis); subsequently, were formulated basis for the current model improvement. As a result, it was identified that, in the proposed model, more in tune with good insurance technique, rigidity must give way to dynamism and flexibility, to allow the good payer access to differentiated and favored conditions in the provision of insurance guarantees, without unprotecting the creditor. From a procedural perspective, this model can contribute to the balanced and efficient

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composition of creditor and debtor interests and in the contractual dimension serve as a stimulus for the development of the market in this insurance field.

Keywords: Judicial guarantee. Insurance guarantee. Appeal deposit. Executive warranty. Flexible insurance.

RESUMO

Desenvolvido no campo da prestação de garantias securitárias no processo do trabalho, o artigo partiu do reconhecimento de que o atual quadro regulatório, rígido e precário, não propicia a equilibrada composição de interesses legítimos de credor e devedor. Diante desse problema, assumiu-se o objetivo primordial de propor a construção de modelo apto a conferir proteção efetiva e eficiente a créditos decorrentes de relação trabalho. Para isso, como método, iniciou-se com a análise estrutural e funcional do seguro garantia judicial em perspectiva processual e contratual (exame do sistema de direito positivo vigente); em seguida, examinou-se a correlação entre os tempos do processo e a efetividade do direito de crédito, realizada nos campos da estatística e da jurisprudência (análise de dados e casos); na sequência, formularam-se bases para o aprimoramento do modelo atual. Como resultado, identificou-se que, no modelo proposto, mais afinado com a boa técnica securitária, a rigidez deve ceder lugar para o dinamismo e a flexibilidade, para permitir ao bom pagador o acesso a condições diferenciadas e favorecidas na prestação de garantias securitárias, sem desproteger o credor. Esse modelo pode, na perspectiva processual, contribuir para a composição equilibrada e eficiente de interesses de credor e devedor e, na dimensão contratual, servir de estímulo para o desenvolvimento do mercado desse ramo securitário.

Palavras-chave: *Garantia do juízo. Garantia securitária. Depósito recursal. Garantia executiva. Seguro flexível.*

1 INTRODUCTION

The judicial procedure, by definition, involves the composition of conflicting interests. In the exercise of this substitute activity, prudence and a balanced distribution of duties and burdens are required, even if, in the areas of the work process, there is a need for a certain special and differentiated protection of workers' rights, a social and procedural actor who, in the common case, presents a vulnerable condition in relation to the adverse party.

This particular characteristic results from the imposition of encircling the credits resulting from a labor relationship, covered with food nature, with reinforced guarantees, in order to provide effective satisfaction. In fulfilling this purpose, however, it is necessary to seek the appropriate balance with the - also - legitimate interests of the debtor. In this sense, the effectiveness of the employee's credit claim, as a guide to guiding the jurisdictional activity, should be in line with the efficiency represented by the imperatives of optimal accommodation of the parties' interests in cooperative procedural concert, despite the differences that lie at the root of the conflict situation.

Therefore, the process of materializing the fundamental right to adequate judicial protection - in favor of plaintiff and defendant, creditor and debtor, although with a differentiated normative burden - involves the prudent convergence between effectiveness and efficiency. Thus, regarding the provision of guarantees, the balance of interests transits through the protection of the credit claim in accordance with the prohibition of imposing undue or excessive legal and economic burdens on the debtor.

In this context, the present investigation is aimed at the examination of the guarantee insurance in the areas of the work process. Thus, as a general design, the research focuses on the construction of a prototypical model of security guarantee that embodies the approximation between effectiveness and efficiency as a counterpoint measure to solve part of the derived impasses: of the traditional and inefficient static and rigid model of guarantee provision in the current Brazilian procedural legal order; of the current precarious regulatory regime and not very attuned to the technical assumptions of insurance.

In a specific way, three objectives are assumed. From the outset, the structural and functional dissection of the legal guarantee insurance in double perspective: procedural, in the capacity of security procedural guarantee; contractual, in the condition of procedural security guarantee. Then, the examination of the correlation between the passage of time of the process and the effectiveness of the credit derived from labor relationship, also carried out in two axes: first, predominantly statistical; next, jurisprudential, from the analytical cut-off of the treatment in respect of the legal guarantee insurance with a predetermined term of validity. Finally, the formulation of a dynamic and flexible security model.

Congruently with the particular objectives of the research, the article is divided into three segments. In the inaugural portion, with a predominantly descriptive purpose, two mutually complementary discursive paths are followed: the examination of the insurance guarantee as an institute of the process, based on the positive legal order (centrifugal approximation, from the process to the contract); the analysis of the guarantee insurance from the elements of the security technique (centripetal linkage, from the contract to the process).

In the subsective segment, we begin by collecting quantitative elements related to the effects of the passage of time on the satisfaction of labor credit and start by analyzing the evolution of the jurisprudence of the Superior Labor Court (TST) on legal guarantee insurance, in particular the issue of security guarantees linked to a predetermined term of validity, especially in the regulatory context of that security product. In the last installment, with exploratory purpose, the article enters into the critical indication of bases for the formulation of a model for achieving efficient effectiveness through dynamic and flexible security guarantees.

2 THE LEGAL GUARANTEE INSURANCE: BASIS, CONTENT AND FUNCTION

Aimed at the panoramic understanding of the structural and functional profile of the judicial guarantee insurance, this segment begins with the descriptive examination of the sectors of the positive procedural law system in which it accommodates. In the subsective fragment, still with the primarily narrative purpose, the judicial guarantee insurance is soon dissected as a security product, with the analysis focused on the legal elements of formation and operation of insurance contracts.

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2.1 THE LEGAL GUARANTEE INSURANCE AS A SECURITY PROCEDURAL GUARANTEE

It is advisable, at first, to explain the development of the judicial guarantee insurance within the Brazilian positive law system, in particular from the perspective of the work process.[3] For the purpose of exposure, a description is proposed divided into five periods. First of all, reference is made to the pre-training period prior to 21 January 2007, the date on which Article 2 of Law 11.382 of 2006 entered into force, which now provides for the admission of the guarantee insurance in the civil execution, by means of the legislative reconstruction of Article 656, § 2nd, 1973[4] CPC.

The embryonic stage followed: from 21.1.2007 to 13.11.2014, date immediately prior to the beginning of Article 73 of Law 13.043 of 2014, which, by amending four articles of LEF, now provides for the admission of the guarantee insurance court in the tax execution process[5] , preferential integrative path in the executive cycle of the work process, in the form of article 889 of the CLT[6] .

The cycle of affirmation and development, from 14.11.2014 to 17.3.2016, dates immediately prior to the beginning of the CPC of 2015, followed by the brief stage of consolidation, from 18.3.2016 to 10.11.2017, is set in motion, the date immediately prior to the inauguration of Law n. 13,467, of 2017. In this evolutionary quadrant, for the purpose of substitution of pledge, the legal guarantee insurance was equated to cash, with the following condition: “provided that in value not less than the constant debit of the initial, increased by thirty percent”, in the form of article 835, § 2, supported by the sole paragraph of Article 848, which deals specifically with the replacement of the pledge.

Then came the phase of normative emancipation, from 11.11.2017 onwards, with the formal entry of the procedural figure in the CLT system, with deepening and acceleration from 17.10.2019, due to the regulatory discipline established by the Joint Act (AC) n. 1, of 2019, of

3 All references to primary normative acts come from the Portal da Legislação da Presidência da República (BRASIL, 2020c). In this condition, fit the six acts of this nature, and respective amendments, with devices mentioned or transcribed throughout the text, here indicated in ascending chronological order: Consolidation of the Labor Laws (CLT - Decree-law n. 5.452, 1943), 1973 Code of Civil Procedure (CPC 1973 - Law n. 5,869, 1973); Law on Tax Executions (LEF - Law n. 6,830, 1980); Law n. 8,177, 1991; Civil Code (CC - Law n. 10,406, 2002); Code of Civil Procedure 2015 (CPC - Law n. 13,105, 2015). Identical record holds for the mentions to the Federal Constitution of 1988 (CF) and respective amendments (EC).

4 “The party may request the replacement of the pledge: [...]. § 2º. The pledge can be replaced by a bank guarantee or legal guarantee insurance, in a value not less than the constant debit of the initial, plus 30% (thirty percent)”. As a precedent, the Superintendency of Private Insurance structured the insurance guarantee as a security product in the regulatory environment (Circular n. 232, 2003, for example), but with little widespread employment due to the resistance of the Judiciary (GOLDBERG; PINTO, 2012, p. 89-90)founded, above all, on the absence of express provision in the positive procedural legal order.

5 Within the Union, the employment of the guarantee insurance is regulated by Ordinance n. 164, of 2014, of the Attorney General’s Office of the National Treasury.

6 Note that the integrative criterion chosen presents structural inconveniences, with the consequent need for systemic and hermeneutic debugging. The following points of tension between Law No. 6.830 of 1980 and the CLT are indicated: the first one is for the purpose of conducting an extra-judicial enforcement procedure - in this case, the certificate of the active debt - representing an obligation to pay a certain amount, it is always, by definition, definitive; whereas the second, in the common case, operates with execution as the procedural stage aimed at fulfilling the obligation portrayed by the judicial instrument, including benefits to do, not do and deliver things, on admission of provisional execution. In other words: in the Labor Court, the enforcement process of extrajudicial enforcement order for the payment of certain amount, although possible, in the form of article 876 of the CLT, represents the exception, and not the rule (SCHIAVI, 2016, p. 48), as revealed by the statistics (CAMPOS; DI BENEDETTO, 2015, p. 11-12). Examples: the tax execution of pecuniary penalty imposed by the supervisory body of labor relations and the execution of claims arising from commitment to conduct adjustment.

TST[7] (BRAZIL, 2020f). By entering this normative system, he retained the primary function of ensuring execution, in the form of Article 882. In addition, it began to play a new role (similar, but not identical to that): guarantee for the purpose of filing appeals, according to article 899, § 11[8].

The scheme provided for in the CLT, however, differs from the discipline provided for in the areas of civil enforcement and tax enforcement. First, a functional distinction is identified. As demonstrated, in the labour process, in the case of a judgment for the payment of the sum, there is room for the presentation of legal guarantee insurance to replace the deposit needed to prepare the filing and the processing of appeals, figure strange to other executive modalities.

Secondly, the dissimilarity lies in the criteria for defining the value necessary for the security cover to produce the guarantee effect[9]. In the tax execution, the amount is determined by the value of the case, composed by the original debit (Article 2, § 2, II, of LEF), plus, as each case, monetary update, default interest and "other charges provided by law or contract" (idem, and Section IV, and Article 6, § 4).

By specifically dealing with the civil enforcement of extrajudicial title for certain amount, the CPC establishes that the judicial guarantee insurance should reach figure "not lower than the constant debt of the initial, plus thirty percent". In this mode of execution, the debit indicated in the original application is composed of the nominal original value of the payment instalment plus monetary correction and default interest, in a convergent sense with the provision of Article 292, I, of the CPC, relating to the action for recovery of debt[10]. Thus, in execution, as a rule, there is monetary expression correspondence between the executive claim (economic advantage initially intended) and the value of the cause, and which serve as a basis for calculating the importance required for the recognition of the insurance guarantee effectiveness.

Suitably adapted, the application of similar criteria finds room in the sentence-fulfilment phase, using the reciprocal integrative rules provided for in the single paragraph of Articles 318,513 and 771. In this environment, the insurance guarantee - as a substitute for the pledge - can provide ballast to the application for the assignment of suspensive effect to challenge the enforcement of the judgment, with the aim of stopping the practice of certain acts of execution, in the form of Article 525, § 6 [11]. In addition, the security product could gain ground to enable the execution of the implementation of the bond requirement established by

7 Inspired by the regulatory model foreseen by Ordinance n. 164, of 2014, of PGFN, for the guarantee insurance in tax execution, Article 12 of AC n. 1, of 2019, of TST, determined the adaptation of the security guarantees submitted since the beginning of the validity of Law n. 13.467, of 2017 (BRAZIL, 2020f). The regulation was modified by AC n. 1, of 2020, of the TST, in force since 29.5.2020 (BRASIL, 2020g).

8 "The Recursal deposit may be replaced by bank guarantee or legal guarantee insurance".

9 At this point, the validity and effectiveness of the insurance guarantee must not be confused. The former occupies a preponderantly "exoprocedural" dimension, while the latter transits primarily through the "endoprocedural" field. To change as children: the lack of efficacy in the guarantee - and for the - process does not compromise, for itself and in itself, the validity of the insurance guarantee.

10 It should be noted that "collection" and "execution", although they share certain characteristics, are not confused: execution is singularized, for example, by the possibility of expropriation of property.

11 Thus, with the use of regulatory integration resources, it is concluded that the pledge guarantee involves replacement by the offer of insurance provided for in Article 835, § 2, of the CPC, which, in this case, moreover, would perform a guarantee function. Similarly, the insurance guarantee serves as the basis for the executor to request the assignment of suspensive effect to enforceable embargoes (CPC, article 919, § 1).

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Article 520, IV, of the CPC, as a condition for the authorization of the practice of satisfactory acts in provisional sentence compliance.

In the CLT's executive guarantee scheme, the effectiveness of the insurance is linked to the discounted execution value, included in it the expenses of the process (costs, for example). The final part of Article 882 of the CLT refers to Article 835 of the CPC. Thus, the requirement - or dispensation - of an increase of thirty percent can open up room for doubt. In this step, two interpretative scenarios emerge.

In this sense, in the first scenario (requirement of increase), the remission would be related to the full system of replacement of the pledge established by article 835 of the CPC. In this sense, in order to equate insurance with pledging money, the coverage should reach the running debt and at least thirty percent more. In the second (exemption from accrual), the normative remission would concern only the establishment of the "preferential order" itself, and not the substitution regime.

By this understanding, there would be a legislative option to establish the ordinal binding for the pledge (and only for it), without, however, requiring that increase in the insurance guarantee. Thus, in this hermeneutic context, the CLT would accept insurance as a "direct guarantee", parallel to the pledge, and not as a substitute for it. The TST, however, determines that the insurance guarantee effectiveness depends, rather, on the addition of at least thirty percent, according to Article 3, I, of AC n. 1, 2019) (BRASIL, 2020f)[12].

2.2 THE LEGAL GUARANTEE INSURANCE AS A PROCEDURAL SECURITY GUARANTEE

The legal guarantee insurance, as a security product, has a peculiar content. In essence, it brings together the elements commonly found in insurance contracts, such as hedged risk, premium, claim and indemnity. In this technical dimension, it is regulated by Circular n. 447, of 2013, of the Superintendency of Private Insurance. In the functional scope, however, especially in an evaluation conducted from the perspective of procedural insertion, the insurance is coming from figures such as bail. Consequently, the insurance guarantee exhibits a bivalent nature: it preserves, with temperaments, the essential security characteristic, but, at the same time, it has a reliable purpose.[13]

This particular characteristic reveals interesting integrative potential: as an idea of a general order, whenever it is foreseen the admission - or the requirement - of bail, there is, in principle, the possibility of replacing it with insurance guarantee. In a more elastic extrapolation, a similar proposition would find, in theory, some comfort in relation to the requirement of a guarantee deposit, as in the case of a termination action proposal (article 836 of the CLT

12 To this end, the regulatory rule invokes Jurisprudential Guidance No. 59 of the SBDI-II of the TST, which contains a reference to Article 835 of the CPC. A caveat comes into play here: the aforementioned jurisprudential understanding was built, amended in 2016, from the perspective of the indirect application - by simple integration - of the CPC in the work process, before, therefore, the inauguration of the emancipation phase of insurance guarantee as an institute endowed with direct forecast in the CLT's own normative body, an open stage, as pointed out, on 11.11.2017.

13 Informative of Jurisprudence n. 483, of 2011, of the Superior Court of Justice (Special Appeal n. 1.224.1995, Fourth Panel, judged on 13 Sep. 2011): "[...] the guarantee insurance, unlike most insurance, is not attached to the mutualismo and the actuary. Indeed, in view of the uniqueness of this type of insurance, which is very close to bail, the policyholder takes out insurance by which the insurer guarantees the interest of the policyholder in relation to the obligation assumed by the policyholder and therefore cannot, the absence of payment of the premium is alleged by the insurer. [...]" (BRAZIL, 2011).

and article 968, II, of the CPC). In a related field, the security product could appear as a conventional guarantee for the legal business of payment instalments executed by the parties on the basis of Article 190 of the CPC.

Within the security technique, damage insurance, established on behalf of others (FRANCO, 2009, p. 310), to protect legitimate interest of third parties regarding the satisfaction of credit claims, approximating it, in this analytical angle, to civil liability insurance (Article 787 of the Civil Code)[14] In essence, insurance protection is returned to the creditor of - if any - obligation to pay. Consequently, as a rule, the worker appears as the beneficiary of security protection.

However, insurance can - and must - reach other actors in the process, since they are recognized as creditors "to whom the law confers executive title" (CPC, article 778), such as, for example, the Union (in the case of tax credits, such as social security contributions and costs of the proceedings), lawyers (fees) and experts (idem), in the form provided for in Article 3, I, of AC n. 1, of 2019, of TST (BRASIL, 2020f).

In this sense, on the subjective level, the interests of three categories of persons are legally interwoven, in two conditions: In the strictly procedural dimension, the creditor (or, in a more indented sense, the exehot) is found; the debtor (idem, executed); the third guarantor, who may be liable and who, in the case of a claim, acquires the condition of execution (CPC, Article 779).[15]

From a security perspective, they are, respectively (ALMEIDA, 2018, p. 31-32): the insured (or, in the event of the occurrence of the accident, the beneficiary), in favor of those who establish the coverage of the risk of default, as the ultimate holder of the interest safeguarded[16] by the insurance; the policyholder , as the one who, by paying a certain price (premium), concludes the insurance contract to offer it as a legal guarantee; the insurer, the legal person who, in exchange for receiving the premium, it assumes the risk of default of the insured. The components of the triad maintain, in pairs, a relationship with each other, which, in a meeting, conform to the triangular legal relationship of judicial guarantee insurance (ALMEIDA, 2018, p. 32).

Furthermore, in the sense of more open understanding, in the institutional field, the establishment of insurance "in favor" of the judiciary itself is recognized as an organic structure responsible for the implementation of the fundamental right to adequate judicial protection, in line with the idea stemming from the traditional expression "assurance of judgment[17]".

14 In the regulatory scope, it is defined the product "Insurance Guarantee: Insured - Public Sector" as the "insurance that aims to ensure the faithful fulfillment of the obligations assumed by the policyholder vis-à-vis the policyholder by reason of participation in bidding, in the main contract relevant to works, services, including advertising, purchases, concessions or permissions under the Powers of Union, States, Federal District and Municipalities, or even the obligations assumed due to: I - administrative proceedings; II - judicial proceedings, including tax executions; III - administrative installments of tax credits, registered or not in debt; IV - administrative regulations".

15 This characterization derives from the conjugated interpretation of the following, in analogue and finalinical sewing: "Enforcement may be promoted against: [...]; III - the new debtor who has assumed, with the consent of the creditor, the obligation resulting from the instrument permitting enforcement; IV - the guarantor of the debt held in an extrajudicial capacity; V - the responsible holder of the asset linked by a security in rem to the payment of the debit; [...]".

16 Defined as "debtor of labor obligations that must provide security in the judicial process", as AC n. 1, from 2019, do TST, article 2, X (BRAZIL, 2020f).

17 No caso do depósito – ou de seguro garantia judicial – recursal, o papel da Justiça do Trabalho acerca-se da atuação de escrow agent, na gestão de escrow account (conta de compromisso), com destinação dependente do resultado do julgamento recurso garantido. O Agente exerce uma função de Seguinte: "Um terceiro encarregado de deter ativo ou conteúdo enquanto um desacordo sobre os ativos é resolvido ou um evento desencadeando o uso dos ativos ocorre. Uma vez que

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In a convergent sense with the purpose of protecting the credit claim of third parties (workers, primarily), the exercise of private autonomy in the legal guarantee contract is limited to the following normative profile: the prohibition of the provision of relief, apportionment or any co-participation of the insured or the policyholder in the event of a claim (Article 10 of Circular No. 477, 2013, of Susep); the prohibition of provision of grace (idem); the need to take out insurance at the first absolute risk (idem, article 9) (BRASIL, 2020e), understood as "where the insurer is fully liable for the loss up to the amount of the insured sum, no apportionment clause shall apply in any event" (IRB, 2011, p. 198); the exclusion of the contract exception not fulfilled with the derogation from the general insurance regime with the requirement that the insurance contract contains provision for the waiver of the application of Article 763 of the Civil Code[18], so that the possible state of default regarding the payment of the prize cannot compromise the security indemnity (idem, article 11, § 1, and article 3, IV, AC n. 1, of 2019, of the TST); the impossibility of resilience and termination of the contract, unilateral or bilateral (Article 3, § 1, of the aforementioned normative act of the TST)[19] (BRAZIL, 2020f).

