FUMEC
UNIVERSITY
MERITUM LAW JOURNAL

Meritum

Volume 15
Number 4
2020

RECTORY
Rector:
Prof. Fernando de Melo Nogueira
Graduation Pro-Rector:
Prof. João Batista de Mendonça Filho
Pro-Rector Of Planning And Administration:
Prof. Márcio Dario da Silva
Pro-Rector Of Post Graduation, Research And Extension:
Prof. Henrique Cordeiro Martins

MINING FOUNDATION OF EDUCATION AND CULTURE
Chairman of the Board of Trustees:
Prof. Antônio Carlos Diniz Murta
Vice-Chairman of the Board of Trustees:
Prof. João Carlos de Castro Silva
President of the Executive Council:
Prof. Air Rabelo

FACULTY OF HUMAN, SOCIAL AND HEALTH SCIENCES
General Director:
Prof. Rodrigo Suzana Guimarães
Coordination of the Law Course:
Prof. Daniel Firmato de Almeida Glória
Profa. Silvana Lourenço Lobo
Coordinator of the Master's Program in the concentration area Social Institutions, Law and Democracy:
Prof. Sérgio Henriques Zandona Freitas

FACULTY OF HUMAN, SOCIAL AND HEALTH SCIENCES - FUMEC
Rua Cobre, 200, Cruzeiro Belo Horizonte/MG – CEP 30310-190
Tel (31) 3228-3090 – Site: www.fumec.br

MERITUM MAGAZINE EDITORIAL COORDINATION:
Prof. Sérgio Henriques Zandona Freitas

TECHNICAL RESPONSIBLE OF MERITUM MAGAZINE:
Prof. Adriano da Silva Ribeiro Ribeiro (Editor Adjunto e Responsável Técnico)
Bel. Cláudia Márcia Magalhães (Secretária do PPGD FUMEC)

ENGLISH REVIEWER AND TRANSLATOR
Adolfo Lara Mendes
Alice Araújo Chaves
Anna Vitória Valdez França de Vilhena Nogueira
Beatriz Ribeiro
Camila Gomes de Queiroz
Carolina Freitas Andrade
Eduardo Marinho Santana Júnior
Gabriella Caramati de Souza Carvalho
Hugo Vilela Santos
Laura Perez
Lucas Camargo
Sofia Silva Batella
Vitória Guedes Cabral

Site: http://www.fumec.br/revistas/meritum/
E-mail: revistameritum@fumec.br

FUMEC UNIVERSITY LIBRARY:
Priscila Reis

GRAPHIC PROJECT
Therus Santana

DESKTOP PUBLISHING
Tecnologia da Informação

Creative Commons License

Meritum: law journal of the FUMEC University / FUMEC University, Faculty of Human, Social and Health Sciences. - v. 15, no. 4 (2020)- . - Belo Horizonte : FUMEC University, 2006- .

v.

Quarterly

ISSN 2238-6939 (Online)

1. Law. I. FUMEC University. Faculty of Human, Social and Health Sciences.

CDU:34

Catalog form prepared by the University Library-FUMEC

Concepts issued in signed articles are the sole and exclusive responsibility of their authors.

Editorial Board

Adolfo Ingácio Calderón, Pontifícia Universidade Católica de Campinas (PUC Campinas)

Arno Dal Ri Jr, Universidade Federal de Santa Catarina (UFSC)

César Augusto Baldi, Universidad Pablo Olavide (UPO), Sevilha, Espanha

Daniel Firmato de Almeida Glória, Universidade FUMEC

David López Jiménez, Universidade de Huelva, Espanha

Deissy Motta Castaño, Universidad Autónoma, Bogotá, Colômbia

Dídima Rico Chavarr, Universidad Autónoma, Bogotá, Colômbia

Erica Palmerini, Scuola Superiore Sant'Anna (SSSUP), Pisa, Itália

Fernando Antonio de Carvalho Dantas, Pontifícia Universidade Católica do Paraná (PUC/PR)

Flávia de Avila, Universidade Federal de Sergipe. UFS

Gladston Gomes Mamede da Silva, Universidade FUMEC

Haroldo Duclerc Verçosa, Universidade de São Paulo (USP)

Jan Peter Schmid, Instituto Max Planck (MPI), Alemanha

Jean-Christophe Merle, Faculdade de Filosofia da Universidade de Saarbrücken, Alemanha

José Filomeno de Morais Filho, Universidade de Fortaleza (UNIFOR)

Joaquim Carlos Salgado, Universidade Federal de Minas Gerais (UFMG)

Jorge Renato dos Reis, Universidade de Santa Cruz do Sul (UNISC)

Karine Salgado, Universidade Federal de Minas Gerais (UFMG)

Kennedy Kihangi Bindu, Université Libre des Pays des Grands Lacs (ULPGL) – República Democrática do Congo

Manuel David Masseno, Instituto Politécnico de Beja (IPBeja), Universidade de Porto (UP), Universidade Federal de Santa Catarina (UFSC)

Nattan Nisimblat, Universidad del Rosario, Bogotá, Colômbia

Otavio Luiz Rodrigues Junior, Instituto de Educação Superior de Brasília (IESB)

Paula Nunes Correia, Universidade de Macau (UM), Macau, China

Raymundo Juliano Rego Feitosa, Universidade Federal de Pernambuco (UFPE)

SUMMARY/SUMÁRIO

COMPANY JUDICIAL RECOVERY: A BRIEF LEGAL TEST OF THE CURRENT SCENARIO 14
RECUPERAÇÃO JUDICIAL DA EMPRESA: UM BREVE ENSAIO JURÍDICO DO CENÁRIO ATUAL
Antônio Carlos Diniz Murta
Nany Papaspyrou Marques Mendes

THE ADVANCE DIRECTIVES: A PERSPECTIVE OF INCLUSION 27
AS DIRETIVAS ANTECIPADAS DE VONTADE: UMA PERSPECTIVA DE INCLUSÃO
Cleber Affonso Angeluci
Ana Letícia Bongardi

TRANSMEDIA EDUCATIONAL NARRATIVE AND PODCAST 42
NARRATIVA EDUCACIONAL TRANSMÍDIA E O PODCAST
Frederico de Andrade Gabrich
Alessandra Abrahao Costa

HUMAN DIGNITY AND THE RIGHT TO RECOGNIZE PERSONAL IDENTITY: AN ANALYSIS FROM EXTRAJUDICIAL PROTECTION INSTRUMENTS 58
DIGNIDADE HUMANA E DIREITO AO RECONHECIMENTO DA IDENTIDADE PESSOAL: UMA ANÁLISE A PARTIR DOS INSTRUMENTOS DE PROTEÇÃO EXTRAJUDICIAIS
Aloísio Alencar Bolwerk
Neuton Jardim dos Santos

THE EXTRAJURISDICTIONAL EFFECT OF PRECEDENTS ON BRAZILIAN CIVIL PROCEDURAL SYSTEM 73
O EFEITO EXTRAJURISDICIONAL DOS PRECEDENTES NO SISTEMA PROCESSUAL CIVIL BRASILEIRO
Jean Carlos Dias
Samira Viana Silva

CONSTITUTIONAL LIMITATIONS TO THE REGULATORY POWER OF REGULATORY AGENCIES 88
LIMITAÇÕES CONSTITUCIONAIS AO PODER NORMATIVO DAS AGÊNCIAS REGULADORAS
Ana Keuly Luz Bezerra
José Machado Moita Neto
Maria Carolina Oliveira de Araújo

THE NUANCES OF ACTIVE LEGITIMACY AD CAUSE OAB IN PUBLIC CIVIL ACTION 105
AS NUANCES DA LEGITIMIDADE ATIVA AD CAUSAM DA OAB NA AÇÃO CIVIL PÚBLICA
Paula Martins da Silva Costa
Zaiden Geraige Neto
Juliana Castro Torres

THE STATE OF EXCEPTION AND JUDICIAL REVIEW: THE ROLE OF CONSTITUTIONAL COURTS IN THE PROTECTION OF FUNDAMENTAL RIGHTS 127
THE STATE OF EXCEPTION AND THE JUDICIAL REVIEW: THE ROLE OF CONSTITUTIONAL COURTS IN THE PROTECTION OF FUNDAMENTAL RIGHTS
Deomar da Assenção Arouche Junior
Delmo Mattos da Silva
Roberto Carvalho Veloso

MERITUM LAW JOURNAL • v.15 • n.4 • 2020

THE JUDICIALIZATION OF POLICY AS A PHENOMENON OF NEOCONSTITUTIONALISM AND THE LIMITS OF REPRESENTATIVE DEMOCRACY 145

A JUDICIALIZAÇÃO DA POLÍTICA COMO FENÔMENO DO NEOCONSTITUCIONALISMO E OS LIMITES DA DEMOCRACIA REPRESENTATIVA

Camila Leonardo Nandi de Albuquerque
Sandro Luiz Bazzanella

WEALTH TAX AND COMBAT AND ERADICATION OF POVERTY FUND: TAX COMPETENCE, UNCONSTITUTIONAL OMISSION AND VIOLATION OF FUNDAMENTAL RIGHTS 165

IMPOSTO SOBRE GRANDES FORTUNAS E FUNDO DE COMBATE E ERRADICAÇÃO DA POBREZA: COMPETÊNCIA TRIBUTÁRIA, OMISSÃO INCONSTITUCIONAL E VIOLAÇÃO DE DIREITOS FUNDAMENTAIS

Julia Pires Peixoto dos Santos
Mario Di Stefano Filho
Vinícius Gomes Casalino

BETWEEN DWORKIN'S LIBERALISM AND LUIGI FERRAJOLI'S GARANTISM - THEORETICAL APPROXIMATIONS AND DIVERGENCES 187

ENTRE O LIBERALISMO DE DWORKIN E O GARANTISMO DE LUIGI FERRAJOLI – APROXIMAÇÕES E DIVERGÊNCIAS TEÓRICAS

Italo Farias Braga
Natércia Sampaio Siqueira

THE IMPORTANCE OF COMPLIANCE FOR THE ACCOMPLISH OF PUBLIC GOVERNANCE IN MUNICIPAL ADMINISTRATION 202

A IMPORTÂNCIA DO COMPLIANCE PARA A EFETIVAÇÃO DA GOVERNANÇA PÚBLICA NA ADMINISTRAÇÃO MUNICIPAL

Pablo Esteban Fabricio Caballero
Alfredo Copetti Neto

FORMS OF ARTIFICIAL INTELLIGENCE AND THE IMPACTS ON CONSUMER PATTERNS AND THE PROTECTION OF PERSONALITY RIGHTS 219

DAS FORMAS DE INTELIGÊNCIA ARTIFICIAL E OS IMPACTOS NOS PADRÕES DE CONSUMO E A PROTEÇÃO DOS DIREITOS DA PERSONALIDADE

Jaqueline Silva Paulichi
Valéria Silva Galdino Cardin

INFORMATION AND INFORMATION SOCIETY CONCEPTS AND ITS RELEVANCE 236

CONCEITOS DE INFORMAÇÃO E SOCIEDADE DA INFORMAÇÃO E SUA IMPORTÂNCIA

Beatriz Martins de Oliveira
Ricardo Libel Waldman

THE ROLE OF NEW INFORMATION AND COMMUNICATION TECHNOLOGIES IN THE DEMOCRACY CRISIS 249

O PAPEL DAS NOVAS TECNOLOGIAS DE INFORMAÇÃO E COMUNICAÇÃO NA CRISE DA DEMOCRACIA

Elísio Augusto Velloso Bastos
Cristina Pires Teixeira de Miranda
Daniela Rodrigues De Nardi

DIGITAL DIVIDE AND PARTICIPATORY CITIZENSHIP IN THE NETWORK SOCIETY 270

A EXCLUSÃO DIGITAL E A CIDADANIA PARTICIPATIVA NA SOCIEDADE EM REDE

André Afonso Tavares
Reginaldo de Souza Vieira

FOURTH INDUSTRIAL REVOLUTION, ARTIFICIAL INTELLIGENCE AND THE PROTECTION OF MAN IN BRAZILIAN LAW 286
QUARTA REVOLUÇÃO INDUSTRIAL, INTELIGÊNCIA ARTIFICIAL E A PROTEÇÃO DO HOMEM NO DIREITO BRASILEIRO
Dirceu Pereira Siqueira
Fernanda Corrêa Pavesi Lara

ECONOMIC THEORY OF CRIME: TOWARDS A SCIENTIFICALLY ORIENTED CRIMINAL POLICY 297
TEORIA ECONÔMICA DO CRIME: POR UMA POLÍTICA CRIMINAL CIENTIFICAMENTE ORIENTADA
Allan Versiani de Paula
Julio Cesar de Aguiar

THE BASIS OF CALCULATION OF FEES:CONSIDERATIONS AROUND BINDING SUMMARY NO. 29 AND THE “COST OF STATE ACTIVITY” 313
A BASE DE CÁLCULO DAS TAXAS: CONSIDERAÇÕES EM TORNO DA SÚMULA VINCULANTE Nº 29 E O “CUSTO DA ATIVIDADE ESTATAL”
Carlos Victor Muzzi Filho

THE IMPLICATIONS OF GOOD FAITH AS A COGENT RULE IN INTERNATIONAL PROCEDURAL AGREEMENT IN LIGHT OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNACIONAL SALE OF GOODS OF 1980 328
AS IMPLICAÇÕES DA BOA-FÉ COMO REGRA COGENTE NOS NEGÓCIOS INTERNACIONAIS À LUZ DA CONVENÇÃO DE VIENA SOBRE COMPRA E VENDA INTERNACIONAL DE MERCADORIAS DE 1980
Renata Alvares Gaspar
Mariana Romanello Jacob

EDITORIAL

STRICTO SENSU IN LAW GRADUATE PROGRAM (PPGD/FUMEC): 10 YEARS

Revista Meritum dedicates in Volume 15, in 2020, a special issue commemorating the 10 (ten) years of PPGD FUMEC.

The FUMEC University, maintained by Fundação Mineira de Cultura – a non-profit entity, managed exclusively by a Board of Trustees, made up of professors from the institution and supervised by the Public Ministry – was created in 1965. FUMEC created and maintains several faculties, including the Faculty of Human Sciences (FCH).

The Graduate Course in Law at FCH was authorized by Presidential Decree on May 25, 1994 and received the seal OAB recommends.

When it completed 15 years of existence, a group of professors of the course, based on activities carried out during graduation; the experience accumulated in teaching, research and extension activities at FUMEC itself and at its home institutions (notably UFMG and PUC-MG); and of already consolidated academic production; presented to CAPES the project for the implementation of the Post-Graduate Course Stricto Sensu (Masters) in Law, being the project approved in 2009, and implemented in 2010.

In 2020, the Stricto Sensu Graduate Program in Law (PPGD) completes 10 years of existence.

The Master's Degree in Law, from PPGD/FUMEC, was recommended and authorized by CAPES on November 9, 2009, in accordance with Official Letter no. 142-10/2009/CTC/CAAII/CGAA/DAV/CAPES; recognition: Ordinance no. 609, of March 18, 2019. The Graduate Program in Law at FUMEC University (PPGD) began its activities in 2010.

In the last quadrennial evaluation, by CAPES, the Program's grade rose from 3 to 4.

In these ten years of existence, its main concern was to strengthen itself and, in this context, it sought, in particular: to consolidate the administrative structures and internal regulations, materials and equipment necessary for the development of its activities; present itself, in the educational sphere, as an option for training at the Master's level in the Metropolitan Region of Belo Horizonte and other cities in the State of Minas Gerais; seek social and institutional partnerships at national and international level to strengthen the course; prepare projects to raise funding and resources for teaching, research and extension; to promote the integration of the faculty, students and administrative staff of the PPGD and the Graduation; consolidate itself as an innovative and excellent course; to form and implement research projects aiming at the integration between professors and students of the law graduation course, from other areas of the Faculty of Human Sciences at Fumec University and from other stricto sensu graduate courses at Fumec; offer courses that are consistent with the projects and profiles of students entering the course; cre-

ate and implement innovative teaching methodologies; to foster teacher and student production; improve the instruments and means of disseminating the intellectual production of teachers and students; consolidate the procedures for collective and democratic participation of teachers and students in conducting the course. This last element should even be highlighted as a striking and differential feature of this PPGD.

In 2015 and 2016, a new website for the Masters in Law was implemented, with the aim of providing greater transparency and disseminating the most relevant information about the PPGD. From a geographical point of view, the course offered by FUMEC is based in Belo Horizonte, which is part of the third largest urban agglomeration in the country.

The Program is structured around the area of concentration in Social Institutions, Law and Democracy and the lines of research Private autonomy, regulation and strategy and Public sphere, legitimacy and control, having received praise from the CAPES evaluation committee, in all evaluations, regarding the innovative content of the course proposal.

As for the insertion of the Program in the field of law and the sub-areas of public law and private law, these are due both to the geographical location of the course, and to the Program's own proposal to work the fields of intersection between the spheres and public law and private. This circumstance creates the need for legal professionals to specialize in order to be able to develop inter- and transdisciplinary research.

In 2014, changes were made, including the reconfiguration of the research line Regulation and private autonomy to incorporate the proposed discussion about the legal strategies of organizations, which was matured and intensified during the implementation of the course and the composition of the faculty. In this sense, the line was renamed Regulation, private autonomy and strategy.

It is recorded that in 2018, the research projects were restructured, which began to encompass a larger field of content, with the nomenclatures: PRIVATE LAW FACING THE CHALLENGES OF THE CONTEMPORARY WORLD - in the line of research line: Private Autonomy, Regulation and Strategy, CONTROL, CONSENSUS AND CITIZENSHIP: CONSTITUTIONAL, ADMINISTRATIVE, PROCEDURAL AND TAX IMPLICATIONS in the line of research: Public Sphere, Legitimacy and Control and RESEARCH AND TEACHING IN LAW: NEW METHODOLOGICAL PERSPECTIVES for both lines of research that addresses contemporary reality, marked by the growing, continuous and free flow of information, it requires the research and development of new teaching and research methodologies that are capable of influencing the work of teachers and students, for the construction of knowledge capable of transforming and improving the reality of training academic and scientific of the professors and students of the course, as well as the syllabus of the subjects of the course.

The program's proposal is, in fact, in the areas of intersection between public and private and its main challenge is precisely to create an environment for teaching, research and extension that promotes interdisciplinarity and the construction of knowledge in the aforementioned areas, considering the context of the historical summa division of legal thought.

Within the scope of the partnership between UFMG / UEMG / UFV / FUMEC in the "City and Alterity: cultural multi-coexistence and urban justice" program, a project was approved under the universal demand of the CNPq 2014, starting in 2015, with the integration of researchers from Fumec in the Program activities.

In 2016, there was the implementation of the Fumec Master's in Law Research Center, which integrates fellows, teaching interns and volunteer researchers with the scope of further streamlining the course's activities, based on the cooperation of master's students in the various activities of teaching, research and extension.

In 2018, the construction of the Doctoral Program in Law institutionally started, with approval in 2019 by CONSEPPE and in 2020 by CONSUNI, the proposal awaits the opening of a window at CAPES for submission by PPGD FUMEC.

In 2020, the migration from the bimonthly system to the bimonthly system in the PPGD was approved, starting in February 2021, integrating the new system with the other PPGs of the institution (PPGA and PPGSISC), with a more dynamic course and an increase in the offer of disciplines and research to Master's students of the Program.

As for the Program's consolidation process, the Postgraduate and Research Pro-Rectories of the FUMEC University have been making an effort, together with the official funding agencies, with which they maintain cooperation projects, such as FAPEMIG, FUNADESP, the CNPq and CAPES itself, to improve the Program's infrastructure, by expanding the collection, notably bibliographic, through partnerships for the acquisition of permanent material and research promotion, as well as for the publication of the Revista Meritum, which is coming improving its procedures to advance in the strata qualified by the Qualis-Capes system.

COMPOSITION OF THE STAFF STAFF

As for the composition of the faculty, the course began in 2010 with 15 permanent professors.

In 2020, the PPGD has 13 professors, 12 of whom are permanent and 1 is a collaborator, of which 08 are professors linked to the Public Law Line and 05 to the Private Law Line.

The faculty of the course is currently composed of the professors, listed below.

André Cordeiro Leal
Antônio Carlos Diniz Murta
Astreia Soares Batista
Carlos Victor Muzzi Filho
Daniel Firmato de Almeida Gloria
Danubia Patrícia de Paiva
Frederico de Andrade Gabrich
Lucas Moraes Martins
Luciana Diniz Durães Pereira
Marcelo Barroso Lima Brito de Campos
Paulo Marcio Reis Santos
Rafhael Frattari Bonito
Sérgio Henriques Zandona Freitas

PPGD COORDINATORS

Prof. Dr. Antônio Carlos Diniz Murta (period 2003-2013)
Prof. Dr. Maria Tereza Fonseca Dias (period 2014-2017)
Prof. Dr. César Augusto de Castro Fiuza (2018-2019 period)
Prof. Dr. Sérgio Henriques Zandona Freitas (2020-current period)

SECRETARY

Bel. Cláudia Márcia Magalhães

EXTENSION PROJECTS AND AGREEMENTS WITH OTHER PROGRAMS

The FUMEC University, in compliance with its teaching, research and extension functions and based on the principles and purposes of national education, has the mission: 'to form citizens aware of their social responsibility, bearers of the values of justice and ethics, in different areas knowledge, able to enter the various professional sectors and to participate in the development of Brazilian society. Thus, considering the University's mission, the Master's in Law at Fumec University has among its goals and activities the increasing expansion of its integration with society and even with the labor market, even though it is not a professional master's degree. . To this end, the program's professors and students maintain relationships with various academic associations and professional entities (IMDP, IMDA, OAB, FIEMG, ABRADT, INPJ, SBPC) externally expanding their area of expertise.

There are extension projects, such as Cidade e Alteridade, Além do Cinema and Livro Aberto, which reach a considerable external audience, according to data in this report. The events held by the PPGD – among which CONPEDI-Belo Horizonte, in 2015, the Luso-Brazilian Meetings, in the following years – in addition to the other activities developed, have also sought to take care not only of sensitive topics to the external community. , but have managed to reveal their effective social impact. The social impact is also measured based on the graduate, who returns to the labor market and the academic environment, after taking the course and to different regions of the State of Minas Gerais.

The Fumec University Master's Program has agreements and partnerships with other programs, with research centers and other institutions, in the country and abroad, presenting activities developed under such agreements, according to products generated and presented in the production data contained in this report . In its first years of operation, there was a great effort to integrate with other regional and national graduate programs and also to internationalize the Program. At the regional level, Fumec's PPGD was decisive in the implementation of the Forum of Coordinators of PPGD's in Minas Gerais, which constitutes an important arena for discussing the challenges of Stricto Sensu Graduate Studies. At the national level, in addition to the partnership with UFMG's Cidade e Alteridade Program, which brings together other 5 national and 2 foreign HEIs, PPGD participated in the organization and implementation of CONPEDI in 2011 and 2015 (partnership between UFMG/FUMEC/Dom Helder).

Internationally, effective academic partnerships were established with several Portuguese universities, such as the University of Lisbon, the Universidade Nova de Lisboa, the Universidade do Minho and the Universidade Católica do Porto. Every year, the participation of professors and even PPGD students in events abroad is intensified, expanding the course's internationalization process. There was also the participation of foreign professors in academic activities, since the implementation of the course, such as conferences, lectures, master classes and round tables. Significant was the receipt of numerous international works by Revista Meritum. Since 2015, therefore, there has been a growing process of internationalization of the Program, considering that it has been relatively recently implemented. The works presented at international events contributed to the dissemination of the Program, putting the Program's community in contact with international partners and opening up good prospects for the future of the PPGD.

Several of the professors at PPGD FUMEC are chief or assistant editors of Qualis CAPES Periodicals, including: Index Law Journals of the Journal of Judiciary Policy, Management and Administration of Justice; Review of Process, Jurisdiction and Effectiveness of Justice; and the Citizenship and Access to Justice Magazine.

PPGD professors, masters and graduates regularly stand out at CONPEDI, with the approval of articles and posters, above the national average, highlighting the wide participation in all the latest international events (Madrid, Oñati, Montevideo, Costa Rica, Portugal, Spain-Zaragoza, Quito-Ecuador and Spain-Valencia) and nationals (Aracaju, Belo Horizonte, Brasília, Curitiba, Brasília, Maranhão, Salvador, Porto Alegre, Goiânia, Belém, 1st and 2nd VIRTUAL CONPEDIs), as well as coordinating WGs in Belo Horizonte (1), Curitiba (1), Brasília (1), Maranhão (2), Portugal (2), Ecuador (1), Salvador (2), Zaragoza (1), Porto Alegre (2), Goiânia (1), Valencia (2), Belém (1), 1st. Conpedi Virtual (1 GT of articles and 4 GTs of posters) and 2nd. Conpedi Virtual (1 GT of articles and 4 GTs of posters), and the poster exhibition with undergraduate and master's students from FUMEC University, UFMG and PUC MINAS (Belo Horizonte, Brasília, Curitiba, Brasília, Maranhão, Salvador, Porto Alegre, Goiânia, Belém, 1st and 2nd Conpedis Virtual). Thus, the partnership with CONPEDI has been long and fruitful.