The risk supported by the insurance corresponds to possible and eventual total or partial default of debit, possibly due to the title of executive in training (insurance as a non-recursal deposit) or in execution (insurance as a guarantee of execution). In this way, the legal insurance business involves - or may involve - double uncertainty. Firstly, as a manifestation of insurance in general, the vagueness about the occurrence of the accident. Eventually, however, uncertainty can override the legitimate interest itself shielded by insurance.

As has been shown, the legitimate interest is in the credit claim. However, due to the characteristics and purposes of that security product, the credit claim may be substantially modified. Indeed, from the debtor's perspective, the offer of insurance guarantee is related to the purpose of access to contradictory: [20]in the case of legal guarantee insurance Return: to extend the cycle of training of the enforcement order; in the case of insurance enforceable judicial guarantee, to allow the opposition of embargoes to execution (CLT, article 884). Consequently, depending on the content of the adversary exercised in appeal or embargoes and the corresponding judgment, there is the possibility of structural compromise of the mandatory legal relationship concerning the credit claim covered by the insurance.

In this line of understanding, the judgment of the appeal, with the production of substitutive effect (CPC, Article 1.008), or the embargoes to execution, may result in the collapse of the credit, with the recognition, for example, of the: non-existence of the obligation (extinction of precariously constituted credit); unenforceability of the title (allocation of an debeatur), unenforceability of the obligation (idem); passive illegitimacy of the executed (shake of the wanted debeatur); active illegitimacy of the exehot (ruin of the debeatur Cui), and so on.

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a situação para o depósito termina, este terceiro-parte entrega os itens garantidos conforme especificado no acordo de custódia" (THE LAW DICTIONARY, 2020).

18 "The insured person who is in arrears in the payment of the premium will not be entitled to compensation if the claim occurs before its purging".

19 Although the normative act mentions, improperly, the impossibility of "termination". From the point of view of good legal technique, as the termination operates in the field of nullities, the normative act could not allow the preservation of null contract. It takes care, therefore, of prohibition of resilição (empty denunciation) and resolution (full denunciation, for non-compliance).

20 As shown above, in the civil procedure executive system, the insurance guarantee - as a substitute for the pledge - fulfils a different function: it does not directly connect with the opening of contradictory, but with the possibility of granting suspensive effect to the challenge to the execution of a judgment or to the embargoes to the execution, in the form of Articles 525, § 6, and 919, § 1, of the CPC, respectively.

The disturbance of the credit claim may be partial if the decision determines the qualitative (change of the quid debeatur) or quantitative (reduction of the quantum debeatur) resizing on the grounds, for example, the exclusion of a certain portion of the scope of the conviction or the recognition of over-execution in the calculation of default interest. In this way, therefore, the insurance guarantee is linked to the legitimate interest marked by precariousness, resolved according to the outcome of the trial of the appeal or the embargoes to execution.

The possibility of qualitative and quantitative resizing of the credit claim can operate in the opposite direction, with the addition of installments or the increase of the value, with the ranking of the procedural condition of the insured debtor. Such a framework may derive, for example: from the appeal of the plaintiff; from the judgment of the appeal of the decision - "judgment" - from the settlement filed by the creditor (CLT, article 884, § 3, final part[21]); the application of a procedural penalty in the course of the appeal or enforcement process, such as a fine and compensation on grounds of bad faith litigation or the commission of an act contrary to the dignity of the justice system; in the case of a determinative judgment, of the supervenient and gradual acquisition of the requirement, by maturity, of new portions of successive tract derived from legal relationship of continued tract (CLT, article 892)[22].

The security cover covers only "[...] the nominal maximum value guaranteed by the policy [...]" (Article 7 of Circular No. 477 of 2013 by Susep) (BRASIL, 2020e), which delimits the indemnity (FRANCO, 2009, p. 309). Regardless of the discussion on the legality of the thirty percent increase requirement, the regulatory requirement establishes, for executive guarantee insurance, that "the insured amount shall be equal to the original amount of the debit executed [...], duly updated by the legal indexes applicable to labor debts on the date of completion of the deposit" (AC n. 1, 2020, of the TST, Article 1, I); and for the insurance non-recursal guarantee, the value of the conviction, applying the limit laid down in Article 40 of Law No. 8.177 of 1991 (idem, II). It is also required that the insured amount, for the purpose of possible compensation, is updated according to the calculation criteria provided for in the legislation of regency (idem, III) (BRASIL, 2020g).

The obligation to indemnify falls on the amount to which the insured was obliged by the policy, in the form of Annex I of Circular n. 477, 2013, of Susep - General Condition 6.6 (BRASIL, 2020e). The update includes monetary correction and interest on late payments (ancillary instalments). Strictly speaking, in the scenarios described above, the alteration of the (main) debt is promoted, with accessions of qualitative or quantitative order: it is not taken care, therefore, of simple updating of the primitive debt by accessory portions.

Consequently, in principle, these additions do not fall within the scope of the security cover, therefore dependent on the new agreement of the insurer, by means of endorsement (Article 7, §§ 1 and 2, Circular n. 477, 2013, of Susep) (BRASIL, 2020e), as the "document, issued by the insurer, through which data and conditions of a policy are changed, in agreement with the insured person" (SUSEP, 2020), within its term (IRB, 2011, p. 93). However, there would be a field to build integrative interpretation in the sense that the 30% increase require-

21 "Only in embargoes to the attachment can the executed challenge the settlement sentence, fitting to the execution equal right and in the same term". In the common case, it takes care, strictly speaking, of interlocutory decision, with the solution of incident question, and not of sentence, in the sense of the word.

22 "In the case of successive benefits for an indefinite period, the performance shall initially include the benefits due until the date of entry into performance".

ment is based precisely on the possibility of extending the credit claim, as complications and vicissitudes inherent to the risks incurred in an insurance contract, which define it.

The risk covered, however, is not properly confused with the eventuality or precariousness of the credit claim, but with the possibility - or probability - of default. Consequently, the risk of default is exposed to the creditor - or potential creditor - of an obligation to pay a certain amount recognised in a formal instrument or consolidation process, as is the case in the case of judicial guarantee insurance.

Thus, in the work process, as a rule, the risk falls on the person of the worker and other creditors of obligations arising from the enforcement order[23]. In a convergent way with the risk included in the security cover, the claim materializes due to the configuration of the default status of the obligation, in whole or in part. With the qualitative and quantitative adjustment of the debt or, at least, the identification of the uncontroversial portion of the debt, the claim occurs due to the absence of accuracy to the official call for payment, within the period provided in the procedural legislation. In the case of insurance, due to the need to make it compatible with the traditional deposit [24]system, the claim occurs - or should occur - as described below.

the consolidation of the obligation to pay a certain amount and, with the possible settlement procedure (CLT, Article 879), the quantitative settlement of the credit claim, taking place with the final decision, it is for the debtor to pay the sum corresponding to the non-recursal deposit, observed, logically, the forces of the claim, in the case of partial reform of the original judgment, within the period specified therein, or, in the case of absence of an estimate, which the judgment of the liquidation shall lay down;[25]

Faced with the debtor's[26] recalcitrance, the claim is configured, understood as "the default of the policyholder's obligations covered by the insurance or the judicial determination to collect the amounts corresponding to the policy" (Article 2, IX, of AC n. 1, of 2019, of TST) with the consequent processing of the security indemnity, defined as the "payment by insurers of the insurance obligations, from the characterization of the claim" (idem, Article 2, III) (BRASIL, 2020f). In the case of a consolidated debit with a quantitative expression higher

23 From a theoretical point of view, they do not pose legal obstacles to the constitution of an obligation to pay a certain amount against the worker, either as the plaintiff or as the defendant. In this way, he himself could avail himself of the judicial guarantee insurance as a substitute for deposit or pledge

24 Regulated by the Normative Instruction (IN) n. 3, of 1993, of the TST, and amendments (BRASIL, 2020h).

25 IT is therefore essentially a proposal to adapt the procedure laid down in Item IV "e" of IN n. 3 of 1993 to the TST, which prescribes the following: "with the final judgment of the decision settling the conviction, will be released in favor of the execution of the amounts [of deposit Recursal] available, within the limit of the amount enforced, continuing, if applicable, the execution by remaining credit, and authorizingif the survey, by the executed, of the values that happen to rise" (BRASIL, 2020h).

26 To take care of the characterization of the claim, Article 10, II, "a", do AC n. 1, from 2019, do TST, contains more stringent provision, to make it coincide "[...] with the final decision of the final decision or by reason of judicial determination, after the trial of the guaranteed resources" (BRAZIL, 2020f). It is understood, however, that as a rule the solution indicated in the final part of the normative precept should prevail, with the regular opening of procedural opportunity for the debtor-insured to make the payment related to the non-recursal guarantee, by notification. Strictly speaking, although the adapted application of the idea of interpellation by time (dies interpellat pro homine) can be admitted, the simple supervenience of the final judgment cannot automatically correspond to the state of inadequacy, particularly in cases where the lack of liquidity of the object of the conviction is combined with the partial appeal brought by the debtor insured. In addition, in line with the General Condition 6.5.1 of Annex I of Circular n. 477, of 2013, of Susep, the occurrence of the final decision is part of the "expectation of a claim" (BRASIL, 2020e), thus considered as "verification by the insured person of the possibility of occurrence of a claim" (Act n. 1, of 2019, of TST, Article 2, II) (BRASIL, 2020f), and not in the claim itself, "characterized by non-payment by the policyholder, when determined by the judgment, of the executed value, subject of the guarantee" (General Condition 6.5.3) (BRASIL, 2020e).

than the amounts corresponding to deposits with a non-recursal purpose, the process shall continue with the execution of the remaining balance.

Once the general elements on the structure and function of the legal guarantee insurance in procedural and contractual terms have been drawn up, the correlation of the security guarantee will be examined more closely from the point of view of the time involved in the proceedings, including more time-consuming analysis of the timing of the claim and the term of the policy.

3 THE LEGAL GUARANTEE INSURANCE AND THE TIME(s) OF THE PROCEEDINGS IN THE CONTEXT OF THE LABOUR EXECUTION: TENSIONS AND DIVERGENCES

The time element plays a central role in process development (ANDOLINA, 2009, p. 259). By definition, the procedure consists of the successive coordination of acts addressed for the purpose of producing and delivering the due judicial benefit in a reasonable time[27]. For this, time assumes the condition of marker of the system of extinction of opportunities for the practice of process acts, with the phenomena of preclusion and the thing judged.[28]

Thus, in this section, we begin by examining the relationship between the passage of time and the effectiveness of the executive activity of the Labor Court to the realization of the credit claim recognized in favor of the worker. Then, the descriptive analysis of the - still ongoing - process of settling the case-law of the TST regarding the validity and effectiveness of the legal guarantee with a fixed term of validity, with the subsequent review of the regulatory technique adopted by it in AC n. 1 of 2019 for the characterisation of the claim, in view of the general legal framework for damage insurance

3.1 TIME AND EXECUTION OF WORKING RELATIONSHIP CREDIT

In the context of ordinary law, the integration of the satisfactory judicial activity into the operative content of the fundamental right to a reasonable duration procedure (CPC, Article 4) is recognized. This right, moreover, emerges duties of cooperative concert among all the actors of the process (article 6).[29]

27 In this context, time is a constituent element of the fundamental right to judicial and administrative proceedings with reasonable duration and speedy processing (Federal Constitution, Article 5, LXXVIII)

28 In the form of Article 223 of the CPC, “Upon expiry of the period, the right to practice or amend the procedural act, regardless of a judicial declaration, is extinguished, but the party proves that it did not do so for a just cause”.

29 By the way, the judicial authority appears as the prime addressee of the duties irradiated by the fundamental right to a reasonable procedure, in the form of the general duty provided for in Article 139. Since the original formation (1943), the CLT operates in a similar sense: “The Labor Courts and Tribunals will have ample freedom in the direction of the process and will watch over the rapid progress of the cases, being able to determine any necessary diligence to clarify them” (Rule 765). It should be noted, moreover, that the broad freedom of conduct of the process acts as a means put at the service of the slight progress of the process.

In the execution processes or in the satisfactory stage of the demand, in the condition of great bottleneck of the justice system (BRASIL, 2019, p. 126 and 221)[30], the element time seems to present a categorical correlation with the possibilities of achieving the purpose of the execution: to promote the effective satisfaction of the credit claim arising from the instrument permitting enforcement[31].

In this sense, the further away from the point of obligation, the fewer concrete chances of effective conversion of the credit claim printed on the title in what the procedural jargon designates as "the good of life", especially in the case of the work process, where the medium and long-term vicissitudes connected with the exercise of entrepreneurial activity may completely compromise the effectiveness of the executive jurisdictional tutelage, identified, for example, by the so-called "survival rate[32]" and the average lifetime of business[33].

In the field of labour relations, the problem takes on a more dramatic shape: in the common case, workers resort to jurisdiction only in the event of - or at the time of - the termination of the contractual relationship, which in a sense turns out to be the Labour Court, according to the expression found, in "Justice of the Unemployed"; [34]the credits under discussion, as a rule, are of a food nature , necessary, therefore, for the worker to provide the most elementary level needs [35](SAMPAIO, 2009, p. 13) connected with their own survival.

30 According to Justice in Numbers, "The Judiciary had a collection of 79 million pending lawsuits down at the end of 2018, and more than half of these lawsuits (54.2%) referred to the execution phase", with "clear trend of stock growth" (BRASIL, 2019a, p. 126).

31 In a technical study on the state of Brazilian tax execution, Queiroz e Silva (2016, p. 9) points out that "the temporal distance between the launch of the tax credit and its collection contributed to the debtor's asset depletion" and, further, reinforces: "the temporal distance between launch and execution favors the undoing of the debtor's assets, substantially reducing the chances of successful execution" (QUEIROZ E SILVA, 2016, p. 9). In a similar line, still on tax execution, the Justice in Numbers notes that "end up coming to the Judiciary old debt securities and, consequently, less likely to recovery" (BRASIL, 2019a, p. 131).

32 Two years after the constitution, the survival rate corresponded, on average, in 2014, to 76.6% of the companies (BRASIL, 2016, p. 16-17). In other words: almost the fourth part of the companies in general did not exceed the two-year operation mark. In the microenterprise segment, at the same time, the rate reached only 55% (BRASIL, 2016, p. 24). The data on microenterprises, in the context of this investigation, point to an even worse scenario, as they bring together about half of the workforce occupied. In addition, the crisis that hit the Brazilian economy after 2014 (time of data collection), may reveal an even more critical situation.

33 In 2015, on average, the Brazilian company had only 10.9 years of existence (IBGE, 2017, p. 22). In the same year, a mortality rate of 15.7% was identified (IBGE, 2017, p. 24). Changing as kids: of the existing set of companies on 31.12.2014, 15.7% ceased to exist throughout 2015. From 2008 to 2014, the annual mortality rate ranged from 14.6% (2013) to 20.7% (2014) (IBGE, 2017, p. 24).

34 Not without a reason. In 2020 (with data until April), according to the "Ranking of Most Recurrent Subjects in the Labor Court", the four most frequent topics necessarily relate to the termination of the employment contract: "prior notice"; "fine [compensation, in rigor] 40% of FGTS"; "fine under Article 477 of the CLT"; "fine under Article 467 of the CLT" (TST, 2020b). These same four subjects occupied the forefront in the calculation relative to 2018 (BRASIL, 2019b, p. 62) and 2019 (TST, 2020b). And according to Justice in Numbers 2018, "in the Labor Court, with 12% of the total of lawsuits filed, there is a concentration on the subject "severance pay for termination of the employment contract" - the largest quantity of new cases of the Judiciary [as a whole]", although "this occurs because the Labor Court has fewer possibilities to register in the National Tables, generating, consequently, data more concentrated in a single item" (BRASIL, 2019a, p. 204).

35 Special attribute recognized, moreover, by rule of the Federal Constitution: to discipline the legal regime of enforcement of obligation to pay a certain amount imposed by the Judiciary to the Public Treasury, article 100, § 1, assigns the condition of "food nature" to claims "[...] arising from wages, salaries, earnings, pensions and supplements thereto, pension benefits and indemnities for death or disability, based on civil liability [...]".

In Labor Court, with data from April 2020, the processing of execution, [36]between the beginning and the end, lasts, on average, about a thousand days[37], and this after the constitution of the executive title, which, in average, considered the procedural cycle Recursal, takes about another thousand days (TST, 2020c) [38].

The duration of the processing does not in itself mean the achievement of the satisfactory purpose of the execution[39], with the actual fulfilment of the set of obligations represented by the title. In fact, they affect events such as the atypical extinction of the execution and suspension due to the absence of identification of the debtor's whereabouts or, in the form of Article 921, IV, of the CPC, due to the absence - or insufficiency - of available assets.

3.2 THE HIGHER COURT OF EMPLOYMENT AND INSURANCE LEGAL GUARANTEE: JURISPRUDENCE CLAUDICANTE, REGULATORY ASSERTIVE

As demonstrated, in the work process, the explicit provision of admission of the guarantee insurance occurred in November 2017, at the time of the beginning of the validity of Law n. 13.467, from 2017. Before that, from the application of the systemic integration rules provided for in articles 769 and 889 of the CLT, the jurisprudence of the TST had been accepting this type of guarantee, but still in an erratic and inconsistent way.

In the pre-training stage, prior to 21.1.2007, there are no decisions regarding the subject under analysis. In the next stage, from that date until 13.11.2014, there is a pronounced tendency to refuse insurance as a suitable means of guarantee, mainly due to the non-compliance of the preferential ordinal scale of the pledge in cash[40] and the forecasted term for the security coverage, [41]invoking, in general, the application of Súmula n. 471, I, of the TST itself.[42]

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36 The release of the statistical summary presents, among others, the following limitations: it does not distinguish the execution as a stage of a process (execution of a judgment, par excellence) of the autonomous process of extrajudicial enforcement (execution of an undertaking to adjust conduct, for example); it makes no difference as to the nature and content of the object of the performance (obligations to pay, to do, not to do and to deliver, basically). In addition, the data do not specify or demarcate the stability of the enforcement order (provisional and final execution), details of which are known, by the public, could provide more adequate understanding of the effects of time on the effectiveness of execution. The Internal Affairs General of Labor Justice, in the system e-Gestão, raises data with greater degree of clipping, as, for example, on the "extinct executions - other" (Item 90.096), with coverage on the "executions terminated without having been extinguished in full compliance with the agreement, the total extinction of the debt obtained by the executor, the application of the statute of limitations or the fulfilment of the obligation to do or not to do" (TST, 2020a).

37 Thus, considering only the temporal scale, the misadventures of the worker find parallel in the tour experienced by the mythical Persian queen Sherazade.

38 In 2019, the average term reached 1,687 days (TST, 2020c). In addition, the historical series started in 2004 shows a strong trend towards an increase in the medium term. There was a slight fall in 2012 (682 days), with a resumption of growth between 2013 (961 days) and 2015 (1,315), with further slight falls in 2016 (1,121) and 2017 (1,026), followed by a sharp rise in 2018 (1,300) (TST, 2020c).

39 In line with Article 924 of the CPC, "Execution shall be extinguished when: I - the original application is rejected; II - the obligation is satisfied; III - the executed obtain, by any other means, the total extinction of the debt; IV - the execution waiving the claim; V - the intercorrent prescription occurs".

40 Example: RO-0116400-46.2009.5.15.0000, SDI-2, Rapporteur Minister Alberto Luiz Bresciani de Fontan Pereira, DEJT 19.4.2011.

41 Example: AIRR-0133400-06.2006.5.15.0084, Sixth Panel, Rapporteur Invited Judge Cilene Ferreira Amaro Santos, DEJT 7.11.2014.

42 "Não fere direito líquido e certo do impetrante o ato judicial que determina penhora em dinheiro do executado, em execução definitiva, para garantir crédito exequendo, uma vez que obedece à gradação prevista no [então vigente] artigo 655 do CPC [de 1973]". De passagem, nota-se que o processo de sedimentação desse entendimento terminou em 20.9.2000, com a aprovação da Orientação Jurisprudencial n. 59 da SDI-II, com ulterior conversão na súmula (agosto de 2005), em época anterior, portanto, à positivação do seguro garantia judicial na ordem jurídica processual. Em outras palavras: a formação da Súmula n. 471, I, não levou em conta – nem poderia levar – o impacto decorrente da legislação superveniente que permitiria a substituição da penhora em dinheiro pelo seguro garantia.

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In the subsequent phase, from 14.11.2014 to 17.3.2016, the previous trend was initially preserved by the use of similar grounds. However, in the final segment, there is a shift in understanding, and the insurance guarantee is accepted as an appropriate substitute for the pledge in cash, at least in provisional execution[43]. With the arrival of the next cycle, from 18.3.2016 to 11.11.2017, it is consolidated the acceptance of the substitution of the attachment in cash by the security guarantee in provisional execution[44], although it was maintained, as a rule, the refusal in definitive execution[45]. In addition, during that period, in June 2016, in the wake of the summary review process carried out at the beginning of the CPC's validity in 2015, there was a relevant milestone for the jurisprudential shift, with the amendment of the Jurisprudential Guidance n. 59 of SDI-2, which now expressly provides for equivalence guaranteeing money and insurance[46].

However, the inflection point, to admit the substitutive effectiveness of the guarantee insurance in definitive execution, seems to have survived only in March 2017 [47], with the decision rendered in Case n. 0020901-94.2016.5.04.0000[48], jurisprudence that, at this point, it remains stable[49] from this inflexive milestone on [50], including after the beginning of the validity of Law n. 13.467, from 2017, period in which a broad process of understanding formation regarding the judicial guarantee insurance begins. By the way, the modality of non-recursal insurance will lead to the development of the TST jurisprudence about the employment of the security guarantee in general, allowing it to fulfill the relevant role of uniformization of the interpretation of the ordinary labor legal order, through the trial of review appeals and especially embargoes (functional competence of SDI-1).

In the period prior to 11.11.2017, with the insurance provided only for the executive guarantee, there was no broad institutional space for the solution of ordinary controversies, due to the limited access to the special judicial instance, in executions, to cases of direct violation of the Federal Constitution (CLT, article 896, § 2, and Summary n. 266 of the TST). Thus, in that period, the controversies reached the TST only in exceptional cases, in the degree of ordinary appeal in warrant of security. Thus, although through analogical integration, there may be scope to apply to the executive guarantee [51]certain legal solutions built to resolve impasses on the Recursal modality.

43 Examples: RO-1000612-51.2014.5.02.0000, SDI-2, Rapporteur Minister Luiz Philippe Vieira de Mello Filho, DEJT 11.3.2016; RO-0021773-80.2014.5.04.0000, SDI-2, Editor Minister Luiz Philippe Vieira de Mello Filho, DEJT 8.4.2016.

44 Example: RO-0010385-59.2015.5.18.0000, SDI-2, Rapporteur Minister Delaide Miranda Arantes, DEJT 30.9.2016.

45 Example: RO-0010385-59.2015.5.18.0000, SDI-2, Rapporteur Minister Delaide Miranda Arantes, DEJT 30.9.2016.

46 "Mandado de segurança. Penhora. Carta de fiança bancária. Seguro garantia judicial. [...]. "A carta de fiança bancária e o seguro garantia judicial, desde que em valor não inferior ao do débito em execução, acrescido de trinta por cento, equivalem a dinheiro para efeito da gradação dos bens penhoráveis, estabelecida no artigo 835 do CPC de 2015 (artigo 655 do CPC de 1973)".

47 Interesting scenario: contrary to expectations, it should be noted that the modification of OJ n. 59 of SDI-2 preceded - and, more than that, led - the change of the jurisprudential framework

48 RO-0020901-94.2016.5.04.0000, SDI-2, Rapporteur Minister Antonio Jose de Barros Levenhagen, DEJT 31.3.2017.

49 In line with the normative command deriving from Article 926 of the CPC: "The courts must standardize their jurisprudence and maintain it stable, fair and consistent".

50 Exemplos: RO–0021527-16.2016.5.04.0000, SDI–2, Relator Ministro Alberto Luiz Bresciani de Fontan Pereira, DEJT 11.4.2017; RO–0021757-58.2016.5.04.0000, SDI–2, Relator Ministro Antonio Jose de Barros Levenhagen, DEJT 28.4.2017; RO–0021468-28.2016.5.04.0000, SDI–2, Relator Ministro Douglas Alencar Rodrigues, DEJT 12.5.2017; RO–0021531-53.2016.5.04.0000, SDI–2, Relatora Ministra Delaide Miranda Arantes, DEJT 26.5.2017; RO-21507-25.2016.5.04.0000, SDI–2, Relatora Ministra Maria Helena Mallmann, DEJT 26.5.2017, e assim por diante.

51 Example: AIRR-0001349-07.2010.5.01.0205, Sixth Panel, Rapporteur Summoned Judge Américo Bede Freire, DEJT 8.5.2015.

The case-law debate has also been about the term of the security guarantee. During the process of insurance insertion in the areas of the work process, within the scope of the TST, it was not accepted, as a rule, the guarantee effectiveness of the policy recorded by a predetermined term clause. In short, it was understood that precariousness compromised the very fulfillment of the purpose of the guarantee, connected with the satisfaction of the credit claim arising from the enforcement order , requiring at least a policy with reasonable term.

In a more recent period (2019 onwards, in particular), decisions coexisted in both directions[52], even after the beginning of AC n. 1, 2019, on 16.10.2019 (BRASIL, 2020f) [53]period in which, however, there seems to be a more pronounced trend in the acceptance of the predetermination of the term, in line with regulatory discipline.

Within the scope of the regulation, for the purpose of preserving the efficiency of the guarantee (and thus protecting the holder of the credit claim), an unorthodox operating regime has been constructed. For this, in a technical reality construction activity, the moment of occurrence of the accident shifted, according to article 10 of AC n. 1, from 2019 (BRASIL, 2020f). More specifically, five hypotheses of occurrence were created, guided by two parameters: due to the inadequacy (material criterion) and due to the duration (temporal criterion). Thus, in the first case, the claim materializes: "with non-payment by the holder of the executed amount, when determined by the judge" (executive guarantee insurance - Article 10, I, "a") and "[...] by reason of judicial determination, after the trial of the guaranteed resources" (Recursal guarantee insurance - Article 10, II, "a", final part).

In the second case, the occurrence of the claim occurs in the following cases: "with the failure to comply with the obligation of, up to 60 (sixty) days before the end of the term of the policy, to prove the renewal of the guarantee insurance or submit new sufficient and suitable guarantee" (insurance executive guarantee - article 10, I, "b"); idem (insurance guarantee Recursal - article 10, II, "b") [54]and, finally, in the form examined in the previous section, "with the final decision" (idem - article 10, II, "a", first part).

The regulation is supplemented by the provision that "proof that the policy has been renewed is the responsibility[55] of the applicant or the executed party and that it is unneces-

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52 Example of refusal: AIRR-0002039-45.2016.5.13.0026, Second Panel, Rapporteur Minister José Roberto Freire Pimenta, DEJT 5.4.2019 (in this case, it is observed that the term of the insurance will expire only on 20.6.2023). Example of acceptance: RR-0010025-52.2014.5.01.0059, Sixth Class, Rapporteur Minister Katia Magalhaes Arruda, DEJT 13.9.2019, in which it was established that "the existence of a period of validity in the insurance guarantee does not invalidate it, since the existence of time limits in the policies is typical of insurance". Example of acceptance with caveat: RR-1000110-66.2016.5.02.0704, Third Panel, Rapporteur Minister Alberto Luiz Bresciani de Fontan Pereira, DEJT 27.9.2019, with the indication that in the case of "[...] given term of validity of the policy [...]" the guarantee "[...] shall be renewed or replaced before maturity"

53 Example of persistence regarding refusal: RR-0011652-45.2015.5.15.0131, Second Panel, Rapporteur Minister José Roberto Freire Pimenta, DEJT 14.2.2020. The same rapporteur: RR-1001402-19.2018.5.02.0057, DEJT 5.6.2020, and AIRR-0001055-87.2017.5.12.0015, DEJT 19.6.2020, among others.

54 The accident forecast set up by the risk of non-renewal of insurance seems to be inspired by Article 10 of Ordinance n. 164, of 2014, of PGFN, with almost identical wording. There is only a slight difference: "obligation to renew insurance" (PGFN) and "obligation to prove the renewal of insurance" (TST).

55 Correctly, it takes care of the legal position of the policyholder as a task, because it relates the provision that is up to him to, in his own interest, maintain the condition relative to the Recursal or executive guarantee. However, contradictorily, in Article 10, I, "b", and II, "b", it is mentioned the "obligation to [...] prove the renewal of the guarantee insurance or present new sufficient and suitable guarantee".

sary to summon him to regularisation" (Article 10, sole paragraph)[56]. If the claim occurs, in any event, the insurer is summoned to pay the corresponding compensation (Article 11).[57]

The material criterion, related to the set default status, converges with the nature of the credit interest protected by the security coverage. The temporal criterion, however, to some extent, seems to force the limits of insurance compliance and operation in general, especially when taking into account the application of other measures derogating from the corresponding legal regime under the Civil Code, examined above.

In essence, the criterion laid down in the Regulation converts into a claim the simple possibility of terminating the security guarantee itself, without immediate adherence to the interest covered by the insurance, related to the risk of default of credit claim. In a heuristic way, the following presumptive chain is established: the imminence of extinction of the guarantee is equivalent to its own extinction (sixty days in advance); the extinction of the guarantee is equivalent to the inadequacy itself [58].

Moreover, the displacement of the claim over time changes the very nature of the interest safeguarded by the insurance and, consequently, the risk assumed by the insurer: in a sense, it leavesto protect the credit claim itself in order to protect the guarantee itself that would override that claim. Similarly, the appropriate risk by the insurer would no longer be limited to the state of default referring to the credit claim, but would cover the risk relating to the simple absence of renewal of the insurance contract itself and, by extension, the risk of revocation of the lien or enforceable guarantee.

In this sense, it could not be recognized, in principle, that the insurance protects the legitimate interest of the policyholder in the provision of a non-recursal or executive guarantee. In a certain interpretative sense, however, there could be a place to defend the idea that it is insurance on behalf of others with the functional vocation of protecting the legitimate interest of the creditor as to the right to rely on the protection of a non-recursal or executive guarantee.

From the point of view of the security technique examined above, however, the contract of insurance on behalf of others is for the benefit of those who appear as the holder of the credit claim. Regardless of this discussion, from the point of view of the creditor, the regime established by the regulation supplements the guarantee related to the satisfaction of the credit, as if to the form of assertive reinforcement.

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56 The rule is contrary to the procedural duty of cooperation, with reach over all actors in the process, including the Judiciary (CPC, Article 6). In the case of the Judicial Guarantee Insurance, linked to the objective extrinsic assumption of preparation, the inconsistency with that duty is more evident. In the event of the expiry, or imminent expiry, of the term of the security guarantee during the processing of the appeal, even after the trial (CPC, 933, § 1º), would oblige the rapporteur to summon the applicant to provide new security (security or not)in the form of Article 933, head, and, by analogy, Article 1.007, § 2, both of the CPC. According to this understanding, the recognition of defection would occur only in the case of absence of timely accuracy for the regularization of the preparation.

57 "Once the claim has been established, the magistrate who is in charge of the proceedings shall determine to the insurer the payment of the enforced debt, duly updated, within 15 (fifteen) days, under penalty of continuing against it the execution in the file itself, without prejudice to any administrative or criminal penalties for failure to comply with a court order". As a seed for a timely investigation, the following question is recorded: the payment of the security indemnity, in substitute condition (indemnity as compensation for damage)would it interfere with the legal nature of the obligation originally to be enforced for tax purposes?

58 The regulatory technique ends up trapping the policyholder and the insurance agent: strictly speaking, either the warranty contract is renewed (with the creation of the legal obligation to renew the insurance) or the claim is incurred, which is therefore, compromises the randomness inherent in security arrangements. According to Tavares (2017, p. 121), the current regulatory framework may represent a "dysfunctional and antirandom [...] situation due to the commitment of the insurer to compensate without risk, in the event of not renewing the policy and the policyholder does not replace the guarantee".

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In this particular analytical angle, the regulatory regime results in double layer protection, overlapping: on the external layer, immediate protection, the guarantee of the guarantee, against the risk of inadequacy (guarantee maintenance requirement; "metaguarantee"); in the inner part, of mediate safeguard, the protection of the credit claim itself, against the risk of default.

Despite this, regulatory heterodoxy may open up room for questions relating to legality (and therefore legal certainty), in addition to being able to compromise the viability of the judicial guarantee insurance as a security product from which the Labor Court itself can reap institutional benefits for the efficient realization of fundamental rights related to the satisfactory jurisdictional activity. Thus, in the next section, possibilities of improvement of the security guarantee regime in the work process are examined.

4 THE LEGAL GUARANTEE INSURANCE AND THE PROTECTION OF THE WORKER'S CREDIT CLAIM: AN EFFICIENT REGULATORY CONFLUENCE PROPOSAL

In order to provide special and effective protection to the holder of the credit claim - commonly of a food nature -, the regulatory framework under the TST restructured the conformative basis of the legal guarantee insurance, distancing it to some extent, the legal system of insurance in general and the more orthodox security technique.

Despite the existence of sound foundations, linked, above all, to the realization of workers' rights, the strengthening of the protective system carried out in this way can, after all, serve as a factor of insecurity and issue signal of discouragement for the dissemination of security instruments as a guarantee in the work process.

In other words, the regulatory regime may result in premium increases or even more cautious behavior by insurance agents. As a result, narrowing the field of operation of the security guarantee would represent an institutional setback, with the return of the inefficient traditional system of attachment, expropriation and disposal of assets being further strengthened.

The improvement of the system of security guarantees in the work process can go through several complementary paths. The first of them, connected with the principle of legality and legal certainty, consists in conducting the judicial guarantee insurance for the environment of the ordinary positive law system (law in the strict sense), in addition to the simple generic provision in the procedural legal order. Care is therefore taken to discipline it in law, as a security product, on certain points of tension that distance insurance in general, without, of course, entering into details, which can - and should - remain in the regulatory environment, with greater dynamism and technical expertise. In this sense, there is the Senate Bill n. 543, from 1999 (BRAZIL, 2020d), approved in it, and currently in progress in the House of Representatives as Bill n. 2.851, from 2003 (BRAZIL, 2020a), prepared for vote in plenary.

In accordance with the wording approved by the initiating legislature, the following deadlocks are solved, for example, at the legal level: the prohibition of the use of the exception of

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the unfulfilled contract (Article 5) [59]and the corresponding duration, as a rule, the duration of the obligation supported by the guarantee (Article 8[60]), which eliminates that little technical penalty of fictional displacement of the claim in time because of the simple "risk of risk" by approaching the end of the insurance term.

In addition, it would be appropriate to amend Article 2[61] to add the express provision of coverage on the obligation arising from a decision or legal proceedings. Another point worthy of attention is the harmonization of the security regime with the permanent possibility of consensual solution of demand[62]: in this field, the insurance guarantee should not act as a factor of discouragement.

Consequently, as a measure to preserve the conciliatory vocation of Labor Justice, it could be foreseen that the novation of the debt, by virtue of transaction legal business, does not compromise the guarantee effectiveness of the insurance, observed, however, as a ceiling, the value of the initial cover, thus derogating from the general rule in Article 364 of the Civil Code.[63]

The second possible improvement path involves the construction of a dynamic and flexible security assurance model, with increased effectiveness and production of efficiency gains for all stakeholders. In this regulatory paradigm: it preserves - and accentuates - the purpose of protection of the credit law (of workers, especially, with food quality), with the institution of a mixed system of guarantees; (re)The legal guarantee insurance is close to the ordinary security technique, highlighting the more evident presence of the economic, financial and actuarial balance guidelines.

More specifically, the dynamic securitisation model starts from the identification of the probability of occurrence of accidents (non-compliance with the obligation), with the consequent creation - and maintenance - of accident boards. For this, using information and communication technology tools, the pertinent data, many of them routinely raised by the Labor Justice (TST, 2020a), must be statistically correlated.

59 "The delay or default of the policyholder in payment of the premium does not affect the rights of the policyholder, continuing the policy in force. Sole paragraph. In the event of delay or default in the payment of any portion of the premium, the maturity of the others will occur, and the insurer may resort to the execution of the counter-guarantees".

60 "The insurance contract shall be valid from the date of commencement fixed in the policy until the termination of the guaranteed obligation. § 1º. The term of the insurance contract may be formalized by the return of the original of the policy by the insured or by his written declaration, certifying the fulfilment of the guaranteed obligation. § second. The term of the insurance contract will also be terminated by a statement from the policyholder to the insurer who, in this case, will notify the policyholder to rule within 30 (thirty) days, regardless of the failure to demonstrate compliance with the obligation. § third. The policy may establish a certain term of validity for the insurance contract, in cases authorized by the official agency of supervision and control of the activity".

61 Seguro-garantia é aquele pelo qual a seguradora garante ao segurado o fiel cumprimento de uma obrigação do "tomador, decorrente de lei ou contrato, até o valor fixado na apólice". Em rigor, a obrigação decorrente de decisão judicial não deixa de decorrer de lei. No entanto, por imperativo de precisão, registra-se sugestão de emenda: "Seguro-garantia é aquele pelo qual a seguradora garante ao segurado o fiel cumprimento de uma obrigação do tomador, decorrente de lei, de contrato ou de decisão ou processo judicial, administrativo ou arbitral, até o valor fixado na apólice". A expressão "de decisão ou processo" justifica-se pela necessidade incluir as obrigações representadas por título executivo judicial (CPC, artigo 515) e extrajudicial (CPC, artigo 784). A extensão para o processo administrativo – em relação à imposição de sanção pecuniária, por exemplo, – poderia permitir que o devedor obtivesse certificação de conformidade antes mesmo do eventual ajuizamento de execução fiscal.

62 According to Article 764 of the CLT, "Individual or collective bargains submitted to the Labor Justice will always be subject to conciliation

63 "The novation extinguishes the accessories and guarantees of the debt, whenever there is no stipulation to the contrary. [...]". For the same reason, the analogue application of Article 787, § 2, by which civil liability insurance is prohibited, should be rejected "[...] to the insured person to acknowledge his responsibility or confess the action, as well as to compromise with the injured party, or to indemnify him directly, without express consent of the insurer".

In this data collection, the following elements related to the passage of time can be included, among others: the average duration of the cognitive cycle of the process (from the proposition of the demand to the final judgment of the judgment[64]); the average duration of the execution process (extrajudicial execution) or of the executive stage of the claim (idem, judicial); the average time of existence and survival of the companies in the industry, possibly correlated with the actual working time of the debtor-borrower.

To obtain a portrait endowed with a higher degree of reliability, one can adopt a geographical cutout. Thus, the possibility of criterion arises, the calculation by area of coverage of each Regional Labor Court (elements "a" and "b", in particular) and by State or municipality (idem, "c"). In addition, certain parameters of material and personal order may be added, such as the branch of economic activity carried out by the debtor, according to the National Classification of Economic Activities, and the nature and object of the obligation covered by the guarantee, by, for example, opposing between instalments arising from a contract of employment which is being performed and a contract of employment which has been terminated.

The rigorous statistical treatment of these elements may result in the establishment of accident indices and/or degrees of inadequacy risk. In this sense, there would be space to examine the possibility of adopting a model inspired by the objective equation of risks related to health, safety and work environment, in the system for calculating social security contributions by the SAT/RAT regime (Work Accident Insurance and Environmental Occupational Risk).

The above picture gives dynamism to the security system. On another side, however, it is advisable to lend flexibility. The dynamic character is related to accidents and risks of general order, considering the set of agents acting in the economic domain. The flexible conformation consists in starting from that dynamic framework and, without losing objectivity, in a complementary way, adapting it to the particular condition of the debtor-borrower[65] , adopting as a source of inspiration, in this segment, the work developed by Feitosa and Cruz (2019, p. 12-14) in the field of Tax Law, for the equation of impasses in the relationship between the Tax and the taxpayer, with the necessary adaptations to the particular context of provision of procedural security guarantee.

Thus, security malleability acts on the following operational axes: as a general guideline, to maintain the effectiveness of the protection arising from the guarantee insurance; to provide the "good debtor-borrower" with better conditions of access to competitive security products (the most expensive premiums, for example); consequently, to serve as an incentive for economic agents in general to adopt behavior compatible with the acquisition or main-

64 In order to mitigate the statistical bias, the calculation should, as far as possible, be based on the processes that result in the recognition of the enforceability of the obligation, without including, therefore, cases of anomalous extinction, for purely procedural reasons, and so on.