Therefore, the Program's goals are to intensify these partnerships and seek others, as shown by the data in this report. The main indicator of solidarity and nucleation of the course is its active participation in the Forum of Coordinators of Postgraduate Programs in the State of Minas Gerais, with an active role of the Fumec University in this process. Visibility, in turn, results from its set of activities and the improvement of information dissemination systems, such as websites, blogs, Facebook pages, on Instagram and the Official PPGD FUMEC Channel on Youtube, currently with more than 60 (sixty) videos made available.

The University's Master of Law course has strived to offer innovative training experiences to Master's students. Among them, there is the Teaching Internship, which allows, each semester, more than 20 (twenty) master's students to engage in didactic and pedagogical activities at one of the centers of the Graduate Course in Law at the University (Public Law ; Social law; Fundamental disciplines; Criminal law; Private law and civil procedure) and the extension activities coordinated by the Legal Practice Center, as detailed in the extension projects and, further on, in the item of this report dealing with Integration with Graduation .

Another innovative training experience also connected to graduation is the systematic participation of master's students in graduation course conclusion papers (TCC), which allows master's students to not only prepare for the preparation and defense of their own master's thesis , how to exercise attributions of examiner of academic works, together with the other professors of the Master's and the Graduation in Law.

There are PPGD disciplines, such as Legal Strategies of Corporations and Legal Teaching Methodology, which have promoted activities that allow Master's students to present small lectures, with guidance from the professor of the discipline, both in the law degree at the University itself and in other institutions , using innovative methodologies in legal education, such as: TED and PechaKucha 20x20 models, Flipped Classroom (inverted classroom), Mind Maps, Storytelling, Design Thinking, public speaking and disinhibition, memorization, among others.

Since the first years of the course, the program's professors have implemented the research project Instructional Design and Innovation in Legal Teaching Methodologies and have systematically developed not only reflections on legal education, based on bibliographical research and

empirical investigations along with the Undergraduate course. in Fumec Law, as it has sought to apply the acquired knowledge. Within the scope of this project, financed by the PROPIC Program of the Fumec University and by the Foundation for Research Support of the State of Minas Gerais – FAPEMIG, the masters began to develop research activities and experimental projects such as recording a web series on the Strategic Analysis of Right, as well as the realization of episodes of the radio program called Qual é Sua Ideia?, aired on Rádio Fumec Web, Rádio Totem Web and also in Podcast, available for the IOS platform.

Below is information about the social impact of the PPGD of the Fumec University. In addition to the development of long-term Extension Projects, the FUMEC University also promoted, with the always active participation of the PPGD, several other extension activities, characterized by the intense participation of the community, reaching its objectives related to Social Responsibility. Among these activities, we can highlight: 24 Roundtables; 850 lectures, 19 workshops, 12 workshops, 118 extension courses, in addition to commented film sessions, academic weeks, fairs, exhibitions, book launches, choral singing, theater and dance presentations, among others.

The PPGD develops activities that promote interfaces with Basic Education, which go beyond the sporadic participation of teachers and students in the Law in Action Project, carried out by the Law Course at Fumec University, such as the integration of high school students in Research Projects of the teachers of the Master of Laws. Some of these students, encouraged by PPGD professors and students, became academics at the University.

On the occasion, the Editors pay their tribute and thanks to all who contributed to this commendable initiative of the FUMEC University and, in particular, to all the authors who participated in this publication, highlighting the commitment and seriousness shown in the research carried out and in the preparation of the texts of excellence.

We invite you to read and/or listen 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 implementation of precepts inscribed in the Democratic Constitutional State of Law.

Good reading everyone!

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

COMPANY JUDICIAL RECOVERY:
A BRIEF LEGAL TEST OF THE CURRENT SCENARIO

RECUPERAÇÃO JUDICIAL DA EMPRESA:
UM BREVE ENSAIO JURÍDICO DO CENÁRIO ATUAL

Antônio Carlos Diniz Murta[1]
Nany Papaspyrou Marques Mendes[2]

ABSTRACT

The economic, financial and health crisis caused by the coronavirus pandemic invites the legal community to a new cycle of studies on the impacts of the new world on Brazilian law, notably corporate law. After examining the construction of the bankruptcy and recovery system, with a specific rule approach, the study proposes the application of civil law institutes, branch of obligations and contracts, in the course of the recovery action, especially in order to check the right to review the contracted plan, under the influence of the new state of affairs, imposed by an unpredictable and extraordinary fact.

Keywords: Judicial recovery; Legal Nature; COVID-19; Business Law; Bankruptcy.

RESUMO

Resumo: A crise econômica, financeira e sanitária provocada pela pandemia do coronavírus convida a comunidade jurídica para um novo ciclo de estudos sobre os impactos do novo mundo no direito brasileiro, notadamente o empresarial. Depois de um exame sobre a construção do sistema jurídico falencial e recuperacional, com abordagem até de regra específica, o estudo propõe a aplicação de institutos do direito civil, ramo das obrigações e contratos, no curso da ação de recuperação, muito em especial para conferir o direito de revisão do plano contratado, sob as influências do novo estado de coisas, imposto por fato imprevisível e extraordinário, conforme Teoria da Imprevisão.

Palavras-chave: *Recuperação Judicial; Natureza Jurídica; COVID-19; Direito Empresarial; Falência.*

1 Graduated in Law from the Faculty of Law of the Federal University of Minas Gerais (1987). Specialization in Commercial Law from the Law Faculty of the Federal University of Minas Gerais (1994). PhD in Commercial Law from the Faculty of Law of the Federal University of Minas Gerais (2000). State Attorney at the Attorney of Taxes and Finance of MG (PTF), a member of the Attorney General of the State of Minas Gerais (AGE / MG). Coordinator of the Attorney of Taxes and Finance (PTF), of the General Attorney of the State of Minas Gerais (AGE / MG) with the Minas Gerais Taxpayers Council (CC / MG). Elected Member / Counselor of the Superior Council of the Advocacy General of the State of Minas Gerais (AGE / MG). Member of the Permanent Commission for the Review and Simplification of the Tax Legislation of the State of Minas Gerais, within the scope of the Secretariat of the Civil House and Institutional Relations and the Secretariat of State for Finance. Full Professor at the Faculty of Humanities, Social and Health Sciences (FCH), a member of the Minas Gerais Education and Culture Foundation / FUMEC University. Lattes: http://lattes.cnpq.br/5206258464220367. ORCID iD: https://orcid.org/0000-0002-9568-7997. E-mail: acmurta@fumec.br

2 Master's in Law from PPGD of FUMEC. Bachelor of Laws from the State University of Minas Gerais - UEMG (2013). Specialist in Public Law from FUMEC University (2017). ORCID iD: https://orcid.org/0000-0001-9531-6996. Email: nanypmarques@gmail.com

How to cite this article/Como citar esse artigo:
MURTA, Antônio Carlos Diniz; MENDES, Nany Papaspyrou Marques. Judicial recovery of the company: a brief legal essay of the current scenario. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 14-26, 2020. DOI: https://doi.org/10.46560/meritum.v15i4.8265.

1. INTRODUCTION

From what cannot be doubted, it is certain that the pandemic of the corona-virus marked the life of the world population in the year 2020. New situations, a future that is unknown and distant. The economy, of course, was transformed by the reflection of the situations generated by the spread of the virus in the world, and, of course, in Brazil. Businesses activity, the essence of the capitalist economy, has experienced varying consequences in this new pandemic period.

Some segments faced a world of opportunities and gains. Others, disabled-limited/obstacles to exercise, due to the recommendation of not grouping people, such as in entertainment, in public transportation, business institutions already affected by financial difficulties came under treatment of the recovery process regulated by law 11.101/2005, and also certainly impacted by the corollaries of the pandemic. These companies are likely to need a revision of the recovery plan so that they can effectively recover.

The normative alternative for non-compliance with the obligation agreed in the recovery plan is the convolution for the bankruptcy action. With the support of the principles that guide the construction of bankruptcy law, the text that is presented, in turn, proposes the possibility of a revision of the recovery plan in progress, if the obligations inserted therein become unbalanced, burdensome. To this end, the exploration of the legal doctrine that gives the recovery plan the nature of a contract, leads and justifies the scientific construction of this article.

From a brief historical effort, and with visits to the rules and other norms of the recovery law, the idea that it proposes to build, is based on the application of precepts of the mandatory and contractual private law, in the solution of the issues arising from this and other inevitable, unpredictable and extraordinary context.

2. THE INSOLVENCY SYSTEM IN BRAZILIAN LEGAL ORDINATION

In 2005, Brazil inaugurated its new legal insolvency regime, which occurred with the entry into force, on June 10 of that year, of Law 11.101/2005, which was sanctioned and published on February 9 also of the year 2005.

The new law proposed to regulate the judicial, extrajudicial and bankruptcy of the entrepreneur and the company, thus replacing the institutes of preventive and suspensive bankruptcy provided for in Dec. Law 7661/45 by the new institutes then brought to call for the new law, which are the Judicial and Extrajudicial Recovery of companies in crisis.

If the debtor is an entrepreneur or business company, if the circumstance is framed in one of the permissives provided for in article 94 of Law 11.101/2005[3], the bankrupt state is set up capable of giving rise to the specific liquidation procedures of the tender process.

3 The debtor's bankruptcy will be decreed which: I - without relevant legal reason, does not pay, without maturity, a net obligation materialized in protested securities or executive securities whose sum exceeds the equivalent of 40 (forty) prices-updated on the date of the bankruptcy request ; II - obtaining for any net amount, not paid, not depositing and not assigning sufficient

On the other hand, the new law, drafted under the reality of Brazilian trade and industry at the beginning of the 21st century, dared to integrate the new institute for the recovery of companies into the national insolvency system, both judicially and extrajudicially.

Such an institute, especially when compared to the past bankruptcy, has an extended scope of its effects in relation to creditors and the very purpose of the measure, the judicial recovery of companies aims to make it possible to overcome the financial economic crisis, allowing the maintenance of the source producer, the employment of workers, the interests of creditors, all with a view to promoting the preservation of the company, its social function and stimulating economic activity, according to article 47 of the aforementioned law 11.101/2005[4].

The current insolvency system adopted by the national legislature, thus, inaugurated in Brazil the outstanding importance to business activity, so that the company's judicial reorganization institute has as its principled normative foundation and aims to promote the company's own preservation and social function and, yet, stimulate economic activity.

In this sense, it is believed that the insolvency legal regime meets the interests of the agents involved in the business activity, giving them solutions that can serve them satisfactorily in the circumstances in which the economic and financial crisis affects the business tranquility then existing, that is, in the liquidation measures carried out in the bankruptcy bankruptcy process, or in relation to the uplift measures carried out in the recovery procedure of the viable company.

By the way, commercial and industrial activity, most of the time, takes place with the offer of credit by the capital investing agents, thus, the industry finances its production under the premise that the result obtained with the sale of the products or services is deemed sufficient to honor the obligations to investors and, still, satisfactorily remunerate the labor and capital employed. When this market perspective is frustrated, as is the case today, the insolvency legal system will have to come on the scene, to ensure the reorganization of the business and business scenario.

assets to the attachment within the legal term; III - perform any of the acts, except if it is part of a judicial reorganization plan: a) proceeds to the hasty liquidation of its assets or use ruinous or fraudulent means to make payments; b) carries out or, by unequivocal acts, attempts to carry out, with the objective of delaying payments or defrauding creditors, simulated business or sale of part or all of its third-party asset, whether or not it is a creditor; c) transfers an establishment to a third party, creditor or not, without the consent of all creditors and without having sufficient assets to resolve its liabilities; d) simulates the transfer of its main establishment with the objective of circumventing legislation or supervision or to damage credit; e) gives or reinforces a guarantee to a creditor for a previous contracted debt without having enough free and clear assets to settle its liabilities; f) leaves without leaving a qualified representative and with sufficient resources to pay creditors, leaves the establishment or tries to hide from his domicile, the place of his headquarters or his main establishment; g) fails to comply, within the established period, with the obligation assumed in the judicial reorganization plan. Paragraph 1 Creditors may meet in litisconsortium in order to make the minimum limit for filing for bankruptcy based on item I of the caput of this article. Paragraph 2. Even if they are liquid, the claims that cannot be claimed are not legitimate for bankruptcy. § 3 In the event of item I of the caput of this article, the bankruptcy petition will be filed with the executive titles in the form of the sole paragraph of art. 9 of this Law, accompanied, in any case, by the respective protest instruments for bankruptcy purposes under the terms of specific legislation. § 4 In the event of item II of the caput of this article, the bankruptcy request will be instructed with a certificate issued by the court in which the execution takes place. § 5 In the event of item III of the caput of this article, the bankruptcy petition will describe the facts that characterize it, adding the evidence that exists and specifying the ones that will be produced. (BRAZIL, Law 11.101, of February 9, 2005. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Access on September 20, 2020).