65 Although with fundamentals and purposes that do not entirely coincide, the article of CLT 899 contains predictions that approach the idea of flexibility, by reducing or waiving the provision of collateral. "The value of the Recursal deposit will be halved to non-profit entities, domestic employers, individual micro-entrepreneurs, micro-enterprises and small businesses"; § 10. "Beneficiaries of free justice, philanthropic entities and companies in judicial recovery are exempted from the deposit". In the same line of operation, regarding the waiver of the provision of executive guarantee: "The requirement of the guarantee or pledge does not apply to philanthropic entities and/or those that make up or composed the board of these institutions" (CLT, article 882, § 6).

tenance of the "good debtor-taker" status (and, with this, to be able to count on that favored regime[66]).

The quality of "current good debtor-borrower" (in the process in which it is intended to offer guarantee) is largely due to the past condition of "good payer". In this line of reasoning, the "good payer", in general, reveals the tendency to fit himself as a suitable and reliable debtor. The objective determination of this condition could result, for example, from the institution of scoring system, to take into account the historical performance of the debtor regarding the regular, adequate and timely fulfillment of obligations before the Labor Court.

It could also compose the evaluation of the previous behavior of the debtor the illicit occurrences, for example: the practice of act against the dignity of the justice system (CPC, articles 774 and 918, single paragraph, among others); the filing of appeals with the purpose of postponement, with the unnecessary addition of time to the process, element that, as demonstrated, acts in the opposite direction of satisfactory effectiveness, and noncompliance with procedural duties in general (CPC, article 77, among others).

In a similar way, failure to comply with the duties of the process would not only lead to an endoprocedural reprimand, but could, indirectly, radiate effects for other processes, with exoprocedural scope, therefore: the punishment applied in a given process would result in the reduction of the transgressor's performance grade, thus reflecting the access regime to provide guarantees under different conditions.

In the same vein, in the case of compliance with the duties of the case, the conduct of the procedural person could be placed on the basis of a positive procedural sanction system, measure that would encourage the staff member to behave appropriately as a litigant not only in the small and finite context of a case, but before the justice system as a whole (encouragement for procedural compliance).

An indication of the condition "good payer" comes from the National Bank of Labor Debtors (BNDT) and the Labor Debt Negative Certificate (CNDT), in the form provided for in article 642-A of the CLT. Thus, in general, in the guarantee procedure, the debtor-borrower enrolled in the BNDT would have less favored condition than the one that can display CNDT[67].

The result of the implementation of a dual-edge system - dynamic and flexible; general and particular - could have repercussions on the legal regime of provision of non-recursal and executive guarantee, with scope not only on the judicial guarantee insurance. In the case of the security guarantee, the debtor-taker's performance note would exert influence - positive or negative - in two dimensions: private, vis-à-vis the insurance market, and public, vis-à-vis the justice system (Labor Court, in the case under study).

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66 As a reinforcement argument for the admission of malleable executive guarantee, it is pointed out the investigation carried out by Campos and Di Benedetto (2015, p. 18), in which it was identified that the opposition of embargoes to execution in the Labor Justice (dependent, as a rule, of provision of guarantee) does not appear frequently or integrate the catalogue of the most worrying problems related to the ineffectiveness of executions. According to them (2015, pp. 20 and 45-46), the problem lies primarily in the voluntary inadequacy of the debtors, regardless of the presentation of guarantees as a means of access to the contradictory: "In short, when studying the embargoes (to the execution and of third parties), it is perceived that the sub-phase in which they are impelled [opposites, in fact] does not present serious problems for the advancement of the phase of labor execution. This is because embargoes are quite rare in courts of all sizes. [...]", so that "the embargoes do not seem to hinder, seriously, the executions in the Labor Justice" (CAMPOS; DI BENEDETTO, 2015, p. 18).

67 Assim, a apresentação de seguro garantia executivo, como substituto da penhora, pode servir como porta de acesso para a CPDT, com efeitos de CNDT.

Together with the insurance market, the influence would come from the direct correlation between the performance of the debtor concerned and the access to insurance contracts under competitive conditions (to lower premiums, for example, as pointed out). Before the Labor Court, there are numerous possibilities to calibrate the guarantee system according to the debtor's history.

The good performance of the debtor-borrower could allow access to less stringent regime. In this sense, for example, there would be space to accept legal insurance with a predetermined term without this, in itself, representing an increase in the risk of default. Thus, for example, according to the statistical tabulation constructed in the form stated above, the minimum term of the policy could oscillate to the taste of that set of variables, based, above all, on parameters of passage of time.

Still on the term of the coverage, as an integrative resource, based on the thirty percent increase in the value of the debt (discussed above)there would be a requirement to increase the duration over the average duration of the process or execution phase. The very requirement of time adjectification may vary according to the historical performance of the debtor-borrower: thus, the agent with previous good performance could present a guarantee with shorter duration, managing to obtain a lower value premium. The lodging of appeals - which, by definition, represents the prolongation of the procedural legal relationship - could result in a requirement to add warranty time by means of a security endorsement.

A bolder step, based on that set of statistical elements, would be to provide for the possibility of waiving part of the guarantee, with the reduction of the own value of the cover, which in that case would not reach the whole debit, advantage that would be justified and based on the identification of the low degree of risk of inadequacy. In any case, however, the proposed improvement of the system is accompanied by the provision of security and procedural rearguard, aimed at protecting the interests of creditors.

Beforehand, it is noted that the security rearguards themselves can be flexible in their modulation, being more or less rigorous, depending on the identification of the risks involved. This system of guarantor escort includes the requirement of reinsurance contracts and the parallel application of procedural instruments to increase the effectiveness of the process, even if they do not place themselves, directly, as a condition for the acceptance of the judicial guarantee insurance.

Parallel instruments are subject to the mitigation of the impact of the passage of time on the process, for example by requiring the immediate payment of the uncontroversial portion of the debt and the efficient application of the idea of progressive transit , with the processing of final execution [68]for the plots not discussed on appeal and for the main debtor pending appeal proceedings against subsidiary debtors, except, logically, in cases of possibility of production of the so-called objective or subjective expansive effect, respectively.

In addition, security countermeasures must include the regulation of the Labor Execution Guarantee Fund (FGET), with creation determined by Article 3 of Constitutional Amendment No. 45, 2004, but still pending regulation (CAMPOS; DI BENEDETTO, 2015, p. 41-45)[69] : in the

68 In this sense, the Summary n. 100, II, of the TST.

69 It questions the state of legislative inertia in the Direct Action of Unconstitutionality by Omission n. 27, proposed in 2014 by the National Association of Labor Prosecutors (STF, 2014). And since then the state of jurisdictional omission prevails,

event of the expiry of the term of the guarantee insurance accompanied by the state of default of the debtor, the satisfaction of the claim would come from resources of that fund, without prejudice, in that case, of the right of return against that debtor, for compensation.

Part of the cost of the FGET could come from the security system itself. Specific tax (IOF)[70] is levied on insurance operations. Given the impossibility of direct tax linkage to certain expense[71], opens up as a possibility to replace the full or partial tax by general social contribution or intervention[72], with collection attached to the fund.

5 CONCLUSION

The actual satisfaction of labor-related claims depends on the provision of certain special procedural protection measures in favor of the creditor-worker, with scope on credit guarantees. This creditor, as a rule, is in a situation of vulnerability: the data found in the research indicate that, in the Labor Court, there is a marked predominance of demands that take care of matters related to the extinction of the contractual legal relationship.

The system of special procedural protection, however, must be guided by the balanced equation between legitimate conflicting interests of creditor and debtor, in order to provide both of them with the optimal realization of the fundamental right to adequate judicial protection. Amid this scenario, the investigation focused on the examination of the Institute of Insurance Judicial Guarantee in double operative perspective (procedural and contractual), in the modalities of executive insurance and insurance Recursal, in it finding little efficient and needful improvement regime.

Inefficiency arises, above all, from a certain regulatory paradox. On the one hand, the current regulatory framework on judicial insurance is based on the premise of strengthening the protection of the worker's credit right, based on strict regulatory rules which, to a significant extent, derogate from the general structural design of damage insurance outlined in the Civil Code. However, on the other hand, the objective - or intention - of supplementing the protection given to the worker's credit right seems not to be able to offer satisfactory practical results: the formal inclusion of legal guarantee insurance in the areas of the work process does not yet have a noticeable impact on the effectiveness of the credit or on the reduction of the average duration of execution in the work process, context in which the time factor acts as a central element in the probabilities of debt compliance.

Given this diagnosis of inefficiency of the insurance guarantee scheme in the work process, the research took care to identify elements for the reversal - or at least the attenuation - of this situation. In this activity, it was noted that the solution to the problem may be the establishment of a dynamic and flexible security model, based on the probabilistic examina-

because the action continues without decision. The matter is part of the object of Bill n. 4.597, from 2004, pending before the Chamber of Deputies (BRASIL, 2020b).

70 CF, article 153, V.

71 CF, article167, IV.

72 CF, article 149.

tion of credit claims, including to re-approximate the insurance guarantee of the elementary structural conformation of this type of contract, marked by randomness.

In this proposal, the elements of dynamism and flexibility of the guarantee insurance are associated with the evaluation of the previous behavior of the debtor as to the correct and punctual addition of credits derived from the labor relationship, to identify the "good payer". To this end, the institution of scoring system and/or establishment of categories of inadequacy risk, operationalized from the statistical treatment of data produced by Labor Justice and other sources, public and possibly private, is proposed.

The dynamism, specifically, determines that the assessment of the condition of good payer should occur continuously, as a measure to encourage the preservation of that quality and to enable the identification of any change in the degree of default risk associated with a particular obligor. Based on the identification of inadequacy risk, dynamically assessed, flexibility should lead to the establishment of differentiated and favored security regimes to benefit the agents that have the status of good payer, in line with the following statement: the lower the risks of non-compliance, the less stringent the requirements for the provision of guarantees. In order to maintain the special protection afforded to credits arising from employment relationships, the dynamic and flexible security model should receive reinforcement from the rear guarantee system, such as the provision of reinsurance contracts and the integration of that model into the FGET, still pending regulation.

In this sense, the proposal for a dynamic and flexible legal guarantee model has at least two great virtues: from a procedural perspective, it contributes to the balanced and efficient composition of the legitimate interests of the creditor and debtor (benefits the good debtor without unprotecting the creditor); from a contractual point of view, it can serve as a stimulus for the development of the market of this security arm.

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ANALYSIS OF INEQUALITIES WITHIN UNIONS IN THE LIGHT OF JOHN RAWLS 'SECOND PRINCIPLE OF JUSTICE

SUBVERSÃO DO SIGNO HEGEMÔNICO DA REPRESENTAÇÃO SINDICIAL:
ANÁLISE-CRÍTICA DAS DESIGUALDADES DENTRO DOS SINDICATOS À LUZ DO SEGUNDO PRINCÍPIO DA JUSTIÇA DE JOHN RAWLS

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ABSTRACT

John Rawls, in his work "A Theory of Justice", explains what to consider the Theory of Justice through the analysis of two principles: the first, which deals with equal basic freedoms for all; the second, which deals with balance and balance in social and economic economies and their connection with accessibility to loads and leadership positions in all. The author states that such principles must be adopted by collective entities that they call Social Institutions, which, in turn, form a basic structure of society. Within the scope of Collective Labor Law, it is identified that the indicators conform to the concept of social institutions described by Rawls, so that it is convenient to analyze the application of the principles of justice in such entities. The applicability analysis of the second principle of justice can be taken as a basis, since indicators are historically more common as institutions that prioritize the voice of white, heterosexual and cisgender men in their internal structure. When performing a critical analysis of the structure of the indicators, we suggest that you apply the second principle of justice, such as the balance of social inequalities, the economy and the opportunity to access loads and positions, assist in the pluralization of the internal environment of such entries, in a way that its demands demand and fight flags normally altered in order to include workers tend to occur in more social, economic and cultural classes, to use a fairer environment, according to Rawls' liberal egalitarian vision of justice.

KEYWORDS: Collective Labor Law. Theory of Justice. John Rawls. Syndicate.

RESUMO

John Rawls, em sua obra "Uma Teoria da Justiça", realiza explanações sobre o que considera ser a Teoria da Justiça através da análise de dois princípios: o primeiro, que trata sobre liberdades básicas iguais

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para todos; o segundo, que trata sobre igualdade e equilíbrio nas desigualdades sociais e econômicas e a sua vinculação com a acessibilidade a cargos e posições de lideranças a todos. O autor afirma que tais princípios devem ser adotados por entes coletivos que chama de Instituições Sociais, que, por sua vez, formam a estrutura básica da sociedade. No âmbito do Direito do Trabalho Coletivo, identifica-se que os sindicatos se amoldam ao conceito de instituições sociais descrito por Rawls, de maneira que se torna conveniente a análise da aplicabilidade dos princípios da justiça em tais entes. Pode-se tomar como base a análise da aplicabilidade do segundo princípio da justiça, uma vez que os sindicatos se mostram, historicamente, como instituições que priorizam em sua estrutura interna a voz dos homens brancos, heterossexuais e cisgêneros. Ao realizar uma análise crítica da estrutura dos sindicatos, sugere-se que a aplicação do segundo princípio da justiça, como equilibrador de desigualdades sociais, econômicas e de oportunidade de acesso a cargo e posições, auxiliaria na pluralização do ambiente interno de tais entes, de maneira que as suas próprias demandas e bandeiras de luta naturalmente seriam alteradas de modo a abarcar trabalhadores/as pertencentes às mais variadas classes sociais, econômicas e culturais, proporcionando um ambiente mais justo, segundo a visão liberal igualitária de justiça de Rawls.

PALAVRAS-CHAVE: *Direito Coletivo do Trabalho. Teoria da Justiça. John Rawls. Sindicato.*

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1 INTRODUCTION

Under the legal-critical methodological approach (GUSTIN, DIAS, 2013, p. 23), the aim is to analyze the inequality within trade unions focusing on John Rawls' political theory, especially the second principle of justice elaborated by the author in the book "A theory of justice" (2008). The work is justified by the centrality of union action in the struggle for Collective Labor Law that is focused on a male, white, cisgender sign, being centered on a subject typically marked as modern. Thus, the election and analysis within the spectrum of political philosophy is a choice to slowly occupy strategic spaces that are also majority male, white and elitized by a hegemonic knowledge paradigm in the global north (BALLESTRIN, 2003; EISENSTEIN, 2014).

Thus, the question-problem to be answered is whether with the practical application of the second principle (equality), elaborated by John Rawls, the union would become a more democratic institution and attentive to the demands of contemporary society? In face of this, the hypothesis of this work is that if the aforementioned principle is respected, in the molds and assumptions presented by the philosopher, we would have a structure more open to the plurality of subjects and more egalitarian to those workers of modernity.

Contextually, one of the main entities of collective representation in the country (if not the main one) is the union, because it is an organ structured, with constitutional protection, to give voice to the working class in its unfair relationship established with employers. Therefore, to understand the reason for its existence with normative protection is to try to establish dialogs, conflicts and rules, through the creation of collective norms (Collective Labor Agreements and Collective Labor Conventions), that guarantee the workers the minimum rights necessary for that employment relationship to establish a dignified and fair life, according to the dictates of the Federative Constitution of the Republic of Brazil of 1988 (CFRB/88) and the International Labor Organization (ILO).

In this way, the reach of what is called a "dignified and fair life" would be through the effectiveness of the fundamental principles of the CFRB/88, being important that for this

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reach the unions act in a fair and inclusive manner in their negotiations. It happens that, within their own internal structure, unions are not usually fair when it comes to the distribution of jobs and positions, reproducing the discriminatory practices suffered by society's marginalized population and contributing to the perpetuation of economic and social inequalities of members of the heterogeneous working class.

The trade unions, in their great majority, show themselves as a portrait of what happens in the companies: white and cis men are prioritized in face of the other classes and genders. Women[3],[4] for example, have not yet reached the level of leadership necessary to guarantee their fair representation in these bodies. This makes it necessary to constantly raise the awareness of the working class about the importance of valuing the female figure in the workplace.

Thus, it becomes imperative to rethink the way in which unions, in their own internal dynamics, distribute jobs and positions, applying John Rawls' "Theory of Justice" to reflect about the injustice that hovers over these institutions.

The work is developed with a presentation of the unions as social institutions, then the second principle of Ralws' theory of justice is presented and the text concludes with the construction of the need to reformulate the internal structures of the union, in search of more justice and equality.

2 THE UNION AS A SOCIAL INSTITUTION

Social institutions are fundamental to the proper functioning of society, and understanding them as collective entities and integral parts of our complex normative structure is a task that demands certain depth and attention (RAWLS, 2008). John Rawls (2008, p. 58) states in his book "A Theory of Justice" that social institutions are a public system of rules that define positions with their rights and duties, powers and immunities.

It can be said, therefore, that each social institution has a normative set that governs the behavior of its individuals, either by the coercive character of its norms, or by their acceptance and recognition as normatized collective structures (RAWLS, 2008).

For Rawls (2008), the scope of what he considers a "Theory of Justice" depends on balanced, effective and fair social institutions, which form, in turn, a basic social structure that

3 There is statistical evidence that there is flagrant and persistent gender inequality in the labor market that prevents women from enjoying the same conditions, wages and opportunities as men in this sphere. According to data collected by the IBGE (Brazilian Institute of Geography and Statistics), women, in 2016, had an average monthly income of R$1,764, while that of men was equivalent to R$2,306. This is due, in large part, to the fact that men occupy most managerial positions (public or private) in the country: according to data from the same institute, 60.9% of these positions were held by men and only 39.1% by women, even the latter having, on average, a higher level of education than men (also according to IBGE data). Moreover, the invisibility and vulnerability in work environments is justified by the fact that women have, for the most part, to fulfill a double work day, since they are still largely responsible for household chores, according to the IBGE (they dedicated, in 2016, 73% more hours than men in weekly household chores) (BRASIL, IBGE, 2018).

4 In the scope of this research, the term women is considered, in the heterogeneous sense, understood as the plural and expanded universe of which women, LGBTI+ women, black women, and other classifications participate. It is also considered, in the same sense, the heterogeneity of female workers participating in the plural and dispersed universe of workers in general.

is fundamental to society. Furthermore, he states that social justice depends on the cooperation of these institutions for the realization of its principles:

> The first object of the principles of social justice is the basic structure of society, the ordering of the principal social institutions into a scheme of cooperation. We have seen that these principles should guide the assignment of rights and duties in these institutions and determine the proper distribution to the benefits and burdens of social life. Principles of justice for institutions are not to be confused with principles that apply to individuals and their actions in particular circumstances. (RAWLS, 2008, pp. 57-58).

In this sense, unions fit the concept of social institutions, since they represent a collectivity of workers and, in its internal dynamics, delegates positions, rules, rights and duties.

The working class represents, historically, an (over)exploited people, who were evicted from the means of production by the capital owners, leaving them to sell their labor force to survive (MARX, 2014). Therefore, the worker represents the hypossuficient part of the labor relationship and, in order to reduce the unequal relationship between capital and labor, he/she organizes with other members of his/her class to form a collective subject of struggle that establishes a more symmetrical relationship to face and negotiate with the employer.

Therefore, it is known that unions can be unfair and excluding institutions; however, it is important that such institutions exist, so that even failed attempts can be turned into examples of the eventual application of a theory of justice (RAWLS, 2008).

3 TRADE UNIONS: FAIR SOCIAL INSTITUTIONS?

In order for one to speak of fair trade unions, it is fundamental that their management be impartial and effective, in such a way that impartiality is understood here to mean that trade unions must abstain from value judgments in their management and actions towards their public. An example of this impartiality would be that their directors or officers should not fail to add to their operating structure people of a certain gender or race for strictly personal and subjective reasons. Another example would be that of not letting the power of capital influence the collective negotiations that they establish with employers (in a way, it is a utopia to say this, because, according to a Marxist interpretation, capital is the one who controls this "employer/employee x worker" relationship. But, at the same time, it would also be a utopia to think of a theory of justice to be applied to the union ambit in a capitalist system, when both parties are in a recognized material inequality?)

Likewise, it is understood that the very exercise of thinking of an ideal, fair and impartial way for unions to operate may be a utopian exercise, but it is still necessary, because, according to Rainer Forst[5], full justice[6], in the vision employed by the author, may indeed be unattainable, but its constant search by citizens is inevitable (FORST, 2018, p. 243).

5 For more information, see Rainer Forst's 2018 work Justification and Critique. Perspectives on a Critical Theory of Politics.

6 One wonders what these conditions of full justice are in a capitalist context of exploitation of workers' labor, but held by the tradition of the adopted political philosophy.

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Trade unions, as much as they cannot be completely fair in their actions, at least manage to mitigate the disparity caused by the exploitative relationship between employers and workers, which strengthens the freedom of struggle of the working class.