4 Article 47: The purpose of judicial reorganization is to make it possible to overcome the debtor's economic and financial crisis, in order to allow the maintenance of the production source, the employment of workers and the interests of creditors, thereby promoting the preservation of the company social function and stimulating economic activity. (BRAZIL, Law 11.101, of February 9, 2005. Available at http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Access on September 20, 2020

Failure to comply with the credit obligation, which often results from the crisis being affected in the business environment, a well-known and very present fact in this historic year of 2020, must be resolved based on the legal insolvency system adopted by the governing legal system, either by bankruptcy or by the recovery modalities established in the commercial legal regime.

Frederico A. Monte Simionato, in a precise lesson on the imperative of guarantees that the insolvency legal regime must offer in favor of those involved in the negotiation activity, explains that:

> "(...) in times when there is so much talk about the company's interest, preservation of the producing entity, the need to satisfy the interests of creditors cannot be overlooked, under the risk of incredible risks. Credit is the most essential thing that exists in the capitalist system (...)". (SIMIONATO, 2008, p.23)

In view of this, it is clear that the insolvency system in force by Law 11.101/2005 regulates the classic liquidation process, adopting the legal insolvency as the configuring element of the bankruptcy stage, that is, due to the intelligence of article 94 of the law. The same norm, as we know, still instituted the judicial and extrajudicial recovery procedures for companies in economic crisis, as long as they are still financially viable, a fact that greatly highlights the concern of the modern legislator to the interests and social function of the company and its usefulness in the market. that integrates.

3. THE JUDICIAL RECOVERY OF COMPANIES

Law 11.101 / 2005, in addition to the typical liquidation precepts for non-viable companies that are in bankruptcy stage, also regulates and mainly the judicial reorganization procedure of the company in crisis, which is able to guarantee and preserve the social participation of the agents involved in the activity business, especially creditors (SIMIONATO, 2008).

This new normative characteristic, which gives prestige to the protection of social interests that interconnect the relationships that exist in the exercise of the company, proposes the preservation of viable business activity and the respective obedience to its social function and the stimulus of economic activity, this, knowingly, so that allow the maintenance of the productive nucleus, the employment of workers and, of course, the interests of creditors.

In this sense, the isolated interest and desire of the entrepreneur, consistent in the exercise of the company in crisis and in a reckless manner, gives way to the aspect and social relevance that can be inferred from the business activity, that is, in order to determine it as a precondition for the granting of the recooperative measure, careful research and examination of its essential financial viability[5].

5 "In the pursuit of the company's social purposes, the company's management cannot determine management policies that are contrary to the company's interest, and in this step there is a general interest in all the factors that make up the company, such as employees, consumers, the State, etc. even more so in cases of reckless or fraudulent management, damaging the interest of creditors. Indeed, the social interest must be the interest of the company, and of the community itself, according to art. 170 of the Federal Constitution and arts. 115, 116, 117, 153-159 of the Brazilian Corporation Law Certainly, the foundation of the new bankruptcy law lies in the preservation of the financially viable company, which means the reformulation of the

The judicial reorganization of companies, therefore, is based on the rule in Article 47 of Law 11.101 / 2005, insofar as this rule reaches and protects the main interests exposed to the situation of the business crisis.

The wording of the aforementioned standard, as stated, regulates and protects the interests of all agents involved in the business relationship, that is, to the extent that the standard foresees the recovery institute as being capable of overcoming the business crisis, so that it is allowed the maintenance of the source of production, the jobs of workers, the interests of creditors, all with a view to promoting the preservation of the viable company and its social function, as well as stimulating economic activity, is the legislator directing the spirit of the law to the idea of the institutional company that works for the benefit of all the public that is linked in its relations[6].

Indeed, the judicial recovery of companies is the institute provided for in the insolvency legal regime and, based on strong principles and fundamentals, proposes and regulates the pay against the crisis and the reconstruction, reorganization, recovery of the company, so that they are satisfactorily the social interests that interconnect the legal relationships within the business have been met.

The success of the recovery measure promotes the preservation of the company, its social function and the encouragement of economic activity, as provided in article 47 of the Law 11.101/2005:

> Art. 47. The purpose of judicial reorganization is to make it possible to overcome the debtor's economic and financial crisis, in order to allow the maintenance of the production source, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its function and stimulating economic activity. (gn) (BRASIL. 2005)

The effective participation of creditors in the luck or setback of the proposed recovery of the company offered by the debtor also records the social framework of the business activity and its respective usefulness in the environment in which it is integrated, especially with regard to reducing the cost of credit for the financing of the production and circulation of goods and services due to the organized business economic activity[7].

The judicial recovery of Brazilian companies, then, is the bankruptcy law institute that seeks to offer and guarantee to the entrepreneur or business society in an economic crisis, capable means of uplifting and overcoming the crisis.

---

company's treatment of economic difficulties, placing all interests in it represented in business activity, in a complex situation of supplying, each according to its strengths and conditions, legal and financial instruments to the process of reconstruction of the productive factor". (SIOMIONATO, Frederico Augusto Monte, 1972 - Bankruptcy Law Treaty / Frederico A. Monte Simionato. - Rio de Janeiro, Forensics, 2008, p. 17-18).

6 "The legal definition is really correct. The magistrates must be aware that it resides here, in art. 47 of the new Law, the source of interpretation and application of the new bankruptcy law, as a norm defining duties, functions and paradigms of legal hermeneutics, asserting the public interest over the individual interest of creditors, and, therefore, reflecting on the analysis of economic viability of the judicial reorganization plan. (SIMIONATO, Frederico Augusto Monte, 1972 - Bankruptcy Law Treaty / Frederico A. Monte Simionato. - Rio de Janeiro, Forensics, 2008, p. 122).

7 "Law 11.101 / 05 must be interpreted from the point of view of its economic utility, like any Bankruptcy Law. In the recovery chapter, this interpretation must be even stronger. The judging body must know that the prerogative of the presentation of the plan is, of course, that of the debtor, and that the sieve of this plan is conditioned, solely and exclusively, to the creditors, insofar as the legal nature of the approval of the plan is concordat, by legal majorities". (SIMIONATO, Frederico Augusto Monte, 1972 - Bankruptcy Law Treaty / Frederico A. Monte Simionato. - Rio de Janeiro, Forense, 2008, p. 21).

However, not all debtors are able to handle the action, since it clearly consists of the socialization of business risks with existing creditors at the time of the measure, and such risk distribution cannot be done in favor of non-viable companies. unrecoverable.

In this way, only the activities that are still financially viable and that, once recovered, can return to society the losses and sacrifices expended for their rescue, should be used by the company's recovery institute.

In this line, the business debtor who identifies and assumes the situation of an economic and financial crisis can seek the processing of the judicial recovery measure, and the Judiciary Branch must, in this case, safely assess the viability demonstrated by the debtor. Viable, therefore, is the company that holds the set of certain elements, such as financial viability, importance and social relevance, labor and technology employed, economic size, consolidated exercise of the activity and maturity for the market, among others that require the presence. For the doctrine of Fábio Ulhoa COELHO, they are able to look for the company recovery institute, the business institutions that in fact and by law meet the conditions of viability to do so. See below:

> Only viable companies should be subject to judicial or extrajudicial recovery. In order to justify the sacrifice of the Brazilian society present, to a greater or lesser extent, in any recovery of a company not derived from a market solution, the business society that the postulates must show itself worthy of the benefit. It must show, in other words, that it is able to return to Brazilian society, if and when recovered, at least in part the sacrifice made to save it. These conditions are grouped in the company's viability concept, to be assessed during the judicial reorganization process or in the approval of the extrajudicial reorganization.
>
> (COELHO, 2011, p.404)

In the same vein follows the reasoning provided by Frederico A. Monte SIMIONATO, who defends the necessary examination of the company's viability as an assumption, the basis for the granting of recovery by the Judiciary. For this jurist, companies that demonstrate irrecoverability, unfeasibility, should follow the setback of the bankruptcy liquidation procedure, leaving to the auspices of the company's recovery institute only those debtors who demonstrate and convince their creditors especially that the activity undertaken is, surely, economically viable.

Here is the precise lesson of the doctrine in question:

> "The company should only be bailed out if it is still viable. Business societies that may demonstrate financial and economic fragility, without even being able to glimpse a serious possibility of recovery, should be declared bankrupt, for the sake of credit, which, in reality, cannot be dissipated in non-viable bodies either by their management incompetent or the volume of liabilities". (SIMIONATO, 2008, p. 129)

In addition, the magistrate, the judicial administrator and even the creditors are responsible for verifying the balance sheets, the recovery plan, in short, the company's effective viability, a fact that denotes due obedience to the Principle of Preservation of the Viable Company[8].

8 "This principle is the starting point for the application of Law 11.101 / 2005. The magistrate, together with the judicial administrator must verify, analyzing the balance sheets, the viability of that business activity. It is true that the application of the new legislation deserves caution, so that the spirit of the Law can be enforced, that is, the maintenance of the viable company, and the feasibility check must be evaluated, even preliminarily, in granting or not the processing of recuperation plan." (SIMIONATO, 2008, p. 130).

For the granting of the measure, the debtor entrepreneur must observe the assumptions dictated by Law 11.101 / 05, which are those proclaimed by article 48 of the respective norm.

The debtor must also explain in the initial petition the concrete causes of the crisis and the equity situation, instructing it with the accounting documents required by the rule of article 51[9] of the affirmed governing law.

Regarding the means of judicial reorganization, the legislator also listed, no less than 16 (sixteen) options offered to the debtor in crisis, these, launched in the text of article 50 of the normative rules of law 11.101 / 2005.

Professionals with proven aptitude should serve the debtor in choosing the bailout strategy, such as economists, accountants, administrators, market analysts and, for lawyers.

The recovery, as can be seen, has the scope of protecting not only the exclusive and individual interests of the entrepreneur, but rather, macro and collective and social interests, a reason that justifies an investigation and interpretation that meets the true intention and effectiveness of the recovery action, its related principles and the insolvency legal system itself.

The company cannot be considered as an activity organized solely in the interests of the entrepreneur's strictly individual interests, as being an asset of his exclusive property that does what he wants and desires, since the company today serves society as a pillar of its economic balance, social development.

Law 11.101 / 2005, sensitive to the social importance of the company and the harmful effect of bankruptcy on society, proposes a new interpretation and finalistic view in favor of the maintenance and preservation of the company. the serious and safe application of the company's recovery and, therefore, the preservation and maintenance of the productive nucleus. The proposed measure, once the case is processed, submitted to the creditors' analysis, the approval of the plan gives judicial recovery the legal nature of a novative judicial contract.

For jurist Maria Celeste Morais Guimarães, the procedural aspect of the recovery measure is highlighted in the definition, because, for such doctrine:

9 Art. 51. The initial petition for judicial reorganization will be accompanied by: I - an explanation of the concrete causes of the debtor's assets and the reasons for the economic and financial crisis; II - the financial statements related to the last 3 (three) fiscal years and those drawn up especially to instruct the request, made in strict compliance with the applicable corporate law and mandatorily composed of: a) balance sheet; b) statement of accumulated results; c) income statement since the last fiscal year; d) cash flow management report and its projection; III - the full nominal list of creditors, including those under obligation to make or give, with an indication of the address of each one, the nature, classification and updated value of the credit, detailing its origin, the regime of the respective maturities and the indication of the accounting records of each pending transaction; IV - the full list of employees, which include the respective functions, salaries, indemnities and other portions to which they are entitled, with the corresponding month of competence, and the breakdown of the amounts pending payment; ; V - certificate of regularity of the debtor in the Public Registry of Companies, the updated constitutive act and the minutes of appointment of the current administrators; VI - the list of the private assets of the controlling shareholders and the debtor's administrators; VII - updated statements of the debtor's bank accounts and their possible financial investments of any type, including in investment funds or in stock exchanges, issued by the respective financial institutions; VIII - certificates from the protest offices located in the district of the debtor's domicile or headquarters and in those where it has a branch; IX - the list, signed by the debtor, of all the legal actions in which he appears as a party, including those of a labor nature, with an estimate of the respective amounts demanded. § 1 The accounting bookkeeping documents and other auxiliary reports, in the form and support provided for by law, will remain at the disposal of the court, the judicial administrator and, upon judicial authorization, of any interested party. § 2 With respect to the requirement provided for in item II of the caput of this article, micro and small businesses may present simplified books and bookkeeping under the terms of specific legislation.
§ 3 The judge may determine the deposit in court of the documents referred to in § 1 and 2 of this article or a copy thereof. (BRAZIL, Law 11.101, of February 9, 2005. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Accessed on Aug. 20, 2020).