The author, going even deeper into the theme, as well as introducing the concept of formal justice, affirms:

> Let us further imagine that this conception of justice has wide acceptance in society and that institutions are impartially and consistently administered by judges and other authorities. That is, similar cases are treated similarly, the similarities and differences being those identified by existing norms. The correct rule set by the institutions is regularly observed and properly interpreted by the authorities. This impartial and consistent administration of laws and institutions, regardless of what their fundamental principles are, can be called formal justice. If we think that justice always expresses some kind of equality, then formal justice requires that in its administration, laws and institutions must apply equally (i.e. in the same way) to those who belong to the categories defined by them. ... Formal justice is adherence to the principle, or, as some have said, obedience to the system (RAWLS, 2008, p. 61-62).

In such a way that we can call formal justice the fact that the subjects of the labor relationship (workers and employers) respect the rules and principles established by the institutions that command them (e.g., **Labour court**, legislation, precedents, jurisprudential guidelines, and unions). Thus, if there is general recognition that a collective norm, a law or a custom must be respected, regardless of whether they are, in fact, fair or not, then there is the figure of formal justice, or only in formalistic conceptions.

According to John Rawls (2008), even if laws and institutions (in this case, unions) are unjust (to different degrees), it is less harmful to respect their determinations, than to establish a deinstitutionalizing environment, without rules and laws. The author states that even unfair institutions (such as most unions and their collective bargaining) do more justice than the absence of normativity and of an institution that represents the working class. It must be emphasized that this is Rawls' (2008) position, and it is not necessarily the correct or hegemonic understanding.An environment that has unjust norms opens room for several types of discrimination, such as sexism, racism, and authoritarianism, for example. In view of this, it is necessary to understand that not all injustices are justifiable under the pretext that the absence of norms would be more harmful (RAWLS, 2008).

Thus, a start for the achievement of a theory of justice is to establish a minimum acceptable standard of recognition for institutions and their norms. In this case, the very fact that unions exist and have certain bargaining power is already a first step towards the application of the principles explained by Rawls, necessary for the realization of the theory of justice.

4 JOHN RAWLS' PRINCIPLES OF JUSTICE

Trade unions are social institutions that have the power of collective bargaining in order to establish a normative minimum necessary for the existence of a formal justice. In light of

this, we move on to the analysis of the "principles of justice" that, according to Rawls, are necessary for the effectuation of a fully just structure. According to the Author, the two principles are as follows:

> First: each person should have an equal right to the most comprehensive system of equal basic freedoms that is compatible with a similar system of freedoms for others.
>
> Second: social and economic inequalities should be so ordered that they are at the same time (a) regarded as advantageous to all within the limits of reason, and (b) linked to positions and offices accessible to all (RAWLS, 2008, p. 64).

He states that the first principle precedes the second, so that everyone must be assured equal basic freedoms (political freedom to vote, freedom of speech to demonstrate and speak, freedom of conscience, etc[7]). Only then should it be ensured that the distribution of wealth and opportunities should be advantageous to all, even if not equal. According to the second principle, everyone should have the same opportunities, and positions of authority and responsibility should be accessible to all.

As far as the point of view of Collective Labor Law is concerned, one can state that, in a neoliberal[8] capitalist system, it becomes a Herculean task to see a horizon, even if distant, that ensures a fair distribution of wealth. Furthermore, there is little possibility of everyone having access to positions of authority and responsibility, since these, in union environments in general, belong almost exclusively to white, cis men.

Summarizing the understanding of the two principles, therefore, the fact that Rawls states that both apply to social institutions, makes us assume that they are applicable, as a consequence, to unions.

5 THE APPLICATION OF THE SECOND PRINCIPLE OF JUSTICE TO THE UNION

If the workers have all their liberties preserved, the second principle that determines a distribution of wealth that is beneficial to all will come into effect. However, it would be inno-

7 In order to understand the importance of the concept of "basic freedoms" for Rawls, we transcribe the lesson of Denilson Luis Werle, who, when explaining what they are about, states that they are the basic condition for the proper development and full exercise of human moral capabilities. Let's see: "Rawls will continue to maintain the thesis of priority of freedom in the sense that one freedom can only be limited or denied for the sake of another or other fundamental freedoms, and never for considerations of general welfare or perfectionist values. Since the fundamental freedoms can be limited when they clash with each other, none of them can be considered absolute. To justify the priority of the basic freedoms Rawls clarifies which concept of person is at the basis of political liberalism. Besides being seen as free and equal citizens, people are taken as citizens who possess two moral faculties (or capacities): that of having a sense of justice and that of forming, pursuing, and revising a rational conception of the good. The list of basic freedoms suggested by Rawls represents the fundamental social conditions for the proper development and full exercise of these two capacities of the person throughout life, fundamental to the development of a sense of personal independence and self-respect [...] What justifies the concept of person adopted by Rawls is the very purpose of justice as equity: "the aim is to formulate a conception of political and social justice in line with the most deeply held convictions and traditions of a modern democratic state. The purpose of doing so is to see whether we can resolve the impasse of our recent political history, namely, that there is no agreement on the way in which basic institutions should be organized to harmonize with the freedom and equality of citizens as persons" (WERLE, 2011, p. 190-191).

8 "Neoliberalism can be defined as the set of discourses, practices and devices that determine a new mode of government of men according to the universal principle of competition" (DARDOT; LAVAL, 2019, p. 15).

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cent to say that workers, even with the intervention of social institutions (unions), have their basic freedoms preserved. To illustrate, it is enough to point out that, even with the formal provision that everyone is free to exercise the right to strike whenever, wherever, and however they see fit (art. 9, CFRB/88 [9]), we see all the time, the judiciary declaring illegalities in legitimate strike movements, contrary to what is stated in CFRB/88, using as argument an infra-constitutional legislation (Strike Law - no. 7.783/89[10]) that has the sole role of limiting an exercise that, by determination of our constitution, should be full. In this sense, Rafael Borges Bias explains:

> There is a conflict between the restrictive text of Law 7.783/89 and Article 9 of the Constitution, which establishes a broad conception of the right to strike, transferring to the workers the responsibility to decide the time and form of deflagration, as well as the claims they seek to conquer. It was delegated to ordinary law only the definition of essential services and activities, besides the treatment of the community's unpostponable needs, in the exact terms of paragraph 1 of article 9. However, Law 7.783/89 is a compendium of limitations to the exercise of the right to strike, violating the constitution, which does not have any expression subjecting form, purpose, or exercise of the strike to specific rules. The concept of strike is constitutionally definitive, not allowing restrictions. (BIAS, 2014, p. 7).

Márcio Túlio Viana argues that the existence of this infra-constitutional law should not be a limitation to the full exercise of strikes, since it should be read critically, without losing sight of the constitutional basis (VIANA, 1996, p. 302). Unfortunately, what we see in practice is a real limitation on the full exercise of the right to strike.

In this way, we see that, at least in Brazil, social institutions (either the Judiciary or the unions) cannot guarantee the full observance of the first principle of justice of Rawls, so that the scope of the second becomes equally limited.

The author, after a long explanation and deconstruction of the concepts of the various principles and sub-principles that he believes are part of this system, arrives at the theory that he believes is adequate for the construction of an ideal of justice and, consequently, also adequate for the idealization of unions, the object of this study (RAWLS, 2008). These are the “Democratic Equality” and the “Principle of Difference” (RAWLS, 2008).

Ralws states, about these institutes, specifically about the principle of difference, that it is a scheme in which the expectations of all people belonging to society increase, regardless of their social class, to the extent that the expectation of any of them, in isolation, increases. In this way, inequality can be maintained among them, however, the expectation of all of them improves when any of them reaches higher levels. Let's see:

> We simply maximize the expectations of the least favored position, obeying the required constraints. As long as this brings benefits to all, as I have

9 Art. 9 The right to strike is assured, and it is up to the workers to decide on the opportunity to exercise it and on the interests they should defend through it. (BRAZIL, 1988).

10 Some authors claim that such law is unconstitutional. Among them, Baboin's lesson stands out: “Thus, Law 7.783/89, when establishing restrictions to the right guaranteed in article 9 of the Constitution, does it in an unconstitutional way. A mere ordinary law, whose approval requires only a simple majority of votes, cannot make it impossible to exercise a constitutional right, a right that is even of a fundamental nature in our legal system. As José Afonso da Silva points out, ‘the best regulation of the right to strike is that which does not exist. The law that comes into existence should not go in the direction of its limitation, but of its protection and guarantee’”. (BABOIN, 2013, p. 33). For more information on the subject, see “Atypical strikes: a new look at the resistance movements of the working class” by Marina Souza Lima Rocha.

> assumed so far, the estimated gains, relative to the hypothetical equality situation, are irrelevant, if not impossible to determine. There may, however, be another sense in which everyone benefits when the difference principle is satisfied, at least if we make some assumptions. Suppose that inequalities in expectations are chain-linked: that is, if an advantage has the effect of raising the expectations of the lowest position, it also raises the expectations of all the layers in between (RAWLS, 2008, p. 85).

Finally, Rawls points out that the Principle of Difference gives weight to the considerations described by another principle: the principle of reparation (RAWLS, 2008, p. 107). This latter principle, according to the author, provides that: "undeserved inequalities require reparation; and since inequalities of birth and natural endowments are undeserved, they must be compensated in some way" (RALWS, 2008, p. 107). This type of undeserved inequality is widely present within unions, whose leadership positions are mostly occupied by white men, precisely because they are made up of these natural characteristics overvalued by modernity (BALLESTRIN, 2013.).

Such union model represents the mirror of the Taylorist-Fordist factory, composed mostly by white men, "workers handling industrial equipment and dressed in overalls" (RODRIGUES, 2019, p. 4). Thus, to typify the working class in a homogeneous way, as if it only fit the white, industrial, male, and salaried mold is to perpetuate an excluding union space, configured by a colorless and masculine homogeneity (PEREIRA, 2017). It is to ignore a plurality of experiences and struggles of those who do not fit into this modern pattern (PEREIRA, 2017).

It is clear, therefore, that, adopting the point of view of democratic equality, the junction between the Principle of Difference and the Principle of Reparation is a good way to pave the way for social institutions towards an effective theory of justice.

Likewise, if unions could, by reformulating their bylaws and internal dynamics, make the actions of union members more diverse and plural, like the working class, this would be reflected in benefits for workers (Principle of Difference).

Thus, the starting point for the disadvantaged, or those who lack opportunities because of their social class, gender or race, will be as equal as possible within it, which will also reverberate in the labor market and, consequently, in society as a whole (Principle of Reparation). In this way, collective social institutions that not only promote Social Justice, but also make it effective through their actions, would really be constituted.

The manner, however, in which such social institutions should jointly apply the principles of difference and reparation is another matter for reflection, which, in view of its enormous complexity and difficulty of overcoming, should be the object of a new study, this time empirical.

6 REORGANIZING THE UNION STRUCTURE

The problem that is observed is the unjust, hierarchical, prejudiced and patriarchal structure found within the unions. How can these collective subjects that represent the heteroge-

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neous working class fight for justice and greater labor rights in the capital/labor relation, if they themselves are unfair, excluding and unequal institutions?

Thus, Brazilian unions are composed, in their great majority, by white and cisgender men, especially when one evaluates the leadership positions (union leaders). If women, transgendereds[11], people of color and other marginalized groups do not (or only minimally) participate in the composition of the unions, then their voices are not heard or even remembered. Thus, these subjects are excluded not only from the labor market, but from the class struggle itself.

The absence or low social, racial, and gender diversity in unions can be diagnosed as a reproduction of the structural inequality of society, which ends up deepening and generating more and more inequalities in the labor market and in society as a whole, configuring itself in a historical vicious cycle of permanent exclusion of certain subjects (RODRIGUES, 2018). According to Adriana L. Saraiva Lamounier Rodrigues "a union that discriminates, that ignores minorities, that reproduces sexist speeches will not represent its workers. Democracy has to start inside union entities to who knows one day reach the business sphere as well (RODRIGUES, 2018, p. 92). It is necessary to break this cycle. Inequality does not start in the unions, but is appropriated by these collective entities. Thus, fighting and breaking it within unions will directly affect the levels of inequality (and, consequently, equality) in the labor market and in society.

Therefore, the issues of race and gender, in particular, are fundamental for the construction of a greater representativeness and political strength of the union. This is because the presence of social movement issues in the unions' agenda is essential to consider "the plural character of the contemporary working class, within which gender and race divides usually generate even more precarious situations for those who are not included in the male and white labor force" (DA SILVA, 2010, p. 122).

Regarding black men and women, there is a structural problem in society, which is proven by the existence of an extra burden of problems on them, resulting from their racial condition (SILVA, 2008). Jair Batista da Silva, in his text entitled "Racism and Trade Unionism - recognition, redistribution and political action of the central unions about racism in Brazil (1983-2002)" brings part of the resolution of the 5th National Congress of the CUT to demonstrate the reality experienced by black people and the apathy of Brazilian trade unions:

> The recognition that racial inequalities constitute a structural problem of Brazilian society implies recognizing the fundamental role of the trade union movement in the fight against racism. In other words, it implies recognizing that, by not facing the racial issue, the union movement legitimizes and contributes to the reproduction of racial inequalities, frustrating a kind of tacit agreement between the oppressive and authoritarian State and unionism around the marginalization of black people. This agreement explains the fact that the data published by DIEESE are not even read by the majority of the leaders, nor considered in union action. In fact, when faced with the debate about the racial issue, the leaders limit themselves to solemn manifestations

11 If such characteristics are already marginalized separately, imagine, then, a black, transgender, and low social class woman? Therefore, it is fundamental to consider intersectionality. According to Crenshaw, the idea of intersectionality "refutes the enclosure and hierarchization of the major axes of social differentiation that are the categories of sex/gender, class, race, ethnicity, age, disability, and sexual orientation. The intersectional approach goes beyond simply recognizing the multiplicity of systems of oppression that operate from these categories and postulates their interaction in the production and reproduction of social inequalities" (CRENSHAW, 2002).

> of solidarity that never go beyond discourse, at best. But there are weirder cases, in which comrades without any information other than that provided by the dominant ideology talk about the "advantages and benefits" of Brazilian racism when compared to South African or North American racism. Taken together, such behaviors configure the disservice rendered by unionism to the fight against racism, understood as an integral part of the fight for the democratization of Brazilian society. The responsibility of the syndicalism in the fight against racism is not due, it should be said in passing, to questions of humanitarian nature, but to the fact that half of the workers are black and, therefore, it is the duty of the syndicate to incorporate the interests of this segment [(Resolutions of the 5th National Congress of the CUT). CUT, 1994, p. 132 - Grifo JBS] (SILVA, 2008, p. 103-104).

Regarding women, a survey conducted by Dieese in 2017 on the number of union leaders by group and gender showed that, of the 139,567 union leaders of labor unions in Brazil, 99,738 are men and only 39,829 are women (SOURCE). The result of the research demonstrates a great inequality in the internal structure of the unions, which privileges men in management positions and that, "even when women manage to be part of the leadership, they hardly have a voice" (BERTOLIN; KAMADA, 2012, p. 47), because they are a minority and hardly find solidarity in an archaic and plastered structure.

Concerning the gender issue, Sara Deolinda Cardoso Pimenta (2012) points out that the male tradition of trade unionism generates the invisibility of women in the world of work and is historically reproduced in the sociological discourse by treating social class without referring to the sex of social actors. Even with the advance of feminist movements, for the author, unions remain under the male view and women are the object of a specific sociology, "as if the place of production where social class was dealt with was dissociated from social relations" (PIMENTA, 2012).

There needs to be a compatibility between what unions preach and how they organize internally. The union discourse that defends democracy, justice and the overcoming of inequalities, many times does not find support in the daily practical relations, thus masking the relations of oppression and discrimination (PIMENTA, 2012). Regarding the presence of women in these social institutions, Junéia Batista, Secretary of Working Women of the Central Única dos Trabalhadores (CUT), in an interview highlighted: "Even though the number of women in the world of work has (sic) increased, their presence in the union still does not reflect this proportion, especially when we check the positions of power in trade union organizations" (CONFEDERAÇÃO, 2016).

The working class can no longer be taken only as that constituted by "the worker, employed, unionized in the industrial sphere of a verticalized Taylorist-Fordist company, concentrated in a single production space in the national territory" (FLEURY; NICOLI, 2018, p. 15-16). The working class is plural, colorful, heterogeneous, composed of the most diverse cleavages (PEREIRA, 2017). Therefore, the participation of invisibilized subjects (in contemporary society and in labor relations) in the internal structure of unions can break with a homogeneous, white, patriarchal structure of the class struggle inherited from modernity, which seeks to erase the complex diversities of the social fabric (EISENSTEIN, 2014, p. 2) In this sense, for the re-signification of the social class category -and, consequently, for the

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recovery of the effectiveness of collective struggles in contemporary[12] capitalism- one must overcome the analysis inherited from the rational-modern paradigm that conceives it as something homogeneous, and, therefore, colorless, universalist as in white, cisgender and masculine: work comes in colors, sexes, genders and is formulated through expressions of power that cross those subjects within their various social relations (PEREIRA, 2017).

In order for unions to configure themselves as fair social institutions, which provide a stability to a well-organized society, they need to support the struggle of the entire working class, so that they have dignified living and working conditions, as well as the right to access the internal positions of the union structure, with effective participation in the class struggle. The inequality that we see inside the unions, dominated by white cisgender men, is a harmful inequality that harms the representation of subjects that are already marginalized in society and in the labor market.

Because these are unjust and harmful inequalities (which do not fit Rawls' Principle of Difference, explained earlier) to those who are already in more precarious and exploitative situations, they must be transformed in order for the injustices within unions, which must be just social institutions, to cease.

The second principle of justice allows inequalities, but only if they bring benefits to all, which is not the case here. Such inequality is extremely harmful to women, people of color, LGBT+ and other marginalized subjects. Thus, it is necessary to apply and analyze the two principles of justice (freedom and equality) internally to the structure of the unions so that they represent the diversity of the social fabric. Only in this way can unions fight for more justice for male and female workers, confronting employers and capital itself.

Trade unions are representative bodies of the working class, but not of its heterogeneity. Therefore, they need to have an internal structure that is more egalitarian, fair, inclusive, and open to marginalized groups, especially black people, women, and the LGBT+ [13]community. According to Maria Antonino, "institutional spaces need to reflect society, but they still fail to do so" (ANTONINO, 2018).

In this sense, Flávia Souza Máximo Pereira states that "there is a conflict between capital and labor, but the social inequality generated by capital is not simply monolithic and excessive; it is particularly excessive according to color, gender, nationality, and sexual orientation" (PEREIRA, 2017, p. 78). For this reason, unions need to reinvent themselves internally and externally. Internally, by diversifying those who occupy management positions and externally, by turning their gaze to other movements that go beyond the economic-labor sphere, such as feminist and anti-racist movements (FLEURY; NICOLI, 2018). Discriminations arising from race and gender (among many others) support and are supported by capitalism[14], which

12 The capitalism to which the text refers is the post-industrial, transnational and network capitalism that provides a scenario of de-characterization of the classic Labor Law paradigm, of precarization and de-collectivization of labor relations and of the blurring of the labor contract (RODRIGUES apud FERREIRA, 2000).

13 The acronym stands for Lesbian, Gay, Bisexual, the umbrella term Trans, which stands for transgender, transvestite and transsexual people and the "+" stands for plurality and all the other constructs that are added and represented in the acronym and those that are being included.

14 Flávio Malta Fleury and Pedro Augusto Gravatá Nicoli exemplify this situation: "After all, the capitalist system exploits, economically, these types of discrimination and oppression, in overlapping axes, perpetuating their existence in the world of work and in other dimensions of human life and society (COLLINS; BILGE, 2016). Capitalism economically exploits sexism, racism, homophobia, lesbophobia and transphobia when, for example, it preferentially employs women, black people, gays, lesbians, transvestites and transsexuals in call centers, more usually known as call centers, where the existence of these

profits from the overexploitation and precarization of these invisibilized lives (SILVA. 2008, p. 105).

According to Lilian Arruda: "[...] it becomes imperative the 'reinvention of the union movement' as a factor of work democratization and as a reinforcement of the 'collective voice'" (ARRUDA, 2004, p. 431). In this sense, a possible proposal for a greater inclusion and representation of these invisible subjects in the structure of the unions, so that they can consolidate themselves as fair social institutions that apply Rawls' two principles of justice, would be the adoption of quotas, especially in management and leadership positions. Especially, as it is found in a modern paradigm, with quotas for women, people of color and transsexuals, being a temporary measure to perform a form of reparation for the constant injustices that these subjects suffer daily in society and also within the unions.

From the moment that marginalized people gain a voice and a space within the unions, they begin to have strength and a support structure to change the reality in the scope of labor relations. According to Lucas Petroni and Raissa Ventura, in the text "Can the normative theory have any contribution in the fight against injustice?", the priority of society's concern should be in relation to those who are worse off and, consequently, need more attention (VENTURA; PETRONI, 2014). According to Flávio Malta Fleury and Pedro Augusto Gravatá Nicoli:

> The individual and collective emancipation of male and female workers must permeate, necessarily, the confrontation of all forms of discrimination and oppression of which they are victims within the work environment, when they manage to access it, and outside it (FLEURY; NICOLI, 2018, p. 13).

One has the challenge of understanding the complex connections between gender, class, and race, fundamental components of inequalities, and what is perceived is that unions are reproductions of these inequalities. Such exclusionary behavior of unions deepens their crisis, as women, people os color, LGBT+ and other constantly marginalized groups stop identifying themselves with the institution, which does not represent them. Thus, the union loses more and more supporters and weakens itself. In the words of Adriana L. Saraiva Lamounier Rodrigues:

> In general, the crisis of representativeness means the loss of the union's capacity to unite the workers' behaviors, and to represent the will of the worker collectivity. If all workers lose their identification with their own entity, the crisis turns into decline (RODRIGUES, 2018, p. 91).

Therefore, for the union movement to regain its breath and strength, it needs to build fairer and more democratic unions and, for that, it will be necessary an affirmative and reparatory action, to include socially excluded people in its internal structure.

The equal presence and performance of women, people of color and LGBT+ in unions is a project that will benefit society as a whole (ANTONINO, 2018), transforming the vicious cycle, discussed above, into a virtuous cycle of inclusion and plural participation of the heterogeneous working class, which seeks to end inequalities, respecting differences, within social institutions and society.

Therefore, a fair performance within the trade unions can have a direct implication on the reduction of injustices in the labor market. If the diversity of working subjects is contem-

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people is invisibilized and hidden from 'a consumer society that favors certain aesthetic standards' (VENCO, 2009, p. 170)" (FLEURY; NICOLI, 2018, p. 13).

plated in the union and labor market dynamics, with opportunities, occupation of prominent positions, enjoying a greater visibility, this will echo effects in several spheres of society, such as unemployment rates, schooling, violence, poverty, greater economic and purchasing power of the population, among others.

7 FINAL CONSIDERATIONS

In view of the above, without intending to finalize the discussion, it is clear that unions, which have a constitutional seat, are collective entities that represent workers, having their own statute, positions, rights and duties assigned to their members, and, therefore, are configured as social institutions in the view of John Rawls. According to Rawls, what contributes for a society to be fair is the proper functioning of its social institutions.

In this way, the current scenario of internal organization and performance of most unions shows that they are unfair, patriarchal and hierarchical social institutions, which rarely represent the heterogeneity of the working class, since they are mostly formed by white, cis men. In this way, unions end up reproducing the structural inequality that exists in society in their internal organization, excluding marginalized subjects, such as women, black people and transsexuals.

Likewise, the application of John Rawls' "Theory of Justice" and principles of justice, especially the second one (equality), in the union organization, despite being an extremely difficult task, can result in a more just and inclusive union structure, which welcomes and gives visibility to those workers who are marginalized by society and excluded from the labor market.

For that matter, in the sense of material equality, the application of gender, gender identity, and race quotas in the structure of the unions, especially in relation to positions of greater protagonism, can work as a way to give visibility to these agendas and marginalized sectors of society in the history of modernity, and also as a historical reparation to the unfair and harmful inequalities suffered by them.

Thus, it is understood that a fair and balanced performance inside the unions can have a direct impact on the dynamics of the labor market and on the treatment of labor relations for everyone who works, especially for those who are most marginalized and invisibilized by a patriarchal, prejudiced, and racist society.

In view of this, from the moment that these subjects gain protagonism within these social institutions and support from the numerous and heterogeneous working class, the market, being understood as a heterogeneous institution, will probably have to yield to their pressures and direct claims through constant and collective struggle, because the working class, articulated and with plural representation, is more numerous, in volume, strength of consumption and claims, than any other and, when united, attentive to social demands and solidified, has much more strength than it imagines, such as, for example, having spaces to achieve more conquests of rights, expansion of the protected subjects within the employment relationship.

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THE QUESTION OF THE MINIMUM LUGGAGE ALLOWANCE IN THE BRAZILIAN AIR TRANSPORT UNDER THE PERSPECTIVE OF THE ECONOMIC REGULATION THEORY

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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.

Key words: Economic Regulation Theory. Civil Aviation. Luggage allowance.

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.

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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 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.

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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 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.

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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 sec-

ond, 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

4 Available at: https://www.anac.gov.br/participacao-social/consultas-publicas/audiencias/2016/aud03. Accessed: Ago 21, 2020

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.

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.

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.

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.

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 / 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 fran-

9 Technical Note nº 11/2019 / DEE / CADE

> chise 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). Accord-

ing 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 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 disposi-

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.

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).

tion[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.

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).

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

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.

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].

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.

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).

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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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.

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PRIVATE ASPECTS OF USUCAPION OF DOMINIC PUBLIC GOODS FROM THE PERSPECTIVE OF THE ECONOMIC CONSTITUTION

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GONÇALVES, Camila Soares. **Private aspects of usucapion of dominic public goods from the perspective of the economic constitution**. 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 September 26, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Paulo Márcio Reis Santos

ABSTRACT

The present study aims to analyze the private aspects of the adverse possession of public dominical property, under the perspective of the Economic Constitution, in order to loosen the current prohibition in the constitutional and infraconstitutional text. Considering the fact that dominical property are only formally public, not fulfilling the principle of the social role of property, and may even be alienated, due to disaffection, it becomes fully viable to acquire them by adverse possession. It will be analyzed the constitutional prohibition of adverse possession of public property, distinguishing the types of public property and delving only into dominical assets; and addressing the principles of human dignity, social role of possession and property, supremacy of the public interest and constitutional economic order to, in the end, demonstrate that the ban on the adverse possession of public property is a setback and, therefore, must be relativized, providing the realization of the right to housing and distributive justice. For this purpose, bibliographic research will be used, through the deductive method, with a theoretical framework in the Economic Constitution itself.

Keywords: Adverse possession. Public dominical property. Economic Constitution. Social function of ownership. Right to housing.

OUTSOURCING AND ITS IMPLICATIONS IN PUBLIC ADMINISTRATION:
A READING OF THE PRINCIPLES OF LEGALITY AND IMPERSONALITY IN THE USE OF LAW 13.429 / 2017 IN PUBLIC ADMINISTRATION

Danilo Felício Gonçalves Ferreira

FERREIRA, Danilo Felício Gonçalves. **Outsourcing and its implications for Public Administration: A reading of the principles of legality and impersonality in the use of Law 13.429 / 2017 in Public Administration**. 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 September 28, 2020.
Virtual room on the digital platform "zoom".
Advisor: Profa. Dr. Luciana Diniz Durães Pereira

ABSTRACT

The outsourcing of labor and services is a worldwide trend that started in the Brazilian private sector and has also started to be used by the Public Administration. It is a management tool in order to achieve the public interest, materialized through a contract signed between entities and legal entities under private law, which allows for cost reduction and specialization in the provision of services or supply of goods, in addition to allowing the contractor focus on your core activities, becoming more competitive. As in the private sector, the public administration tries to reduce the state equipment, using partnerships, privatization, privatization and other forms; all of them focused on that goal. The Public Administration has used the instrument of outsourcing public services, especially for secondary activities, such as support functions, in the case of cleaning, surveillance and attendance services, although through other instruments, it has been delegating the provision of services to private individuals. at first they would be of its core activities, a fact widely discussed in the doctrine, mainly after the approval of law 13.429 of 2017. Through outsourcing the service, the contractor passes to the contracted third party the responsibility for the activities in order to be able to concentrate on the best performance and still charge the contractor for quality and efficiency in the contracted service. But if you don't charge for the quality of services through good management, you lose the cost / benefit. Stop this, there was the insertion of some institutes in the legal system accepted by both doctrine and jurisprudence, to regulate state intervention in economic control; the delegation of public services, collaboration agreements with the private sector, such as service provision contracts where outsourcing is inserted. The present work intends to make a reflexive analysis about the outsourcing process in Public Administration, from a legal-administrative perspective. For that, it uses a critical-dialectical methodology based on the analysis of specific norms, including those resulting from New Law n. 13,429 / 2017.

Keywrod: Public Administration. Outsourcing. Principles. Rules. Legality. Impersonality.

DIGITAL CONFLICT RESOLUTION PLATFORMS IN CONSUMER LAW

PAULO EDUARDO DINIZ RICALDONI LOPES

LOPES, Paulo Eduardo Diniz Ricaldoni. **Digital conflict resolution platforms in consumer law**. 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 October 2, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Daniel Firmato Almeida Glória

ABSTRACT

The Constitution of the Republic of 1988 preamble establishes the Democratic State of Law based on the peaceful settlement of disputes and the article 3º, paragraph 3º of the 2015 Code of Civil Procedure determines that the law operators must encourage self-composition, however, the judicial assets in Brazilian courts demonstrate the litigious trend of the population. In this reality, the average time required to obtain a complete solution to the dispute tends to be of some years, resulting in the dissatisfaction of the population and ineffectiveness of the principle of access to justice. This research aims to analyze the lack of effectiveness of the jurisdictional provision due to the high amount of law suits in process and propose the use of self--composed alternative dispute resolution (negotiation, mediation and conciliation) to ensure the principle of access to justice, the reduction of the judicial assets and the possibility of resolving the deal in less time and in a satisfactory manner. Specifically, it will focus on Consumer Law, which most of the actions will be of the special courts jurisdiction, therefore, as they are guided by procedural economics and search for conciliation or transaction, it is perfectly suited for these methods, especially through digital platforms. Finally, in order to prove the hypothesis of the benefits that extrajudicial selfcomposition will be enabled to citizens and the State, three digital conflict resolution platforms that operate in Consumer Law were studied. For the paper, the hypotheticaldeductive method was used, through a bibliographic search in books, dissertations, theses, videos, magazines, websites, laws, jurisprudence, among others, having as theoretical framework the Constitution of the Republic of 1988 and the Code Civil Procedure 2015 to understand how society and the State behave in the face of conflicts and, based on a data analysis, analyze the number of processes in progress in the country.

Keywords: Access to justice. Consumer law. Alternative dispute resolution. Digital conflict resolution platforms. Consumer society.

POLITICAL ASPECTS IN THE MATTER OF HISTORIC EVOLUTION OF SHARED GUARD IN BRAZIL

Carlos Roberto de Oliveira

OLIVEIRA, Carlos Roberto de. **Political aspects in the matter of historic evolution of shared guard in Brazil**. 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 October 9, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Antônio Carlos Diniz Murta

ABSTRACT

Shared custody was an innovation brought in the legal system with Law n. 11.698/2008. The institute has been widely used and still raises doubts and questions in the legal community. In view of this, the present work aims to study the current challenges of shared custody and present arguments in favor of the autonomy of family law, in view of its specificities. To arrive at the conclusions of this work, an introductory chapter was elaborated to deal with the family, addressing its evolution and also the legislative changes that occurred over the years, with the development of society. After that, the next chapter was dedicated to the treatment of types of custody admitted in the Brazilian legal system, in addition to a brief history of the emergence of shared custody in the world and the legislative treatment of parental alienation in Brazil. Subsequently, there is a chapter aimed at presenting Family Law as an interdisciplinary branch and with many peculiarities, in view of this, arguments are presented in favor of its legislative autonomy, through a Statute of families. This chapter also discusses Bert Hellinger's family constellations and their use by the Brazilian judiciary. Finally, the last chapter is dedicated to the practical treatment of shared custody, going through its positive and negative aspects and the problematizations that still persist in doctrine and jurisprudence. The research method adopted here was the deductive one through the bibliographic research of works, articles, dissertations and specific theses about shared custody and also the research in works of Family Law. The main theoretical frameworks adopted by this work can be mentioned by lawyers Nelson Rosenvald, Cristiano Chaves de Farias, Maria Berenice Dias and Luiz Edson Fachi. It is preliminarily concluded that Family Law in view of its specificities must merit its own legislative treatment, separate from the Civil Code and the shared Guard is in constant study and progress, in view of the new situations that are presented in this work.

Keywords: Shared custody. Family relationships. Children's rights. Autonomy Family law. Interdisciplinary view of the guard.

CORPORATE LEGAL RISK MANAGEMENT AS A STRATEGY FOR BUSINESS SUSTAINABILITY:
APPLICABILITY OF ISO 31000 AND ISO 31022 STANDARDS

Luciana Procopio Bueno

BUENO, Luciana Procópio. **Corporate legal risk management as a strategy for business sustainability: applicability of ISO 31000 and ISO 31022 standards**. 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 November 19, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Frederico de Andrade Gabrich

ABSTRACT

Companies currently occupy a relevant role in the Brazilian economic, social and political scenario because they provide development and progress by providing, directly or indirectly, the subsistence of a significant part of their population. When producing and circulating goods and services, organizations are also responsible for a significant amount of the State’s tax revenues and for boosting technological advances and innovation, becoming the center of the contemporary economy. Due to its obvious social function, corporate sustainability is an object of interest to the entire community. Legal rules regulate a significant part of relationships and businesses, in such a way that companies are exposed to different types of legal risks, especially due to the relationship with a large number of stakeholders, such as customers, suppliers, business partners. , State and society, in addition to the particularities of each organization and its market segment. Understood from a systemic concept of company survival, corporate sustainability requires critical thinking about the strategic relevance of companies, as well as the criticality of the risk represented by the progressive judicialization (especially in companies). This directly affects competitiveness, flexibility of the labor market and production costs, by committing part of the billing and profit to payment or provisioning to face high cost lawsuits. From this perspective, this research seeks to establish an answer to the problem of the need to adopt effective strategies for the management of corporate legal risks that provide alternatives for the business and the creation of value for the interested parties. Based on the analysis of how this corporate legal risk can be identified, measured, controlled, mitigated and, when possible, eliminated, in addition to the recognition of opportunities for its exploitation or maximization, strategic risk management and the establishment of competitive advantages in the business environment. For this study, the deductive scientific method was adopted, developed based on the theoretical references of Zygmunt Bauman, Ulrich Beck, Anthony Giddens, Alfred Marshall, Joseph Schumpeter, Aswath Damodaran, Michael Porter, Cássio Machado Cavalli, Fabio Konder Comparato and Frederico Gabrich.

Keywords: Corporate Legal Risk. Strategic management. Corporate sustainability. ISO 31000. ISO 31022.

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THE POSSIBILITY OF DIGITAL INHERITANCE IN THE LIGHT OF THE BRAZILIAN LEGAL ORDER

VICTOR WERNECK GOMES

GOMES, Victor Werneck. **The possibility of digital inheritance in the light of the Brazilian legal order**. 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 November 27, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Paulo Márcio Reis Santos

ABSTRACT

Brazilian legislation has not kept up with so many new developments in possible innovations in the modalities of interaction in modern private life. The last few decades in Brazil have been characterized by changes in personal relationships, in which more and more people are digitally interconnected, basically spending their entire life allocated on digital devices connected to the Internet. Having no legal regulation for most of the activities of individuals in a virtual environment, consequently there is no regulation for sharing content on the Internet, which can be these texts, videos, photos and others, as well as there is no type of legislative provision for digital goods acquired only in virtual form on the Internet. The justification and motivation of this work is the fact that the digital assets provided for in the individual's assets, in the absence of legislation and regulations, end up being lost in succession. The central hypothesis of this research fits into a possibility of directing the transmission of digital goods after death in a kind of inheritance, called digital inheritance. The general objective is to define how digital inheritance would occur, analyzing digital goods and their characteristics and what conflicts may occur in relation to other rights in the legal system. The aim is to relate the inheritance rights and the predictions already existing to adapt to digital assets, investigating whether there is a possibility of a digital inheritance and testamentary ways to dispose of digital assets. It is necessary to investigate how digital assets protected by personality rights could conflict with the inheritance, in order to finally seek to relate the current reality of the theme in Brazil and propose whether there is a need for change in rights successions provided for in Brazilian law. It is a research in an interdisciplinary perspective, adopting deductive as the predominant reasoning, with the work developing from a bibliographic research, being directed to the areas of Civil Law, Digital Law and Constitutional Law. Regarding the nature of the data, the primary data deals with the research of laws, bills, doctrine and jurisprudence, with secondary sources being official and statistical data from national and international bodies and companies, as well as the research of Brazilian or foreign studies in the area of Law. Civil, Digital Law and Constitutional Law linked to digital assets and digital heritage, being a bank of theses and dissertations, in addition to periodicals.

Keywords: Heritage. Digital inheritance. Digital goods. Civil right. Digital law.

COLLECTED CONTRACTS, DEFAULT AND CIVIL RESPONSIBILITY:
AN INVESTIGATION IN THE LIGHT OF THE ASSUMPTIONS OF PRIVATE AUTONOMY AND STRATEGIC ANALYSIS OF LAW

Fernando de Souza Amorim

AMORIM, Fernando de Souza. **Collected contracts, default and civil responsibility: an investigation in the light of the assumptions of private autonomy and the strategic analysis of law**. 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 November 30, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Paulo Márcio Reis Santos

ABSTRACT

This research has as its theme the contractual coalition, an institute that is verified when there is a plurality of legal businesses that are valid and able to produce effects and connection between them but not concluded between the same parties. In the light of the assumptions of private autonomy and the Strategic Analysis of Law, it is asked, as a research problem, whether in the linked contracts there is civil co-responsibility of a contracting party unaware of the defaulted contract, but part of the network of related contracts. Also, it questions whether a contractor who is part of a contractual coalition network is liable for damages caused to a contract other than that of which he is a member, because of the incidence of the objective good faith principle. As a hypothesis, it is stated that, despite the contracts that make up the network being formally autonomous and subject to specific legal regimes, their treatment must consider their existence as a system. Thus, the incidence of the principle of objective good faith imposes on the related contractors the limitation to the exercise of subjective rights and the incidence of annexed or instrumental duties of conduct in the coalition's face as a system and not just the individual pacts. The general aim of the research is to demonstrate the legal effects of the linked contracts, especially in the possibility of recognizing the civil co-responsibility of the contractors that are part of the contract network in case of default and under what modality (contractual or non-contractual), besides its practical repercussion in the economic market in the light of the assumptions of private autonomy and the Strategic Analysis of Law. The research adopts, as theoretical references, the concept of related contracts proposed by Francisco Paulo de Crescenzo Marino, the notion of objective good faith proposed by Judith Martins-Costa, besides the concept of Strategic Analysis of Law by Frederico de Andrade Gabrich. As for the other methodological aspects, the research is developed in a legal-dogmatic methodological aspect, using hypothetical-deductive reasoning. This is theoretical research and, about the generic type, it is classified as legal-comprehensive or legal-interpretative. About the mode of analysis of the sources, this research is classified as qualitative and is interdisciplinary, combining concepts of Civil Law, Constitutional Law, Jurisprudence, Philosophy of Law, and Strategic Analysis of Law. The research uses primary and secondary data and, as a methodological procedure and technique for collecting information, the bibliographic survey.

Keywords: Linked contracts. Tort law. Principle of objective good faith. Legal effects. Default. Strategic Analysis of Law.

THE (DIS) PROTECTION OF PEOPLE WITH INTELLECTUAL AND MENTAL IMPEDIMENTS IN THE LIGHT OF THE CURRENT THEORY OF DISABILITIES AND THE CONTEXT OF THE STATE OF MINAS GERAIS

Eliana Guimarães Pacheco

PACHECO, Eliana Guimarães. **The (dis) protection of people with intellectual and mental impediments in the light of the current theory of disabilities and the context of the State of Minas Gerais**. 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 December 2, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Paulo Márcio Reis Santos

ABSTRACT

The present research has as its theme the alterations processed in the theory of disabilities carried out by the Statute of Persons with Disabilities, which incorporated into the Brazilian legal system the precepts of the Convention on the Rights of Persons with Disabilities, to which Brazil is a signatory. It is asked, as a research problem, and because of these changes, whether it was incurred in lack of protection, especially aggravated in the State of Minas Gerais, considering the statistical data of individuals with mental and intellectual impairments. As a hypothesis, it is stated that the legislative changes, recognizing the full capacity of people with mental or intellectual disabilities, without a framework for in-depth study of the consequences, provided equal treatment to essentially different people. The general aim of the research is to investigate whether, for the mentally and intellectually disabled, effective protection was performed in correspondence to the specificities of each individual, and to understand the business freedoms of the person with a mental disability, and the role third parties in exercising those rights. As a theoretical framework, the research adopts the criticisms made by Zeno Veloso, José Fernando Simão, and Taisa Maria Macena de Lima, who emphasize the mismatch between the current rules of disability theory and the complexity of people with mental and intellectual impairments. As for the other methodological aspects, the research is inserted in a legal-social perspective, adopting the hypothetical-deductive reasoning as the predominant reasoning. The research is bibliographic and interdisciplinary, combining concepts from Civil Law, Theory of Law, and Psychiatry.