> Judicial recovery is a lawsuit aimed at remedying the debtor's economic and financial crisis, safeguarding the maintenance of the source of production, the employment of its workers and the interests of creditors, thus enabling the realization of the company's social function.
>
> (GUIMARÃES, 2007. p. 126)

In the definition of Alberto Caminã Moreira, r also envisions the idea of a contract to be signed between the debtor and his creditors, who are the addressees of the proposal contained in the plan. For that doctrine, judicial reorganization consists of the debtor's right to present his proposal to his creditors, a plan, which may or may not be accepted by them. It is not, therefore, a litigious measure, but a procedure whose cause for request is the proposal to overcome the crisis through the implementation of a strategic plan that will be analyzed and approved or rejected by creditors[10].

Joaquim Jorge Lobo affirms that judicial recovery has a nature and characteristics specific to Economic Law, since the rules that regulate it do not aim to resolve a conflict in the light of the ideal of justice, but rather to offer solutions, means and conditions for companies state of crisis can rebuild and restructure, so that it can return to fulfilling its economic and social function in the production chain[11].

The doctrine in question sees judicial recovery as an institute linked to Economic Law, notably because the recovery measure has the purpose of offering the company in crisis the means to facilitate the restructuring of the activity and not directly the solution of the case under the main idea of justice.

Marlon Tomazette, for his part, says the judicial recovery as a:

10 For Alberto Camiña: "In the judicial reorganization, there is no claim made against creditors, understood as the claim of a right against the defendant, so that the defendant can be submitted to him. The debtor's right, in judicial reorganization, is to present a proposal, to present a plan. The fate of the plan, however, is in the hands of creditors, who will be able to accept it, modify it or reject it. [...] Negotiation is the key word; and this negotiation, while taking place before the Judiciary, takes place without the intervention of the judge. The law does not provide for jurisdictional action for this purpose; even though the Brazilian judge has general powers of conciliation, and it is really emphasized by the doctrine. " (Ibid., P. 249-250).
For Joaquim Jorge Lobo, "although' complex act 'and' constitutive action ', judicial recovery has the nature and characteristics of an economic law institute, as a step to demonstrate. I join the doctrine, led, in the country, by Orlando Gomes, who maintains (a) that Economic Law is located in an intermediate zone between Public Law and Private Law, (b) to have a threefold unity: 'of spirit, of object, and method 'and (c) the rule of law is not guided by the idea of justice (principle of equality), but by the idea of technical effectiveness due to the special nature of the legal protection that emerges from it, in which general interests prevail and collective, public and social, which it collimates to preserve and serve as a priority, hence the publicity character of its norms, which materialize through 'prince costume', 'legal prohibitions' and 'exceptional rules'. In effect, the judicial recovery of the company is an institute of Economic Law, because its norms are not primarily aimed at realizing the idea of justice, but above all to create conditions and impose measures that allow companies in a state of economic crisis to restructure, even if with partial sacrifice of your creditors ". (LOBO, Jorge Joaquim. Company law in crisis: the new company recovery law. Revista Forense, v. 379, p. 119-131, May-Jun. 2005, p. 127-128).

11 For Joaquim Jorge Lobo, "although' complex act 'and' constitutive action ', judicial recovery has the nature and characteristics of an economic law institute, as a step to demonstrate. I join the doctrine, led, in the country, by Orlando Gomes, who maintains (a) that Economic Law is located in an intermediate zone between Public Law and Private Law, (b) to have a threefold unity: 'of spirit, of object, and method 'and (c) the rule of law is not guided by the idea of justice (principle of equality), but by the idea of technical effectiveness due to the special nature of the legal protection that emerges from it, in which general interests prevail and collective, public and social, which it collimates to preserve and serve as a priority, hence the publicity character of its norms, which materialize through 'prince costume', 'legal prohibitions' and 'exceptional rules'. In effect, the judicial recovery of the company is an institute of Economic Law, because its norms are not primarily aimed at realizing the idea of justice, but above all to create conditions and impose measures that allow companies in a state of economic crisis to restructure, even if with partial sacrifice of your creditors". (LOBO, Jorge Joaquim. Company law in crisis: the new company recovery law. Revista Forense, v. 379, p. 119-131, May-Jun. 2005, p. 127-128).

> Set of acts, the practice of which depends on a judicial concession, in order to overcome the crises of viable companies. Thus, we can establish the essential elements of judicial recovery: (a) series of acts; (b) creditors' consent; (c) judicial concession; (d) overcoming the crisis; and (e) maintaining viable companies.
>
> (TOMAZZETE, 2011, p.42)

The concept elaborated by the didactic author reveals judicial recovery as a procedure, judicial contract and, still, its teleological and principiological aspect.

3.1 STUDY ON THE LEGAL NATURE

In reading its legal nature, adherents of the privatist doctrine tend to affirm that the legal nature of judicial recovery is a judicial contract. Publicists, who see recovery as a public law institute, claim that judicial recovery is a procedural law institute (LOBO, 2005, p.126).

For Sérgio Campinho, judicial recovery is a novative judicial contract. It is a contract that is celebrated before the judiciary and, after granting the processing of the recovery action, as proclaimed in the norm of art. 59 of Law no. 11.101 / 2005, implies the renewal of credits prior to the request.

Tomazette, follows the same line that confers the legal nature of a contract to judicial reorganization, and further explains that the judicial performance present in the course of the reorganization action does not dismantle its contractual aspect, since the judge is merely a supervisor of the procedure.

The judiciary, therefore, does not impose recovery, it can only grant it if an agreement is reached between creditors. Therefore, judicial recovery is an agreement of wills between the debtor in crisis and his creditors, who manifest themselves together, through the assembly of creditors, since they have a common interest (TOMAZETTE, 2011).

In spite of the authority of the arguments about the legal nature of the company's recovery, the contractual aspect of the company's judicial recovery stands out, insofar as it, the institute, is examined alongside the legal elements that configure the private contract, and with the identification of points that coincide with them - recovery of the company and private contract.

The importance and value of other scientific legal constructions, which also define the legal nature of recovery, can obviously not be overlooked, but in a different way.

The procedural nature, by the way, is equally rich and well-founded, as long as it is built from the observation that judicial recovery is processed through the exercise of the right of action, subject to the state jurisdiction of the Judiciary Power, therefore, its nature is eminently procedural.

The contractual nature of the company's recovery institute, in turn, stands out from the existence of a viable company recovery plan, carried out in the presence of strategic preparation, presentation to creditors, deliberations, changes and approval (consensus) - volitional element.

The declaration of the will, general, free and consented, to contract a viable plan for judicial reorganization of the company, is a fundamental assumption of the legal institute. In this way, the contractual feature of the legal nature of the company's recovery is clear, as both

in this institute and in private contracts in general, the will agreement is a legal requirement enshrined both in terms of existence and validity.

In judicial reorganization, the debtor and creditors "sit down at the table" to effectively negotiate as to the mandatory ties that bind them, all of this, carried out before the state jurisdictional power, which provide security and validity to the effects that result from the recovery institute.

Therefore, there are coincident elements, of a contractual nature, in the scientific legal construction of the company's judicial recovery.

The law of obligations, governed by the civil code, completes and standardizes the content of private contracts in general, as these, the contracts, are essentially instruments for agreeing obligations, whether to do or not, to deliver or not, to satisfy or not. The obligations agreed upon in the context of corporate business operations are materialized in the contracts, which arise from voluntary, free and consensual declarations.

Furthermore, article 47 of law 11,101 / 2005, regulates the preservation of the company as a legal objective of the company's judicial recovery. Preservation, likewise, is a precept that also regulates contracts in general, insofar as the legal system enshrines the preservation of contracts as a normative postulate that guides the interpretation and execution of contractual obligations. In the recovery action plan, the approval of the plan, as it is known, produces a renewal of the obligations then entered into, an effect that is also characteristic of the private law of the obligations.

The law provides that:

> "Art. 59. The judicial reorganization plan implies a renewal of credits prior to the request, and obliges the debtor and all creditors subject to it, without prejudice to guarantees, subject to the provisions of § 1 of art. 50 of this Law".

In the same sense, the approval of the plan also binds the debtor to the obligations included in the plan, and if it fails to comply with any of them, the convolution of the bankruptcy recovery action is an effect already provided for by law.

The vigor of the law, and the well-established doctrine and jurisprudence, signed a consensus that the plan, once approved, must be strictly complied with by the debtor recovering, under the risk of his bankrupt recovery action being called upon. Also, if the procedural period of the action has passed, the non-fulfillment of the remaining obligation, in time and manner, justifies the reason for asking for filing for bankruptcy action. As can be seen, the plan is approved, or the recovering debtor complies with it, or its bankruptcy must be fatally decreed.

The law provides:

> Art. 61. The decision provided for in art. 58 of this Law, the debtor will remain in judicial reorganization until all obligations foreseen in the plan are fulfilled that are due up to 2 (two) years after the grant of the judicial reorganization.
>
> § 1 During the period established in the caput of this article, non-compliance with any obligation provided for in the plan will entail the convolution of bankruptcy recovery, under the terms of art. 73 of this Law.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 14-26 • 2020

> § 2 Bankruptcy is declared, the creditors will have reconstituted their rights and guarantees in the conditions originally contracted, less the amounts eventually paid and except for the acts validly practiced within the scope of the judicial reorganization.. (BRASIL, 2005)

However, in current times, when the world is overwhelmed by the economic effects caused by the pandemic of the covid-19, certainly companies will seek the existing alternatives to provide them with survival during and after the installed crisis, in particular, the action of recovery.

In addition, so many other companies that were already in a situation of recovery are now forced to find the balance point capable of guaranteeing viability for their legal existence, although in a factual scenario that is certainly very different from the one that existed when the recovery plan was built.

These companies are under the severity of the normative vigor of the bankruptcy and bankruptcy legal system, obliged to comply with a mandatory plan elaborated, discussed and approved in a totally different context. The chosen strategies, designed and elaborated to guarantee the viability and success of the recovery, are now challenged by a new, uncertain, unknown and unexpected world.

What treatment should be given to these business institutions? Decree its fatal bankruptcy under the literal legal basis of the normative text? Or, on the other hand, alongside the rules governing the preservation of the company and the contracts, the social function, the interests of creditors, the revision of the plan already approved could be allowed, including as a reinterpretation of the recovering institute.

In this line, again the acceptance of judicial reorganization also in its contractual nature is necessary for the theory of unpredictability, typical of private obligatory relations, to be applied to guarantee the recovering debtor the opportunity to revise the plan already approved, obviously, by means of participation of creditors even in a new meeting.

Based on the theory of unpredictability, in the hypotheses of non-compliance with obligations due to unpredictable and extraordinary events, such as the still immeasurable crisis of the covid-19, the judicial reorganization plan must be subject to the right of review, so that it is provided to the recovering of rebalancing the situation, and achieving the sacred objective, namely, the recovery of the company.

To subject the law 11,101 / 2005 to a new and current interpretive exercise, under the baton of constitutional guarantees established in the order, means to frame the actual factual framework of the circumstances to a modern interpretation and application of the recovery law, to allow the judicial review of the approved plan, through a new conclave and obedience to the rites and procedural guarantees.

By means of a fundamental foundation, built on the contractual legal nature of the recovery plan, the revision of the company's recovery plan would be allowed, under the joint and harmonious regulation of private laws, notably those of a contractual and mandatory nature, and the rules inscribed in the bankruptcy and bankruptcy legal system.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 14-26 • 2020

4. FINAL CONSIDERATIONS

In Brazil, a bankruptcy and recovery system has been in force for fifteen years, with the object of legally regulating business crisis conflicts, mainly in private activity.

Said system takes care of the bankruptcy process in a wide way, and also recovery of companies in crisis.

The set of these norms was instituted by a modern principiological content, instituted in the 21st century environment. It is, at fifteen years old, and already with directed jurisprudence challenged by a factual state overwhelmed by an unprecedented sanitary, health, financial and economic pandemic in the world.

In the previous lines inserted throughout this study, the intention was to demonstrate the strong normative construction of the theme, its historical, general aspects, and specific rules, these, brought to the challenge of the world that presents itself at this time. This is the greatest and sacred function of law, that is, to regulate socio-human conflicts.

This is the moment when the doctrine of law is dedicated to thinking about solutions, with well-founded support, capable of allowing the maintenance of companies, under the current and necessary re-reading of the system of laws.

Until today, the simple and unmotivated failure to comply with the obligations of the plan approved by the transmuted assembly, as the law says, is a conviction, almost in an automatic pass, for a company recovery project in a fatal bankruptcy liquidation process and for the closure of the activity.

The revision of the contracted obligations proper to the law of private contracts, can be applied in the recovery action, allowing another opportunity to overcome the recovering company, in the face of a new, extraordinary, and unpredictable world of things.

The proposal is nothing more, nothing less focused on the consecration of the principles and objectives of the institute, protagonists of this system now called into question, the preservation and social function of the company, zeal for the interests of creditors and maintenance of the source that produces jobs. review of the obligations contracted in the recovery plan, is based on the dialogue between the sources of civil law - obligations and contracts, with company law.