Keywords: Brazilian Statute of Persons with Disabilities. Mental and intellectual impediments. Theory of disabilities. Lack of protection. Minas Gerais state.

THE USE OF MUSIC IN THE TRANSDISCIPLINARY TEACHING OF LAW:
AN APPROACH TO THE RIGHT TO EDUCATION

Roselaine Andrade Tavares

TAVARES, Roselaine Andrade. **The use of music in the transdisciplinary teaching of law: an approach to the right to education**. 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 December 11, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Frederico de Andrade Gabrich

ABSTRACT

The teaching of Law needs to be increasingly transdisciplinary and developed through active methodologies. This is also due to Resolution no. 5/2018, from the Ministry of Education. But this is still a problem for many professors in law courses, who do not know how to really use active methodologies, nor how to be transdisciplinary. Based on the deductive method and based on the work of professor Mônica Sette Lopes, “Uma metáfora: música e direito”, the objective of this research is to demonstrate the effectiveness of the method of using music to improve the active and transdisciplinary learning of Law in undergraduate courses, from the analysis of the right to education, and prove that the requirements set out in Resolution no. 5/2018 of MEC, especially that of transdisciplinarity, can be achieved by applying Brazilian popular music to the teaching of law since music is a good didactic option, notably because it stimulates skills that would not be developed from exclusively instructive methodologies education.

Keywords: Law. Education. Music. Transdisciplinarity.

ADMINISTRATIVE APPROVAL OF THE REQUEST FOR EXTRAJUDICIAL RECOVERY AS A PROPOSAL FOR DEBUROCRATIZATION AND DEJUDICIALIZATION

THIAGO CORTES REZENDE SILVEIRA

SILVEIRA, Thiago Cortes Rezende. **Administrative approval of the request for extrajudicial recovery as a proposal for deburocratization and dejudicialization**. 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 December 21, 2020.
Virtual room on the digital platform "zoom".
Advisor: Profa. Dra. Danúbia Patrícia de Paiva

ABSTRACT

The present study has as main objective to demonstrate that the national policy of judicialization and de-bureaucratization of the Judiciary stamped in Provision nº 125/2010 - CNJ, materializes at the moment when legislative measures are put into effect with the intention of reaching this end. Thus, as with the request for recognition of extrajudicial usucapion inserted in the national legal system through Law No. 13,105 / 2015, as well as the possibility of carrying out inventories, shares, consensual separation and consensual divorce through the administrative route authorized by Law no. 11,441 / 2007, it is believed, analogically, imbued with the detrimental core, that the notary of protests of titles and debt documents, after the issuance of a competent law, could be the administrative authority responsible for ratifying the request for extrajudicial recovery, thus suppressing, the judicial homologation required by article 162 of the Bankruptcy Law (Law No. 11,101 / 2005), removing numerous lawsuits from the Judiciary. Such procedure, deductively from the others mentioned above, would begin and be concluded within the scope of extrajudicial services of securities protests. Thus, the withdrawal of cases from the Judiciary makes justice faster, more effective and more economical, providing more sustainable national economic development. This initiative is in line with the new political-legal scenario fostered by the national judicial policy of adequate treatment of conflicts of interest within the scope of the Judiciary and by Provision No. 72, of 07/27/2018, of the same body, which provided for incentive measures the settlement or renegotiation of debts protested in the protest notaries in Brazil. To base this study, the deductive scientific method will be adopted, with the analysis of laws, doctrines, scientific articles, as well as more recent jurisprudence on the subject. As a result, it will be deduced that, in the same way as with judicial usucapion, judicial separation and divorce, now extended to the extrajudicial, after drafting a competent law, the protest notaries, public agents endowed with notary public faith, drivers of de-bureaucratization and dejudicialization of the Judiciary, should be able to ratify the request for extrajudicial recovery, and it is up to the citizen to also use the judicial route.

Keywords: Notary. Protests. Extrajudicial recovery. Judicialization. Notaries.

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.

Start date: 01/01/2010

http://ppg.fumec.br/direito/linhas-de-pesquisa/

THE JUDICIALIZATION OF POLITICS AND JUDICIAL ACTIVISM:
LIMITS OF THE JUDICIARY'S PERFORMANCE

GIOVANNI GALVÃO VILAÇA GREGÓRIO

GREGÓRIO, Giovanni Galvão Vilaça. **The judicialization of politics and judicial activism: limits on the Judiciary's performance**. 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 September 19, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Carlos Victor Muzzi Filho

ABSTRACT

In the contemporary scenario, the performance of the Judiciary has gained more and more importance and the discussion about the jurisdictional exercise has been highlighted in several countries. Thus, the research aims to address the factors that led to the judicialization of politics and judicial activism, as well as their implications. The study of the problem theme is justified by the role of the courts when judging actions with a high valuation burden. In this regard, the aim is to investigate the limits of the Judiciary's performance in order to appreciate issues that get involved in the Legislative and Executive spheres. Therefore, it is necessary to examine the principle of separation of powers, including demonstrating that the relationship between the Legislative, the Executive and the Judiciary has undergone mutations over time. It is also observed that the totalitarian regimes, which marked the 20th century, caused an intense constitutionalization of human rights, whose protection was attributed to the courts. Therefore, it is intended to discuss judicial activism from the perspective of substantialist and proceduralist theories, presenting the judicial minimalism developed by Cass Sunstein, as an appropriate form of self-restraint in the Judiciary. The hypothesis worked out is that judicial activism is not compatible with the democratic principle, since the judicial demands of high moral inquiry, as well as the realization of fundamental rights, must be concentrated in the Legislative and Executive - legitimate instances to act in order substantial amount of political values. The Judiciary is responsible for ensuring legitimate procedures, ensuring democratic deliberation, so that citizens can define their own political destiny. Regarding the methodology, the hypothetical-deductive legal method was used, using bibliographic research, through the study of works, articles, dissertations and theses, as well as documentary research, with the analysis of related legislation and jurisprudence. to the research theme. And finally, as a technical procedure, theoretical and interpretive analysis, seeking a solution proposal for the highlighted problem-theme.

Keywords: Separation of powers. Judicialization of politics. Judicial activism. Self-restraint.

FREEDOM OF EXPRESSION VERSUS HATE SPEECH: A MATTER OF (IN) TOLERANCE AND LEGAL CONTROVERSIES

Alessandra Abrahão Costa

COSTA, Alessandra Abrahão. **Freedom of expression versus hate speech: A matter of (in) tolerance and legal controversies**. 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 September 29, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Carlos Victor Muzzi Filho

ABSTRACT

Through the hypothetical-deductive method, the present work has as its theme the paradoxthat exists between the right to freedom of expression and the free expression of thought withhate speech or Hate Speech. The research uses as a theoretical framework the judgment ofHabeas Corpus 82.424 / RS, better known as the Ellwanger Case, and makes a hermeneuticalapproach to freedom of expression from the perspective of Brazilian law and thejurisprudence of the United States Supreme Court. The "Ellwanger Case" judgment definedthe theoretical basis of the concept of racism and sparked the debate about the limits offreedom of expression and publication of books with anti-Semitic ideas (BRASIL, 2004). Asa research problem, the paper asks: what would be the limitations of the right to freedom ofexpression so that hate speech does not reproduce the silencing effect of classes that have lesssocial representation? As a hypothesis, it is stated that the excessive limitation of the right tofreedom of expression and the free expression of thought tarnishes the general right offreedom, enshrined in the 1988 Constitution of the Federative Republic of Brazil, and thefoundation of the Democratic Rule of Law. The research is justified by the need to criticallyanalyze the question of the existence of hate speech and the free expression of thought fromthe perspective of the weighting technique, through the analysis of the peculiarities of thespecific case and as a way of guaranteeing the Democratic Rule of Law . The generalobjective is to develop a critical analysis of the limits to the right to express and expressthought, based on the condemnation of hate speech, in addition to investigating Americanjurisprudence in concerning to the First Amendment to the United States Constitution.Specific objectives are: a) to demonstrate the existence of a general right of freedom fromwhich the right to freedom of expression and its species is extracted, namely: the right to freeexpression of thought; freedom of the press; freedom of information; freedom of opinion,among other constitutionally guaranteed freedoms; b) to identify the antagonistic conceptionsof the right to freedom of expression in the United States and Brazil, through the study ofjurisprudence in both countries, as a way of corroborating the importance of the right to freeexpression as a maintainer of democracy; c) confirm the virtues of applying the WeightingTechnique as limiting the right to freedom of expression, in order to avoid excesses and thesilencing effect of hate speech; d) to identify the legal and jurisprudential protection ofpersonality rights, as well as the limitations to the right to freedom of expression, alreadyexisting in the Brazilian legal system. As a complementary theoretical framework, the book"Freedom of Expression and Hate Speech" was adopted, by Samantha Meyer-Pflug. As for the other methodological aspects, the work was developed based on national and foreignresearch, in order to elaborate a comparative law that could influence, or not, the developmentof the discussion about the limits of freedom of expression in Brazil.

Keywords: Freedom of Speech. Free Manifestation of Thought. Weighting Technique. NorthAmerican First Amendment; Ellwanger Case.

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TAX PLANNING AND ITS LIMITS FROM THE PERSPECTIVE OF THE PRINCIPLE OF LEGAL SECURITY: REFLECTIONS ON ADMINISTRATIVE JURISPRUDENCE

RAQUEL SAMPAIO DE VASCONCELOS LINS DILLY

DILLY, Raquel Sampaio de Vasconcelos Lins. **Tax planning and its limits from the perspective of the principle of legal certainty**: reflections on administrative jurisprudence. 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 October 1, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Carlos Victor Muzzi Filho
Co-supervisor: Prof. Dr. Rafhael Frattari Bonito

ABSTRACT

The present study focuses on the analysis of the limits of tax planning from the perspective of the principle of legal certainty and its consequences in the decisions of administrative courts. First, will be analyzed the constitutional principles that are part of the discussion on tax planning. Afterwards, a chapter will be dedicated to analysis the principle of the legal certainty, considering that this is the protagonist of the present work. The relationship between tax law and private law will also be studied, mainly some concepts of private law that are relevant to understand the topic. Once these premises are established, will be studied the concept of tax planning for different authors and the theory of the phases of the debate of tax planning in Brazil, prepared by Marco Aurélio Greco, in view of its relevance to understand a good part of the divergences in this field. Finally, going through all these concepts and principles that are relevant to understand tax planning, in order to provide pragmatism for the present study, some cases of tax planning present in the Brazilian administrative jurisprudence will be analyzed, mainly with regard to the criteria used in decisions to validate or invalidate transactions carried out by taxpayers. The methodological technique adopted was that of theoretical research, using books, theses, dissertations and articles. The hypothetical-deductive method was used.

Keywords: Tax planning. Legal certainty. Administrative judgments.

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THE STATE'S CIVIL RESPONSIBILITY FOR JUDICIAL ERROR IN THE CRIMINAL SPHERE AND THE FUNDAMENTAL RIGHT TO INDEMNITY

Flávio Murad Rodrigues

RODRIGUES, Flávio Murad. **The State's civil responsibility for judicial error in the criminal sphere and the fundamental right to indemnity**. 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 October 5, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Sérgio Henriques Zandona Freitas

ABSTRACT

This study aims to demonstrate the State's obligation to compensate defendants who have been victims of judicial errors in criminal proceedings, which have damaged their individual freedom or even their image or honor. It will be verified that the activity of the State through the organs of the judiciary can cause material or moral damage in the life of a citizen. These State acts, abusive or not, commissive or omissive, can generate illegal condemnation and, from them, will arise onus that need reparation by economic means. It will be demonstrated the hesitation in the Brazilian courts to acknowledge the error and, consequently, its liability and effectiveness of indemnity payment, as well as a presentation about the historical evolution of liability, which will analyze the general aspects of the Theory of Civil Liability and how this subject is established in the Brazilian Constitution of 1988, the Civil Code, the Code of Civil Procedure and the Code of Criminal Procedure. It will focus on the judicial error in the criminal area, on how Brazilian doctrine and jurisprudence conceptualize it and on the necessary requirements so that, if existing, the State should be held responsible under the constitutional command. In order to exemplify the matter in comparative law, the concept of judicial error adopted in various countries will be brought forward, more specifically in Australian, North American, Portuguese and Argentine law and what the Pact of San Jose of Costa Rica and the Spanish legal system determine. Decisions of the Superior Court of Justice and the Supreme Federal Court will be analyzed to propose, at the end, a concept of judicial error and the requirements for the right to compensation. A descriptive research will be done according to the deductive method based on thesis and dissertation banks, Law magazines, physical and digital books, legislation and the analysis of judgments of the Brazilian courts. The theoretical framework will be based on the Theory of State Civil Responsibility developed in Brazil by Sérgio Cavalieri Filho and on the State Responsibility for the Jurisdictional Function, by Ronaldo Brêtas de Carvalho Dias.

Keywords: Civil liability of the State. Judicial error. Criminal area. Damage. Indemnification. Fundamental right.

THE DYNAMIC DISTRIBUTION OF THE PROBATORY CHARGE AND THE DEMOCRATIC STATE OF LAW

JESSICA SERIOUSLY MIRANDA

MIRANDA, Jessica Seriously. **The dynamic distribution of the probatory charge and the democratic state of law**. 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 October 20, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Sérgio Henriques Zandona Freitas

ABSTRACT

The present study has as its theme the dynamic distribution of the burden of proof provided for in article 373, paragraph 1, of the Code of Civil Procedure of 2015 and, by objective, its critical analysis from the premises of the constitutional process model. Following the line of research of the Stricto Sensu Postgraduate Program in Law at FUMEC University, the aim is, after studying the theories of the process and the foundations of the Democratic Rule of Law, to verify the adequacy of the dynamic form of distribution of the evidential burdens to the constitutional paradigm, which establishes the guidelines of a democratic constitutional process. Its main hypothesis, at the end confirmed, is the compatibility of the dynamic distribution of the burden of proof with the Democratic Rule of Law, based on the observance of the procedural guarantees established by the Constitution of the Republic of 1988. For a better understanding of the dynamic distribution of the burden of proof , confirmed by the Civil Procedural Code of 2015, general notions about the proof institute will be presented, followed by the study of the various theories on the distribution of the burden of proof, thus outlining the bases for dynamization. The study adopts the deductive method and is developed through jurisprudential and bibliographic research in physical and digital books, websites, bank of theses and dissertations and Qualis Capes journals.

Keywords: Constitutional Process. Democratic state. Test. Burden of proof. Dynamic distribution of the burden of proof.

THE RECONSTRUCTION OF THE DISTRIBUTION OF THE BURDEN OF PROOF IN THE ADMINISTRATIVE PROCESS THE PERSPECTIVE OF THE CONSTITUTIONAL PRINCIPLES OF THE PROCESS

Adriano da Silva Ribeiro

RIBEIRO, Adriano da Silva. **The reconstruction of the distribution of the burden of proof in the administrative process from the perspective of the constitutional principles of the process**. 156f. 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 October 24, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Sérgio Henriques Zandona Freitas

ABSTRACT

The research proposal is the verification, in the Code of Civil Procedure, of the application of the distribution of the burden of proof, set out in art. 373 (BRASIL, 2015), precisely in the administrative process. The problem-issue facing this study and for which it intends to understand can be explained in the following statement: has the State applied the distribution of the burden of proof, in the constitutional process model, in administrative processes? The development of the research is justified by the need to check whether the test institute has been used by the State in the context of its administrative processes and its application as it meets the constitutional process, by its institutional principles and the Democratic Rule of Law itself. The general objective is to verify the application of the distribution of the burden of proof in administrative processes, testifying the proposal through the institutional principles of the process. The general objective is to verify the application of the distribution of the burden of proof in administrative processes, testifying the proposal through the institutional principles of the process. Specific objectives are: a) to conceptualize the institutional principles of the process (broad defense, contradictory and isonomy); b) to study the procedural rights and guarantees applied to the administrative process; c) describe the current situation of the burden of proof, addressing the concept and the evolution, in the administrative process; d) describe the main changes and innovations brought by the Civil Procedure Code (BRASIL, 2015) regarding the distribution of the burden of proof and its application in the administrative process; e) to analyze the presumption of veracity and legitimacy of administrative acts and the flexibility of the burden of proof; f) study the procedure for reversing the burden of proof in the administrative process and the Principle of Cooperation; g) study the dynamic theory of the burden of proof in the administrative process; h) analyze the jurisprudence on the distribution of the burden of proof; i) to propose advances on the test institute in the administrative process.

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The theoretical framework of the dissertation is the Theory of the Democratic Constitutional Process, by the work of José Alfredo de Oliveira Baracho, as well as the studies of Sérgio Henriques Zandona Freitas, regarding the Procedural Law of Public Administration, also seeking the testification of Popper, object of the research by Rosemiro Pereira Leal and André Cordeiro Leal. As for the methodological aspects, it will be based on the analytical procedure, which aims at a critical approach to the problem theme. It will therefore be based on the inductive method. Exploratory research will be carried out in order to allow greater familiarity with the problem, with a view to making it more explicit, which will be effective through foreign and national bibliographic research and documentary research. Also from an interdisciplinary perspective, through the study of the Constitutional Process, Civil Procedural Law and Administrative Law. The conclusion of the research confirms the need to reconstruct the dynamic distribution of the burden of proof in the administrative process by the State and the Public Administration, taking into account the constitutional process, due to its institutional principles and the Democratic Rule of Law itself.

Keywords: Democratic state. Procedural constitutional principles Administrative process. 2015 Civil Procedure Code. Reconstruction of the dynamic distribution of the burden of proof.

SUMMARY No. 231 OF THE SUPERIOR COURT OF JUSTICE:

A PRINCIPIOLOGICAL-CONSTITUTIONAL (RE) CONSTRUCTION IN THE DEMOCRATIC STATE OF LAW

Carlos Henrique Pérpetuo Braga

BRAGA, Carlos Henrique Pérpetuo. **Summary no. 231 of the Superior Court of Justice**: a principled-constitutional (re) construction in the Democratic State of Law. 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 October 27, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Sérgio Henriques Zandona Freitas

ABSTRACT

The theme of this research is Precedent 231 of the Brazilian Superior Court of Justice, which prohibits the reduction of the provisional penalty below the legal minimum. Said entry contradicts express legal provision, notably art. 65 of the Brazilian Penal Code, and, therefore, violates several principles of a constitutional nature, intrinsic to the application of the penal sanction, notably, the legality (or reservation of the law), the personality, the individualization, and limitation of sentences, giving different situations different identical. As a research problem, it is asked whether the statement in Precedent 231 of the Brazilian Superior Court of Justice is in line with due constitutional process and with the provisions contained in the Brazilian legal system, in particular, with art. 65 of the Brazilian Penal Code. It is initially stated, as a research hypothesis, that the precedents of Precedent 231 of the Brazilian Superior Court of Justice adopt premises incompatible with the fundamental guarantee of jurisdiction and with due constitutional process, violating the mentioned principles head-on, in addition to the maximum principle of the Democratic State right. For the development of the research, the concepts of constitutional process and Democratic Rule of Law, introduced by Ronaldo Brêtas de Carvalho Dias, and his unique understanding of power (exercised exclusively by the people), capable of guiding the exercise of jurisdictional function on effectively democratic bases. The general objective of the research is, therefore, to criticize the statement of Precedent 231 of the Brazilian Superior Court of Justice and its application, seeking to verify its compatibility with the due constitutional process. About the other methodological aspects, the research is guided by the hypothetical-deductive method, operating from and bibliographic research, national and foreign, in addition to jurisprudential research.

Keywords: Precedent 231. Brazilian Superior Court of Justice. Constitutional process. Due to the constitutional process. Democratic state.

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ADJUSTMENT OF THE TRANSPARENCY OF BIDDINGS AND CONTRACTS OF THE FEDERAL UNIVERSITY OF MINAS GERAIS TO THE LAW ON ACCESS TO INFORMATION

MARA DUTRA LEITE

LEITE, Mara Dutra. **Adjustment of the transparency of biddings and contracts of the Federal University of Minas Gerais to the law on access to information**. 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 October 28, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Sérgio Henriques Zandona Freitas

ABSTRACT

The present study analyzes the adequacy of the transparency of bidding and contracts of the Federal University of Minas Gerias - UFMG with regard to the provisions of Law No. 12,527, of November 18, 2011, known as the Law of Access to Information - LAI, through the analysis of data contained on the University's website and its units. In order to have a better understanding of the topic, an explanation about the right of having access to information was presented, and the principles of transparency and publicity were subsequently discussed, as well as the provisions contained in CR / 88 of 1988. The following chapters reffered to the provisions contained in the LAI and the Tax Liability Law. When approaching the specific problem of work, issues related to public procurement, transparency of bidding and their contracts were discussed, as well as the methodology applied to analyze the studied data. After such an analysis, the scores obtained by each Managing Budget Unit - UG were counted for subsequent consolidation of the data collected and generation of final considerations regarding the adequacy of the transparency of bidding and contracts from UFMG to LAI.

Keywords: Transparency. Active Transparency. Public Transparency. Access to Information Law.

FISCAL EXECUTION AND THE EFFICIENCY PRINCIPLE: FROM JUDICIAL ACTION TO ADMINISTRATIVE COLLECTION

LEONARDO BRANDÃO ROCHA

ROCHA, Leonardo Brandão. **Fiscal execution and the efficiency principle: from legal action to administrative collection**. 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 November 18, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Carlos Victor Muzzi Filho

ABSTRACT

This work has as question the analyze the judicial tax enforcement, by the efficiency principle, as instrument (in)eficient to tax collection and the administrative procedures adoption. The tax enforcement have shown delegitimated procedure. Thus, aims to analyze the historical and it´s tax collection numbers, in contrast to the efficiency principle. Equally, the procedure of the law 10.522/02 will be analyzed under the due process os law perspective in order to explain the opposite way of the tax revenue, tendentious to neglect judicialization. Thus, will be checked the tax collection procedures, judicial or not, used by the Procuradoria Geral da Fazenda Nacional. Also the tax collection systems of Chile, Peru and Argentina will be noted. The general objective is the understanding of the migration from the judicial tax enforcemet to the administrative revenue. The bibliographic research will be used through the deductive and comparative method, as well as data research to, in conclusion, determine a need of improvement of the judicial tax collection procedure, already threadbare.

Keywords: Tax enforcement. Revenue. Tax. Efficiency principle. Administrative procedures.

A REFLECTION ON LAND MANAGEMENT, PROPERTY AND REGISTRATION

AMANDA DE CAMPOS ARAÚJO

ARAÚJO, Amanda de Campos. **A reflection on land management, property and registration**. 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 November 30, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Marcelo Barroso Lima Brito de Campos

ABSTRACT

One can easily see the current difficulty faced by state agencies in promoting public policies aimed at identifying and regularizing vacante lands. The objective of the research was to assess whether it is possible to extract, from the historical process of formation of the current brazilian land framework, the existence of procedures to control the privatization of properties and, consequently, to identify "vacant" lands, which these are returned properties. For this purpose, firstly, the institutes of possession, property and vacant lands were characterized. Having established the necessary premises regarding the legal contours of these institutes, a historiographic analysis of the national territorial occupation was carried out, identifying their main characteristics, legislation and the practical effects of governmental action. Then, the founding bases of the Real Estate Registry were assessed, as well as the form of construction of the registry collection, in order to verify the level of security and relevance of the registered data, for possible territorial ordering policies. It was observed that the Real Estate Registry is the only source capable, at present, of providing knowledge of private properties and, consequently, enabling the identification of vacant lands, although the registry collection must be worked with extreme caution so that it is effectively able to provide relevant data to this task. The research allows to verify that the existence of a control of the property was always intended, but it was only possible to favor and strengthen the possessions, resulting from the irregular occupation of the territory.

Keywords: Land management. Privilege of posses. Real estate registration. Relevance of the collection.

THE FINES IN THE COURTS OF AUDITORS AND THE EXCESS OF DISSUASION:
LIMITS TO THE EXERCISE OF THE SANCTIONED ADMINISTRATIVE POWER

ERIC BOTELHO MAFRA

MAFRA, Eric Botelho. **The fines in the courts of auditors and excessive of dissuasion: limits on the exercise of the sanctioned administrative power**. 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 December 7, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Lucas Moraes Martins

ABSTRACT

Considering the utilitarian theories (deterrence) of Sanctioning Administrative Law, this dissertation aims to discusses the penalties applied by the Accounting Court of the State of Minas Gerais and the Federal Accounting Court to verify whether the penalties, imputed by the aforementioned Courts, would be attributed under these theories, taking into account the induction of behaviors to provide good governance and accountability of the respective individuals under jurisdiction, or would be based on a justifying strategy on the same theoretical bases developed to legitimize the application of penalties by simply non-compliance with the rules of the legal system. In this direction, seeking to deepen the analysis of the application of administrative sanctions by the Federal and Accounting Court of the State of Minas Gerais, the legal contours of the powers conferred on this Accounting Courts and their current conception as an effective public agency of fundamental rights and inducer of good public management will be examined. Furthermore, the theories elaborated on the justification of the penalty's purpose will be explained, which can assist in the development of the idea of sanction in the Accounting Courts, in order to then develop a conception that the application of sanctions by these public agency must go beyond the mere retribution, notably in the face of the autonomy of principles and grounds of these referred administrative sanctions, which should not be unrestrictedly bound by Criminal Law. To this end, the reasons contained in the decisions of the TCU and TCEMG will be studied in order to verify the focus given on the imputation of penalties with the primary objective of contributing to the practice of these Courts. Starting from preliminary studies that point to the imputation of penalty justified by the mere practice of an act contrary to legal norms, the hypothesis is that these sanctions have their own specific vocation which distinguishes them materially from other branches of law, especially in the face of the role attributed to the Accounting Courts. This role, without departing from the fundamental constitutional guarantees to avoid arbitrariness in its application (over-deterrence), with the approximation of contemporary theories about the justification of penalty's purpose, allows the rapprochement between these Accounting Courts and those under jurisdiction, for thus they would allow the promotion of good governance and accountability of their controlled ones in a perspective based on dissuasion.

Keywords: Audit institution of the Government. Law of administrative sanctions. Accounting Courts. Utilitarian theories (deterrence theories). Retributive theories. Over-deterrence.

THE UNCONSTITUTIONALITY OF THE CEBAS CERTIFICATION REQUIREMENT OF LAW 12.101 / 09 IN FACE OF IMMUNITY PROVIDED FOR IN THE 1988 FEDERAL CONSTITUTION

WILMARA LOURENÇO SANTOS

SANTOS, Wilmara Lourenço. **The unconstitutionality of the cebas certification requirement of Law 12.101 / 09 in face of the immunity provided for in the 1988 Federal Constitution**. 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 December 10, 2020.
Virtual room on the digital platform “zoom”.
Advisor: Prof. Dr. Rafhael Frattari Bonito

ABSTRACT

The purpose of this dissertation is to discuss the CEBAS certification requirement (Certificate of Social Assistance Beneficent Entity) advocated in Law 12.101 / 09, for the regulation of tax immunity contained in the Federal Constitution of 1988, against the judgment of RE 566.622 /RS in headquarters of general repercussion by the STF, however prove its validity with regard to the exemption established by ordinary law, segregating the referred institutes and their requirements for tax purposes of non-payment of taxes or legal waiver. Ordinary legislation allows the work carried out by philanthropic entities of social assistance, health and education to enjoy the tax exemption instituted by the Federal Union, provided that they comply with the requirements of the infraconstitutional norm, culminating in the administrative certification of these institutions, validating the exemption from collection of taxes. taxes. However, these institutions have the right to tax immunity, provided for in articles 150, V'c 'and 195§7 of the 1988 Federal Constitution, which provides for the prohibition of the institution of taxes on the assets, income or services of these institutions, provided that the requirements of the law are met. The legislation prepared to regulate the requirements of tax immunity is contained in Complementary Law, article 14 of the National Tax Code, prohibiting the distribution of profit or income, determining that the amounts received by the institution are fully reversed for the execution of the activities covered by the Bylaws and that the accounting is regular.

Keywords: Tax immunity. Certification. National Tax Code. Philanthropic entities. Federal Constitution. Complementary law. Ordinary Law

ANALYSIS OF THE OBSERVANCE OF THE PRINCIPLES OF BROAD DEFENSE AND CONTRADITORY IN THE DISCIPLINARY ADMINISTRATIVE PROCESS OF THE PUBLIC SERVANT OF MINAS GERAIS IN THE FACE OF THE MINING ANTICORRUPTION LAW

GLÁUCIA MILAGRE MENEZES

MENEZES, Gláucia Miracle. **Analysis of the observance of the principles of broad defense and contradiction in the disciplinary administrative process of the public servant of Minas Gerais in the face of the mining anticorruption law**. 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 December 14, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. Marcelo Barroso Lima Brito de Campos

ABSTRACT

The proposal is to understand that, within the scope of the Comptroller General of the State of Minas Gerais, there are two punitive procedures, namely, the Disciplinary Administrative Process and the Administrative Process for Accountability of Legal Entities, this coming from the Anticorruption Law, which although they are legal sanctioning, at the Internal Affairs Department, had different rites, which makes it possible to question the observance of the application of the broad defense and the contradictory, especially in the Disciplinary Administrative Process. Therefore, this is the focus that the research seeks to understand and provide a critical-propositional view of the main aspects discussed, with an emphasis on constitutional precepts. It is intended, therefore, to verify if there is a difference of applicability of the principles of broad defense and contradictory with a view to improving the Minas Gerais Administrative Disciplinary Process, based on: the procedural rules that guide the legal responsibility process contained in the Law Federal No. 12,846 / 2013, regulated by State Decree No. 46,782 / 2015, before the amendment given by State Decree of No. 47,752 / 19, within the scope of the State Executive Branch; and the legislative proposal that was pending at the Legislative Assembly of Minas Gerais that aimed at improving the application of these principles.The methodological aspect used in the research will be the legal-dogmatic one, with the hypothetical-deductive method of approaching knowledge, because by presenting the problem one can refute or not the hypothesis. As for the generic types of research, it is possible to classify it into legal-comprehensive, legal-propositional and legal-comparative. The research was based on the "Theory of the Constitutional Process" by José Alfredo de Oliveira Baracho, in which it aims to identify the supremacy of the constitutional norms over the others that make up the current procedural normative body, through the imposition of constitutional guarantees

of the constitutional principles of the adversary and of broad defense. The results obtained through this study indicate that the Statute of the civil servant of Minas Gerais needs to be modernized in view of the observance of the constitutional principles of broad defense and contradiction, in comparison to the Anti-corruption Law also of the State of Minas Gerais, since it is necessary to harmonize the procedural steps, in view of the Disciplinary Administrative Process and the legislative evolution that is guided by the realization of the Democratic Rule of Law, with the possibility of reformulating its normative body. It is believed that the identification of the principles of widespread and contradictory defense in the Administrative Disciplinary Process and Administrative Process for Accountability of Legal Entities, as well as the analysis of procedural differences, adding possible differentiation in the use of these principles in view of the 1988 Constitution, legislative reform can be proposed. Thus, it appears that it is essential that the public servant, who responds to such correctional process, be given the opportunity to avail himself of the guarantees of his fundamental rights in process.

Keywords: Constitution of the Federative Republic of Brazil. Broad and contradictory defense.Administrative Disciplinary Process of Minas Gerais. Administrative Process for Accountability of Legal Entities in Minas Gerais. procedural and Democratic Rule of Law.

THE RESOLUTIVE PERFORMANCE OF THE PUBLIC MINISTRY IN THE PARADIGMATIC PERSPECTIVE OF THE DEMOCRATIC STATE OF LAW

ZAPHIA BORONI DE SOUZA

SOUZA, Zaphia Boroni. **The resolutive performance of the Public Ministry in the paradigmatic perspective of the Democratic State of Law**. 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 December 16, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. André Cordeiro Leal

ABSTRACT

The 1988 Constitution of the Federative Republic of Brazil, which instituted the project of the Democratic State of Law, raised the Public Ministry to the category of an independent, permanent institution, with responsibility for the defense of the legal order, the democratic regime and social and individual interests unavailable, therefore, it is important to have a prominent role in the taxation of the implementation of the democratic project. In this bias, it is proposed, by legal dogmatics, the so-called resolutive profile of the Public Ministry, which has as premise the proactive, reflective action, focused on preventive taxation and acting in the extrajurisdictional scope. The research developed in this work aims to study the ways of resolving action by the Public Ministry, notably the civil inquiry, the commitment to adjust conduct, recommendations and public hearings, questioning them in the face of the legalconstitutional paradigm of the Democratic State of São Paulo. Law, investigating whether they are in line with legal democracy or whether the Public Prosecutor's Office would still have a historical bias of authoritarian activity. Therefore, the theoretical bases that relate to democratic procedurality were analyzed, whose foundations are found in the constitutional theories of the process, presenting the paradigmatic understandings of the Rule of Law, with an approach to the paradigmatic developments of the Liberal State and Social State, treating, for end, of the current paradigm of the Democratic State. It also addressed the introductory precepts of the foundations of democratic procedurality, seeking, finally, to correlate the preventive action of the Public Ministry as being the most legitimate form of ministerial action in the Democratic State of Law. The research is bibliographic and uses Karl Popper's hypothetical-deductive methodology.

Keywords: Public ministry. Resolutive Performance. Democratic State. Democratic procedurality.

RESCISORY ACTION BASED ON PRECEDENT OF CONSTITUTIONAL CONTENT:

ANALYSIS OF ARTICLE 525, § 15 OF THE CPC BEFORE THE DECLARATION OF INCONSTITUTIONALITY DELIVERED BY THE STF IN DIFFUSED CONTROL

Renata Cristina Silva Mourão

MOURÃO, Renata Cristina Silva. **Rescisory action based on precedent of constitutional content**: analysis of article 525, § 15 of the CPC before the declaration of unconstitutionality delivered by the STF in diffuse control. 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 December 18, 2020.
Virtual room on the digital platform "zoom".
Advisor: Prof. Dr. André Cordeiro Leal

ABSTRACT

The object of this work is to assess the (in) compatibility between the fundamental right to res judicata and the suitability of the rescission action in view of the declaration of unconstitutionality issued by the STF under diffuse control, pursuant to the provision contained in article 525, § 15 of the CPC . This is because, according to the proceduralist provision, any time the STF decides against the res judicata, it can be the object of rescission action, even after the two decadential years that gave it a constitutional guarantee that it will not be changed any more. , since these two years will be counted against the final judgment of the decision handed down by the Supreme Court. In this context, there would be a contradiction between the provision contained in the CPC and the constitutional guarantee of legal certainty guaranteed to the disputing parties by the Originating Constituent. The decommissioning of the res judicata, whose application of the law or normative act was requested by the interpretation of a magistrate imbued with the duty to control constitutionality in the specific case, is not understood as a decision that is limited to applying a law subsequently declared unconstitutional. From this perspective, the following question arises as a research problem: the decommissioning of res judicata whose term starts from the publication of the unconstitutionality decision issued by the Supreme Court under diffuse control would constitute deensa to the fundamental right of legal security? The principle of legal certainty is implicitly provided for in the Federal Constitution, constituting a measure that allows the parties to have knowledge and certainty regarding the unfolding of their acts based on the existing legal regulation. As a corollary of legal certainty, the legislature gave the res judicata the status of constitutional guarantee, which in the teachings of Humberto Theodoro Júnior confers certainty on the right recognized by the courts. The methodological aspect to be used will be the legal-dogmatic one, because the research will be elaborated in the field of law using elements internal to the legal system, characterizing it in a theoretical research. The source of the research will be bibliographic and the multidisciplinary knowledge sector, since it is based on the branches of Constitutional and Civil Procedural Law, open to the development of the theme. At the end of the research carried out, it will be sought to demonstrate that the stipulation of the initial term for the filing of rescission action from the date of the unconstitutionality decision rendered by the STF, constitutes an affront to the constitutional value attributed to legal certainty.

Keywords: Thing judged. Legal Security. Precedents. Constitutionality Control. Relativization.

CIVIL AGREEMENTS IN ADMINISTRATIVE IMPROBITY HYPOTHESES:

LEGAL-NORMATIVE DEVELOPMENTS AND REFLECTIONS ON THE TEMPORAL AND MATERIAL LIMITS OF AGREEMENTS BASED ON THE CNMP AND CSMPMG RESOLUTION

Flávia Baracho Lotti Campos de Souza

SOUZA, Flávia Baracho Lotti Campos de. **Civil agreements in the event of administrative improbity hypotheses**: legal-normative developments and reflections on the temporal and material limits of the agreements based on the CNMP and CSMPMG resolution. 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. Sérgio Henriques Zandona Freitas

ABSTRACT

The 2015 Civil Procedure Code recognised, as a procedural foundation, the search for consensual settlement of conflicts, consecrating the existing forms of self composition established in Act 7.347/85, Act 12.846/13 and Act 12.850/13, components of the microsystem against corruption. Nevertheless, article 17, §1º of Act 8.429/92, in its original wording, prohibited agreements, transactions or reconciliations dealt by that Law in cases of administrative improbity, aiming to protect public property and administrative morality, as of civil liability of public agents or third parties who, together, committed unsubstantiated acts. The principle of supremacy and unavailability of the public interest prevailed in its traditionalist bias. The constitutionalization of administrative law, from the perspective that all fundamental rights should, as far as possible, be sought and preserved, without absolute prevalence of any of its principles, as well as the paradigm shift from a punitive and imposing Public Administration to a consensual and more dialogical one, generated reflexes in the instruments or methods of management control. Thus, the judicial slowness and the high costs within the legal apparatus system, combined with the effectiveness in complying with extrajudicial agreements, resulted in the most incipient search for consensual solutions to conflicts, including the fight against corruption with faster and more effective refund of the treasury. In this perspective, Act 13.964/19 changed Act 8.429/92 to allow for agreements to be made in the event of administrative misconduct and to enact the agreement of non-civil pursuit, with no regulation though, and limiting it to the phase of the civil or preparatory investigation to the main procedure for the civil act of misconduct. The purpose in this dissertation is thus, with basis on a bibliographical research, using the hypothetical-deductive method and having as a theoretical reference the constitutionalization and consensus in contemporary Public Administration,

to define what is of public interest in administrative improbity actions; to demonstrate the possibility of making agreements also in the course of the main demand, starting from the application of the principle of proportionality, reasonableness and a more coherent and coordinated normative interpretation of the legal system; to recognise , as yet to be regulated, the possibility of analogy application of the guidelines foreseen in the Resolutions of the National Council of Public Prosecutors and the Superior Council of the Public Prosecutor's Office for the conclusion of the terms for conduct adjustment and to point out, at the end, the material limits of civil agreements in administrative improbities, safeguarding the fundamental rights and guarantees of citizens and, consequently, of the collectivity.

Keywords: Administrative misconduct. Consensual public administration. Civil agreements.Regulation. Material extension and limits.

THE PROVISION OF PUBLIC SERVICES:
THE NEED TO ENHANCE LAW 13.460 OF 2017 (USER DEFENSE CODE)

ITIBERÊ GUARÇONI MARINHO

MARINHO, Itiberê Guarçoni. **The provision of public services**: the need to enhance Law 13,460 of 2017 (User Defense Code), 2020. Dissertation (Master of Law). Minas Gerais Education and Culture Foundation - FUMEC. Faculty of Human, Social and Health Sciences, Postgraduate Program in Law. Belo Horizonte, 2020.

Defense on December 23, 2020.
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Advisor: Prof. Dr. Rafhael Frattari Bonito

ABSTRACT

This paper deals with the provision of public services under a constitutional perspective. The issue is addressed in accordance with the dictates referring to the binomial state's duty to provide services and the citizen's right to have services provided with quality, especially when it comes to essential public services. The Constitution of the Federative Republic of Brazil in 1988 is known as the "Citizen Constitution", and presents in its text several generations of rights and a democratic context and a constitution that guarantees the provision of public services is an activity that is above all, it is the citizen's right and is essential to human dignity. However, the activity of services does not always happen appropriately in order to guarantee the citizen and user of these services the effectiveness of their rights. Thus, the study aims to demonstrate the fragility of public service that, despite having in hand an instrument in the molds of the Consumer Protection Code, capable of gathering, in a single legal document, with the publication of Law 13.460 of 2017, the so-called User Defense Code, the defense of their rights and duties as a way of seeking constitutional guarantee and effectiveness in relation to them is still uncertain. Will be presented, the context of public services, its particularities that prevent the existing protective legislation from applying to the user of public services in a broad and effective manner, as the protection of the user of public services is still uncertain even with Law 13.460 of 2017. Given this, it is defended here the improvement of the User Defense Code, capable of bringing legal security and effectiveness to the rights of the user of public services, which are constitutionally foreseen.

Keywords: Constitution. Constitutional System. Code of Consumer Protection. Public Services. Essential services. Services uti universi. Services uti singuli. User. User Protection Code. Legal Security.