REFERENCES

BARBOSA FILHO, Marcelo Fortes; PELUSO, Cezar (Coord.). *Código Civil comentado*. Doutrina e jurisprudência. 6. ed. Barueri: Manole, 2012.

BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil de 1988*. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 20 ago. 2020.

BRASIL. Decreto-lei 7.661, de 21 de junho de 1945. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto-lei/del7661.htm. Acesso em: 20 ago. 2020.

BRASIL, Lei n. 6.404 de 15 de dezembro de 1976. *Dispõe sobre as sociedades por ações*. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l6404consol.htm. Acesso em: 20 ago. 2020.

BRASIL. Lei 10.406, de 10 de janeiro de 2002. *Institui o Código Civil*. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm. Acesso em: 20 ago. 2020.

BRASIL. Lei n. 11.101, de 9 de fevereiro de 2005. *Regula a recuperação judicial, a extrajudicial e a falência do empresário e da sociedade empresária*. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm. Acesso em: Acesso em: 20 ago. 2020.

CAMPINHO, Sérgio. *O Direito de Empresa à luz do novo Código Civil*. 9. ed. Rio de Janeiro: Renovar, 2008.

CAMPINHO, Sérgio. *Falência e recuperação de empresa:* o novo regime da insolvência empresarial. 5. ed. Rio de Janeiro: Renovar, 2010.

COELHO, Fabio Ulhoa. *Curso de Direito Comercial*. 12. ed. São Paulo: Saraiva, 2011. v. 3: Direito de Empresa.

COELHO, Fábio Ulhoa. *Curso de Direito Comercial*. 17. ed. São Paulo: Saraiva, 2013. v. 1: Direito de Empresa.

DELGADO, José. Interpretação contemporânea da lei de recuperação judicial e sua aplicação ao produtor rural quando pratica atos empresariais. *Revista de Direito Empresarial e Recuperacional*, Florianópolis, v. 1, n. 0, p. 11-57, jan./mar. 2010.

GUIMARÃES, Maria Celeste Morais. *Recuperação judicial de empresas e falências*. Belo Horizonte: Del Rey, 2007.

LOBO, Jorge Joaquim. Direito da Empresa em crise: a nova lei de recuperação da empresa. *Revista Forense*, v. 379, p. 119-131, maio-jun. 2005.

MOREIRA, Alberto Camiña. Poderes da assembleia de credores, do juiz e atividade do Ministério Público. *In*: PAIVA, Luiz Fernando Valente de (Coord.). *Direito Falimentar e a nova lei de falências e recuperação de empresas*. São Paulo: Quartier Latin, 2005.

SIMIONATO, Frederico Augusto Monte. *Tratado de Direito Falimentar*. Rio de Janeiro: Forense, 2008.

STAJN, Rachel; PITOMBO, Antônio Sérgio A. de Moraes (Coord.). *Comentários à Lei de Recuperação de Empresas e Falências*: lei 11.101/2005 – artigo por artigo. 2. ed. São Paulo: Revista dos Tribunais, 2007.

TOMAZETTE, Marlon. *Curso de Direito Empresarial*. 4. ed. São Paulo: Atlas, 2012. v. 1: teoria geral e direito societário.

TOMAZETTE, Marlon. *Curso de Direito Empresarial*. São Paulo: Atlas, 2011. v. 3: Falência e recuperação de empresas.

Received/*Recebido:* 08.10.2020.

Approved/*Aprovado:* 03.12.2020.

THE ADVANCE DIRECTIVES: A PERSPECTIVE OF INCLUSION

AS DIRETIVAS ANTECIPADAS DE VONTADE: UMA PERSPECTIVA DE INCLUSÃO

Cleber Affonso Angeluci[1]
Ana Letícia Bongardi[2]

ABSTRACT

In view of the finitude of human life and its nuances, the present work draws an analysis of the natural process of dying, in view of the therapeutic obstinacy to sustain the lives of patients at any cost, even without any quality, nullifying the existential autonomy of these persons. In this sense, the research aimed to promote a scientific approach to the Advanced Directives and how this institute preserves the patient's private autonomy, especially those who are prevented from expressing their desire and thoughts. The research argues that the Advanced Directives, although there is no federal legislation on the subject, it is a valid existential legal business and liable to be effective in the Brazilian legal system. However, it emphasizes that the absence of regulations on the subject prevents the dissemination of the institute to the Brazilian population, as well as creates a certain legal uncertainty, since it makes individual´s hostages of variable interpretations about the validity and effectiveness of these instruments. The study was built according to the hypothetical-deductive method, instrumented by bibliographic review on the topic.

Keywords: Finitude of human life. Advance directives. Autonomy.

RESUMO

Diante da finitude da vida humana e suas nuances, o estudo traça uma análise sobre o processo natural de morrer, diante da obstinação terapêutica em sustentar a vida de pacientes a qualquer custo, mesmo que sem nenhuma qualidade, anulando a autonomia existencial desses sujeitos. Nesse sentir, a pesquisa teve como finalidade promover uma abordagem científica sobre as Diretivas Antecipadas de Vontade (DAVs) e como esse instituto preserva a autonomia privada do paciente, principalmente daqueles que se encontram impedidos de expressar sua vontade e pensamentos. A pesquisa defende que as DAVs, embora não haja uma legislação federal sobre o tema, trata-se de negócio jurídico existencial válido e passível de eficácia no ordenamento jurídico brasileiro. Contudo, ressalta que a ausência normativa sobre o assunto impede a difusão do instituto para a população brasileira, bem como cria uma certa insegurança jurídica, vez que torna as pessoas reféns de variáveis interpretações sobre a validade e eficácia desses instrumentos. O estudo foi construído segundo o método hipotético-dedutivo, instrumentalizado por revisão bibliográfica acerca do tema.

Palavras-chave: *Finitude da vida humana. Diretivas Antecipadas de Vontade. Autonomia.*

1 Professor of Civil Law at the Federal University of Mato Grosso do Sul - Três Lagoas/MS Campus. Doctor of Education. Master in Law. Doctoral student in Law. ORCID iD: http://orcid.org/0000-0002-3683-2023. E-mail: patobranco11@hotmail.com.

2 Graduated in Law from the Federal University of Mato Grosso do Sul, Três Lagoas/MS Campus. Pivic/UFMS researcher period 2019/2020. Member of the 'Emerging Civil Law' Research Group of the same institution. E-mail: analebongardi@gmail.com.

How to cite this article/Como citar esse artigo:
ANGELUCI, Cleber Afonso; BONGARDI, Ana Letícia. The advance directives: a perspective of inclusion. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 27-41, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.7774.

1. INTRODUCTION

Throughout human existence there have been questions regarding the terminality of life, whether about the mystique about the after death or the difficulty in accepting the process of dying. Developments in medicine and technology have led to the spread of procedures and treatments designed to preserve life at all costs, with the sole purpose of distancing death, thereby prolonging a state of life, often without quality.

There are many situations in which the autonomy of the patient is disregarded in the medical-hospital environment, prevailing the medical or family opinion, especially when the subject is prevented from expressing his own will, either in the face of a biological limitation, as the case of degenerative diseases and coma, also by legal limitations, for example, when the individual is under the decision power of his or her legal guardian, or representative.

Given this social situation that reveals the interference of health professionals and family members in the autonomy of patients, the purpose of this work is to analyze the implementation in the Brazilian legal system of the Anticipated Directives of Will (Davs)a juridical institute capable of preserving the will of the individual in situations that may not be able to express his personal aspirations, as a way to guarantee the protection of his personality and uniqueness.

Initially, an examination was carried out on the end of the natural person, its nuances and the challenges that still persist in the medical environment, emphasizing the methods and procedures of therapeutic obstinacy that were applied to humans with the sole objective of prolonging an artificial life without quality of life.

Through this analysis, the work has the purpose of criticizing the procedures influenced by distasia, rejecting the application of medical techniques whose focus is the precarious maintenance of human life, as well as defending a natural process of death, that is, to reflect on Orthenasia as a way to preserve the autonomy of patients.

Subsequently, a historical and semantic contextualization was elaborated on the legal institute of the Anticipated Directives of Will (Davs), analyzing its origin, how it occurred its implementation in the legal system, as well as all the particularities of the document, emphasizing the two models that have been developed for this, the living will and the lasting mandate. This analysis sought to defend that the VAD is an existential legal business, in which the autonomy of the subject must be preserved and propagated.

Finally, there was an analysis on the inexistence of federal regulations on Vads, emphasizing that the mentioned existential juridical business is valid has constitutional and infraconstitutional support, however it is essential a normative that regulates the subject, as a way to solve procedural conflicts about its registration, as well as the dissemination of the institute, making it accessible to Brazilians.

In view of this, this study has reserved itself to analyze the particularities existing in the finite process of human life, the existential autonomy of patients and the family and medical interference in this very personal harvest of being, as well as the Davs as a solution to these questions, therefore, the discussions that permeate this theme are carried out from the civil-constitutional perspective between private law and public law.

The questions raised correlate with the right to life and freedom, expressly provided for in art. 5th, caput, of the Federal Constitution and the existential private autonomy of the patient, their possibility of self-determination at the moment of death, which, like life, must be worthy. Thus, the discussions transpose the personality protection provided by the Civil Code and relate to the fundamental rights expressed in the constitutional text, before the dignity of the human person, the existential autonomy associated with freedom and psychophysical integrity.

2. THE END OF THE NATURAL PERSON: THE PROCESS OF THE TERMINALITY OF LIFE

In several periods of Humanity man has perfected himself in the search for solutions of several chronic diseases that afflict the population. One of the great purposes of the technologies and the improvements of medicine has been and is being the distancing from death, prolonging the state of life of the human being, although through mechanisms whose quality of this life is doubtful. However, the human being has only one certainty in his life: his finitude. In this way, the questions and reflections on the various questions regarding the end of life are necessary and current.

Death, extinction of the natural person, is an inevitable consequence of life. The human inability to understand and reflect on it is millennial. Man has always possessed the ambition to tame it and thus prolong its survival, forgetting his own frailty of body and mind. Senility and finitude are biological and thus natural processes. However, the relentless and incessant distancing from death and the preservation of life at all costs are unnatural, artificial processes that can preserve a painful life, a process of death more suffered, thus nullifying the dignity and freedom of a person (BARROSO; MARTEL, 2010, p. 236-237).

> The end of the person is as real as the beginning, and precisely in the sense that, as we did not exist before birth, we will no longer exist after death. However, death cannot suppress more than birth has established, that is, it cannot suppress that which from the beginning made birth possible. In this sense, natus et denatus (born and unclassified) is a beautiful expression. However, empirical knowledge as a whole presents only phenomena: therefore, only these are affected by the temporal processes of birth and perishability, but not by what is phenomenalized, the essence itself (SCHOPENHAUER, 2013, p. 23-24).

In the process of human existence, considering the being-in-the-world', there are some moments when people do not have the ability to express feelings and wills, because they are in a state of biological or legal limitation for this mister. In Brazil, unfortunately, it is in these moments that many people have their will and perspective of life annulled, that is, disrespected.

This is because, still persist in the hospital environment and in the family conducts of obstinacy therapy that promote distanasia, without taking into account, often the own will of the patient. Moreover, the Brazilian society also reinforces these procedures, by remaining static before the subject of the death process, hence the need to discuss the end of life process, its nuances, fortunes and misadventures, respecting the dignity of the human person in every sense and comprehensively.

Among these situations there is the so-called vegetative state, for example, a situation in which a certain person may have his will disregarded by the application of certain medical treatments that do not match his own history and outlook on life. In addition, there are also so-called degenerative diseases that can weaken the human conscience and prevent the person from fully exercising his existence and making decisions about medical procedures and treatments such as Alzheimer's, rheumatism, multiple sclerosis, among others.

However, it should be emphasized that it is not always the cases of weakness in the conscience and impossibility of expressing thoughts and feelings that occur the disrespect to the freedom and will of a person. This situation of interference in patient autonomy may also be present in individuals with chronic diseases, such as cancer. These subjects live in the hospital environment fragile and vulnerable, often to the submission of any and all procedural types that can artificially distance death, prolonging life at all costs (distanasia), without any quality of life.

In these cases, medical treatments are, most of the time, painful for the patient and, due to the lack of communication and information, as well as to family and medical interference in existential private autonomy, estss people findat the mercy of these treatments that only prolong an artificial life, thus suppressing the very dignity of the human person.

Thus, private autonomy, in addition to establishing the freedom of the individual to conduct property juridical business, free from the interference of others, is also linked to the control that the person has over his own body. In this sense, the exercise of conservative acts by the family or doctors in the decision-making of patients on issues related to their physical and/or psychic integrity - although influenced by social solidarity - revealif illegitimate, because they can cause the violation of human dignity, given that, by not respecting the biographical trajectory of the being, they hurt their private autonomy (TEIXEIRA; SÁ, 2018, p. 244).

The right to choose the medical procedures that you want or not to be performed in your own body is closely related to freedom, that is, to existential private autonomy. Therefore, deciding on questions concerning the body and the finiteness of life correspond to an expression of human individuality, free from the interference of others, after all, in the words of Stefano Rodotà:

> Whose body is it? The person concerned, the relatives around her, a God who has donated to her, a nature that wants it inviolable, a social power that takes a thousand forms of it, a doctor or a magistrate who establish their destiny? (RODOTÀ apud MORAES; CASTRO, 2014, p. 780).

Are it with these situations that questions arise, bearing in mind that death is an inevitable process, would the individual have power over it? Is it possible that he had the right to choose which treatments he wants or not to apply to himself? Would you, therefore, have the right to choose the right moment of his death, when in the processes of life termination? Every individual has the legal and constitutional support for a dignified life, however, would the human being have the right to a dignified death?

Although these issues may seem insoluble at first, there is a need to address them, considering, by methodological cut option, that it will not be euthanasia, consistent with

> "intentional medical action to hasten or cause death - with the sole benevolent purpose - of a person who is in a situation considered irreversible and incurable, according to current medical standards, and who suffers from intense physical and psychic suffering" (BARROSO; MARTEL, 2010, p. 239).

In Brazil, the constituent legislator inserted the idea that life, in order to be worthy, needs the widest freedom when referring to the existential aspects of being, according to the teleological interpretation of art. 1st, section III, of the Federal Constitution (BODIN DE MORAES, 2010, p. 189-190). Therefore, respect for subjective decisions at the moment of human finitude, in a responsible and informed way, free from the intrusion of others, is one of the ways of safeguarding the dignified human life in all its completeness.

Thus, from a civil-constitutional point of view, the content of freedom, as regards existential private autonomy, is a fundamental right that can be expressed in different ways: in freedom as the opportunity to accomplish everything that legislation does not prohibit, as well as the duty of non-intervention in the private harvest of the human being, as well as encompassing the process of self-determination - "obedience to oneself" (BODIN DE MORAES, 2010, p. 190-191). In this way, the process of choice, including the end-of-life moment, as the opportunity to realize the Davs, must be ensured and its content must be filled only by the person, individually considered.

The content, now defended, is linked to the civil and constitutional aspects related to human freedom, expressed in the existential private autonomy and the possibility of the realization of Vads, instrument, as will be seen, able to promote the preservation of the self-determination of the human being who reaches, even, the final moment of life. The present analysis is therefore limited to private law, mainly as regards the premises of private life provided for in the Civil Code, as well as public law, concerning the Constitutional Law, in view of the fundamental guarantees of freedom, privacy and intimacy of human beings as a means of guaranteeing respect for the dignity of the human person.

In this line of argument, if we intend to defend what can be called the natural process of death, that is, to reflect on Antarctica, "death in its proper time, not combated with the extraordinary and disproportionate methods used in distasia, nor rushed by external intentional action, as in euthanasia" (BARROSO; MARTEL, 2010, p. 240) respecting, thus, the autonomy of the person to exist in the natural process of life, rejecting the incidence of medical procedures whose focus is the artificial maintenance of human life at all costs.

The following question arises: is life a right available? The reflection on the right to the realization of Davs relates to the possibility of availability or unavailability of human life. Initially, by considering it as a very fundamental and personal right, it is possible to understand the right to life as an unavailable prerogative, since it proves to be one of the most important legal assets, if not the most important of the person, that is, it would be absolutely inviolable.

However, human life is not restricted to biological dynamism, but can also be understood as a process of self-determination of the human person, as a development of the unique and irreplaceable will of each being (ROCHA, 2007, p. 224). Therefore, beyond a life, viewed only from the biological aspect, it is essential to understand it as a process of strengthening human autonomy in order to guarantee dignity.

There is no duty to life in the Federal Constitution, but an intimate relationship between the right to psychophysical integrity and the right to a dignified life. This dignity is manifested in the possibility of making choices, conscious and responsible, about one's own life, thus arising the premise that interference in subjective decisions concerning human finitude is not legitimate, the will of third parties or the carrying out of compulsory procedures capable of establishing treatments that only prolong the natural process of death, which affronts human dignity itself (ROCHA, 2007, p. 224).

Therefore, by guaranteeing the possibility of carrying out the existential juridical business of the Anticipated Directives of Will, the dignity of the human life of the person is assured in the last moments of his or her existence. Thus, there is no need to speak, at the moment of realization of this act and in the fulfillment of the existential choices enshrined therein, in the availability of human life, but that its effectiveness reflects respect for the biographical trajectory of each one. Thus, in the words of Ana Carolina Brochado Teixeira and Maria de Fátima Freire de Sá

> it must be made clear that, if death appears as a possibility in the process of building personality, it must be considered, not as an affront to the right to life, but as a realization of a good life project of a recipient or co-author of the law that seeks the realization of his individuality (TEIXEIRA; SÁ, 2018, p. 243).

In this way, respect for the dignity of the human person, also in the process of dying, as well as the guarantee of the realization of the Davs, enables the protection of human life in its entirety, in view of its attainment, above all, the values developed by the person himself in the course of his existence, that is, his life trajectory. Thus, these rights relate to the personality of the subject, codified in the Civil Code, as well as the rights and guarantees expressed in the Federal Constitution, and these are the perspectives observed here.

3. ANTICIPATED DIRECTIVES OF WILL: HISTORICAL AND SEMANTIC CONTEXTUALIZATION

The Anticipated Directives of Will (Davs) consist of the kind of manifestation of the autonomy of will regarding medical-surgical treatments and procedures that are desired or not to be applied in the natural person, that is, it is through this instrument that the patient can exercise the freedom to decide on the treatments, procedures and medical care to be applicable in his own body, even when he can no longer decide. These are essential information concerning harmless treatments until invasive and risky surgeries (GODINHO, 2012, p. 955), that is, a skillful instrument for the full effectiveness of which "no one can be constrained to undergo, at risk of life, medical treatment or surgical intervention", in the form of art. 15 of the Civil Code.

The VAD can be considered as a projection of private autonomy for the future, therefore, it is a legal business capable of anticipating the individual will, so that its effects are implemented later. Initially, this instrument was created with the objective of limiting the "non curative medical intervention", that is, the therapeutic obstinacy, mainly in cases of terminal diseases or irreversible unconsciousness. Currently, Vads also have the purpose of the patient to refuse certain therapeutic options and choose the treatments that suits him, to be per-

formed in the future, especially in the event of possible unconsciousness (SÁ, 2012, p. 183), especially considering the technological advances in the area of health today.

The Davs emerged in the 1960s with US law, and were positively endorsed by the federal Patient Self Determinaction Act of 1991, the aim of this law was to protect the self-determination of patients' will in decisions involving their health care. This was a great advance for the communication between doctor and patient, bypassing a paternalistic view, in which the doctor was the master of the decisions on the health of a given patient, being therefore this subject to his technical and professional will (DADALTO, 2013, p. 1).

In American systematization, Vads are formalized by means of a document in which the patient reduces to writing the treatments by which he does not wish to be submitted when he is in a vegetative state or in other cases where he is unable to express his will. The expression of this will, bet on the instrument, overrides the will of health professionals, as well as family, friends, tutors or curators and this document must be signed by two witnesses. In addition, the document must be delivered to the personal physician, spouse, lawyer or patient confidant, as well as the document must be referenced by the Committee of the hospital where the patient is being treated. Finally, this document can be revoked at any time until the patient reaches the state of unconsciousness (MELO apud DADALTO, 2018, p. 254).

In general, the Anticipated Directives of Will value personal autonomy, with the aim of respecting the enlightened choices of people with the object of their own body. It is therefore a possible impediment to therapeutic obstinacy, since the natural person will be able to choose a certain medical treatment that values his quality of life, that is, it consists in the enhancement of a dignified life and also of a dignified, less painful and suffered death.

This institute is a possibility for the patient to self-determine before the will of doctors and family in the hospital environment. Autonomy, given the options of medical treatment, has as a premise the opportunity to refuse a certain procedure that would be applied to it. This alternative is supported by the Federal Constitution, specifically in the right to freedom, ensuring that the patient's will overrides the therapeutic option chosen by the health professional, provided it is a conscious decision and after the proper information (DANTAS, 2019, p. 590-591).

The Vads have a direct relationship with the so-called Palliative Care (PS), and there are serious studies, in the sense of their application in the home, by teams that make up the Primary Health Care (PHC). Thus,

> PHC comprises a form of care comprised of essential health care based on methods, practical technologies and socially acceptable scientific evidence that are universally available to individuals, families and the community, by encouraging popular participation. This assumption, originating from the Declaration of Alma-Ata 4 of 1978, aims at a new form of organization of the health system, characterized by multidisciplinary actions of individual and collective scope, located in the first level of care in these systems. It is noteworthy that PC implies an interpersonal relationship between those who care and those who are cared for, thus depending on a multidisciplinary approach to produce harmonic care, aimed at the individual with no possibility of healing, as well as his family (SOUZA; ZOBOLI; PAZ; SCHVEITZER; HOHL; PESSALACIA, 2015, p. 350).

On many occasions the therapeutic options presented to the patients can cause greater suffering, due to the malaise and intense side effects. Therefore, through Vads, the person can opt for less invasive therapeutic options, that is, they can decide for palliative[3] care , in order to preserve their personality, even at the time of finitude of human life (TEIXEIRA; SÁ, 2018, p. 246).

In this way, the Davs propagate the knowledge and maturation of the human being about his finitude and vulnerability, that is, the human being, conscious of his own biological frailty, will be able to choose which medical treatments are consistent with his life history, identity and dignity, to the point of not wanting the prolongation of an artificial life, but choosing less painful medical procedures that guarantee you a physical and mental comfort for a dignified death in respect to your life path.

Autonomy, in its existential bias, constitutes self-government, the manifestation of subjectivity, in the act of drafting laws that lead their own lives and coexist with the norms created by the State, that is, it is precisely freedom to decide individually, rationally and not coerced, on subjective issues that do not affect third parties, but only oneself (TEIXEIRA, 2018, p. 95).

Thus, the act of performing an VAD corresponds to a manifestation of existential autonomy, in view of the self-regulation, the possibility of deciding on medical procedures that are desired or not applied in the body itself and, Being a conscious and informed decision, of an eminently individual nature, it must be respected by all and observed by health professionals.

In the period when American federal law was published several American states recognized its legitimacy and adopted it, and there were two types of Davs: living will (known as living will) and Durable power of Attorney for health care (known as a lasting mandate). The first consists of a document in which a person capable of expressing his or her wishes regarding medical treatment which he or she ratifies or rejects and which should be observed in the future if he or she is in a situation which he or she is unable to express his or her true will, an example would be the comatose state. The second is the appointment of one or more people to decide about the medical treatments to be performed on the patient who is also in a situation that cannot express their will. In this case, this third person, also called the attorney, must respect the patient's innate will (DADALTO; TUPINAMBÁS; GRECO, 32013, p. 464).

These documents (vital will and lasting mandate) have no patrimonial purpose, as they relate to personal, irrevocable and non-transferable rights, more specifically, linked to the person's power to control his or her own body with regard to the medical procedures that he or she wishes to be applied.

At this point, there is even a reflection on the terminology "living testament", because, as the arguments put forward, there is a terminological impropriety about the expression "testament", so dear to Civil Law with regard to the patrimonial dispositions by act áticausa mortis', which is given, by an almost literal translation of the American expression, although it should be read from existential and non-material rights, because of these it is not.

3 Palliative care can be defined, according to the World Health Organization (WHO), as "total active care for patients whose disease no longer responds to curative treatment. Pain control and other symptoms and psychological, social and spiritual problems are a priority. The objective of Palliative Care is to provide the best quality of life for patients and their families" (OLIVEIRA; LOPES, 2007, p. 168).

There are also other pertinent criticisms of the use of this terminology, such as the fact that the will only produces post-mortem effects, and this will not necessarily occur in the case of Davs. Moreover, the characteristic of the solemnity is questioned, essential in the case of the act of disposition of the patrimony, but questionable in the case of the Davs (SÁ, 2012, p. 184), given the own normative absence in order to establish specific formality.

In Brazil, in order for the Anticipated Directives of Will to penetrate the legal order, it is necessary, in the foreground, reflection on the possible right to a dignified death in respect of the fundamental right to the dignity of the human person enshrined in the Federal Constitution of 1988, in order to prevent therapeutic obstinacy, based on the application of medical procedures, often not tolerated by the patient, whose main objective is the prolongation of an artificial life, suffered and painful.

It should be pointed out once again that we are not here defending the so-called euthanasia, in which the patient intends to put an end to life, but only and exclusively, allowing the person the full exercise of choice regarding medical treatments and procedures that he or she does not wish to undergo, This is because there is a multitude of technological possibilities whose main purpose is to prolong life, without taking into account the risks, damage and suffering to which the person is subjected, in a fine line to its objectification. Euthanasia requires a more accurate study, whose limits do not allow its approach.

In order for the Anticipated Directives of Will to enter the Brazilian legal system, it is necessary to establish an honest and sincere relationship between the patient and the doctor, free from the paternalism in which the doctor is the center of decision-making, a relationship of respect for the patient's autonomy of will, so that he can anticipate his choices regarding the medical treatments to be applied in the future in a given situation of vulnerability, bearing in mind that this is a characteristic of human life.

It should be noted that there is no explicit current legislation on Vads in the Brazilian legal system, which in itself is not sufficient to prevent the validity and effectiveness of provisions with such contents, since it is in the field of autonomy deprived of will and there is no legal impediment to the provisions on issues related to the end-of-life process, without pretension of anticipation of death, but only regulating, by declaration of will the procedures and medical-surgical treatments that it allows itself to undergo. It has already been said on another occasion "provided that there is no legal prohibition, not contrary to public order and good customs, people enjoying their private autonomy may be linked to legal affairs, which in this case have existential rights, because they do not concern property rights, but to the exercise of rights that have the person himself and his dignity as centrality" (ANGELUCI, 2019, p. 49).

Moreover, it is necessary to emphasize that body autonomy, understood as the self-determination of the subject in relation to his own body, a subspecies of the gender of existential autonomy, is also related to the implementation of the will enshrined in the Vads, bearing in mind that it contains expressions of the concrete action of freedom and entails consequences only in the sphere of its holder (BODIN DE MORAES; CASTRO, 2014, p. 796). Therefore, the absence of relevant legislation on the subject does not prevent the realization and implementation of the will enshrined in this legal institute, since it corresponds to the action of body autonomy, one of the characteristics of the exercise of freedom.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 27-41 • 2020

It should, however, be emphasized that this normative absence leads to at least two problems identified: i) prevents wide access and knowledge on the subject and, consequently, its diffusion to as many people as possible and ii) allows a certain legal uncertainty on the subject, because the lack of regulation makes people hostage to variable interpretations as to the validity and effectiveness of these instruments.

In the wake of these problems, the Federal Council of Medicine has issued regulatory norms on Vads, which are, until now, the only normative sources that are reported in the Brazilian legal system, although it is a deontological norm and, therefore, with application restricted to the sphere of medical professionals, it is a relevant step on the subject, which needs further progress.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 27-41 • 2020

4. FOR A FUTURE OF ADVANCE DIRECTIVES

Historically Civil Law centers its major concern with the patrimony of the person, its regulation and preservation, there is rarely an explicit concern with its existence and dignity, what has been felt more lately, from the Civil Code of 2002 that expressly regulated the rights of the personality and showed more pronounced concern with the person in each legal relationship, as a result of the guidelines of the Federal Constitution itself of 1988.

It should be noted that, over the years, the concerns have ceased to be strictly patrimonial and have gained an existential focus, and this is what the Davs are concerned with, specifically with the expression of the private autonomy of each human being in the end-of-life process.

Autonomy can be exercised in a prospective way, that is, by pointing out which actions should be followed in the future by physicians and health professionals, especially in cases of unconsciousness, in order to ensure, if applicable, dignity at the end of life (TEIXEIRA; SÁ, 2018, p. 255-256). It is in this sense that the Davs act, expressing the power of action of the person throughout the process of their existence, in order to safeguard the integrality of their being.

Thus, some of the positive effects that scholars point to are the preservation of the patient's self-determination, as well as the possibility that these documents will function as guides that will reduce conflicts in the decisions of family members or even guardians. In addition, it is worth mentioning that Vads can also decrease the professional dilemmas that arise in the terminality of life (MELO apud COGO, 2018, p. 256).

Despite all the studies carried out on the subject, there is still a persistent impasse in the midst of these researches, that is, there is still no federal legislation regulating Vads, being expressly regulated only by a Resolution of the Federal Council of Medicine (CFM)as mentioned above.

The Code of Ethics of the Federal Council of Medicine, adopted by resolution CFM n° 2217/2018, of September 27, 2018, assumes the ethical commitment to respect the autonomy of the patient, which can be verified when expressly prohibits the doctor "guarantee the patient the exercise of the right to decide freely about his person or his well-being, as well as exercise his authority to limit it" (art. 24), as well as, when prohibits "shorten the life of the patient, even if at the request of this or his legal representative" (art. 41, caput), guiding that "in cases of incurable and terminal disease, the physician must offer all available palliative care without

taking unnecessary or obstinate diagnostic or therapeutic action, always taking into account the patient's expressed will or, if impossible, the legal representative" (sole paragraph of art. 41), therefore respecting the patient's will.

In addition, the CFM published, in 2012, Resolution n° 1,995 that disciplines Vads in Brazil, considering the current discussion of the subject and the social and professional concern to discipline the conduct of physicians (MELO, 2018, p. 269).

However, Resolution n° 1.995, because it was created by the CFM, under the legitimate power of classist regulation, although it cares about discipline on this current issue, it only regulates the conduct of the physician in adverse circumstances of the Davs and, on many occasions, the aforementioned resolution disregarded the patient's private autonomy, as noted in article 2°, § 2° of the aforementioned resolution[4].

Thus, it appears that such a resolution, although it presents the worthy concern to standardize the Vads under the focus of medical conduct, it is still unsatisfactory, as it does not lay down rules for the formalization of this document, its registration, rights of the patient, among other important issues to ensure the very personal right of self-determination of the human being when faced with the terminality of life.

In this context, the Federal Senate's Bill n° 524, proposed in 2009, provided for the rights of the terminally ill patient, specifically what it consists of "the making of decisions on the institution, the limitation or suspension of therapeutic, palliative and suffering-mitigating procedures" (art. 1°). However, said project was filed in 2014 (MELO, 2018, p. 270).

There is, in addition to this, another Bill n° 5.559/2016 that is being processed in the Chamber of Deputies, which also deals with patients' rights, as well as discipline, in its article 20, the right of patients to have respected their Vads, both by health professionals, as for their families. However, this project does not provide for the formalization of this document, among other procedural issues, although it represents a legislative advance by introducing the Vads as an existential and personal issue of the patient (MELO, 2018, p. 270-271).

Although there is constitutional and infraconstitutional support for the validity of Vads, given that the integrative interpretation embodied in the constitutional principles of the Dignity of the Human Person (art. 5) and the prohibition of inhuman treatment (art. 5°, III) underpin the Davs (DADALTO, 2013, p. 4), there is still a lack of legislation in Brazil to regulate the matter, which can cause legal uncertainty, as the application of Vads will be at the mercy of the interpretation of each law enforcer, because there is no legislation to regulate the matter, which leads to considerable legal[5] uncertainty.

4 Art. 2°. In decisions about the care and treatment of patients who are unable to communicate, or to express their wills freely and independently, the doctor will take into account their advance directives.
(...)
§ 2° The physician will no longer take into account the anticipated directives of the patient or representative who, in his analysis, are in disagreement with the precepts dictated by the Medical Code of Ethics.

5 Like the decision drawn up by the Court of Justice of São Paulo: "VOLUNTARY JURISDICTION. ADVANCE DIRECTIVES OF WILL. ORTHOTHANASIA. Intention to establish limits to the medical action in the case of future situation of serious and irreversible illness, aiming at the use of artificial mechanisms that prolong the suffering of the patient. Decision to dismiss the case for lack of interest in taking action. Manifestation of will in the elaboration of living will generates effects independently of the judicial seal. Voluntary jurisdiction with integrative function of the will of the interested party applicable only to the cases provided by law. Demonstration that can be done through extrajudicial notary. Needless to move the Judiciary only to attest his sanity at the time of the declaration of will. Extrajudicial Registry can attest to the free and conscious manifestation of will and, if you want additional caution, the author can rely on witnesses and medical certificates. Declaration of the right to Antarctica. Author who does not suffer from any disease. Pleito declaratório não pode ser utilizado em caráter genérico e abstrato. Falta de interesse de agir verificado. Precedents.

Moreover, many people are unaware of the existence of Vads, which guarantees them the right to express, by means of a document, the medical treatment they do not wish to undergo in situations they cannot express their will, that is, in situations they are unconscious. In this way, through the legislation, with its due publicity, more people would know the Davs and, in this way, exercise their right to self-determination and freedom.

However, this does not mean that the legislation should be strictly procedural, as the Davs are an existential issue and are thus fluid, it is perhaps better to be regulated by means of general clauses allowing the system to be more open, it is only necessary to regulate matters involving the registration of these documents, as well as certain formalities that the document should set out, more generally and not restrictively, in order to enable the person to exercise his or her freedom fully, on existential issues.

In this sense, it is relevant a specific legislation on this subject to enable greater effectiveness of Vads and their dissemination in Brazil, in order to standardize some criteria of capacity and/or discernment of the grantor (with due respect to the Statute of the Person with Disabilities, thus enabling its inclusion for the realization of this existential document), as well as disciplinary the content of the Davs that would be legally valid in the Brazilian order (Given that, still, in our order, euthanasia and assisted suicide are prohibited), and also to regulate whether or not there would be a period of efficacy for these documents and also who could be appointed as attorney for health care and any formal aspects to their registration (DADALTO, 2013, p. 6)

In this procedural harvest, the Davs still do not have an official means for their registration, and some scholars on the subject, such as Luciana Dadalto, argue that the making of this document should be done through public writing, in order to guarantee legal certainty, since there is no official means for its registration, in practice grotesque errors are occurring, generating the possibility of cancelling these documents because they are fragile (DADALTO, 2013, p. 9).

In addition, many scholars also advocate, as was proposed in Portugal, through Law n° 25/2012, the creation of a Registry for Davs to ensure its deposit in a single location, making it easy to access for health professionals and, Thus, it is avoided that Vads become dependent on people who are sometimes accompanying the patient (RAPOSO, 2011, p. 183), which could be stored in the cloud, with access by health professionals, when necessary.

However, there are those who defend the unnecessary use of public deed for the registration of Davs, given the high cost for the registration of this document and, thus, this would cause little adherence to the realization of Davs, and would not make the constitutional right of patient self-determination viable to Brazilians.

Faced with all these impasses pointed out, often caused by the lack of legislation on the subject, there seems to be a need for federal legislation to regulate the matter in order to make this constitutional right accessible to all Brazilians who are still suffering in hospitals and cannot self-determine because they are in a situation of unconsciousness or are imminent, and still, depend on the will of their relatives, guardians or healers.

Sentence of extinction maintained. Appeal not provided". COURT OF JUSTICE OF SÃO PAULO. Civil Appeal nº 1000938-13.2016.8.26.0100, 7th Chamber of Private Law. Available at: https://esaj.tjsp.jus.br/cjsg/getArquivo.do?conversationId=&cdAcordao=12400740&cdForo=0&uuidCaptcha=sajcaptcha_1fa8c7d2220844cbb31c121fd409e1d1&vlCaptcha=rzvq&novoVlCaptcha=>. Accessed on: 09/02/2020.

The Bill n° 25/2012 approved in Portugal that, although some provisions are criticized by scholars (such as the term of validity of the document in five years and that, after it has passed, this must be renewed by the grantor) presents advances on the subject and can be used as an inspiration for the creation of Brazilian legislation, adapting to the needs and peculiarities of this system that is very close to that. By way of example, the aforementioned project provides on the creation of the National Register of Vital Testaments (DADALTO, 2013, p. 4), with the purpose of facilitating the access of health professionals to Vads, as well as helping to preserve the patient's will.

As for the Spanish legal landscape, it is important to note that the first normative on Davs emerged in Cataluña, where Law No 21, of 29 December 2000, was created. This legal document was addressed to the doctor responsible for the treatment, in which a larger and capable person expressed his choices as to the therapeutic options to be applied if, in the future, he could not express his will personally. Catalan law also lays down, as a requirement for the existence of the legal act, the performance before a notary or three witnesses, who are of legal age and have full civil capacity, two of whom may not be related until the second degree, as well as can not have patrimonial bond with the grantor (FREIRE DE SÁ, 2012, p. 184-185).

The community of Madrid has also regulated this issue through Law No 3 of 23 May 2005, providing as a citizen's right the possibility of laying down the prior instructions of will on medical treatments that the person could authorize for carrying out in his own body. There was also the creation of the Register of Previous Instructions of the Community of Madrid, where these documents must be deposited, preserved, and accessibility in that territorial area is guaranteed (FREIRE DE SÁ, 2012, p. 185).

Subsequently, Spanish legislation on Davs also created a National Register of Prior Instructions that would be administered by the Ministry of Health and Consumption and was regulated by Decree n° 124/2007 (DADALTO, 2013, p. 3-4)in order to ensure that doctors are aware of the document and thus respect the patient's wishes.

It is thus noted that, although Davs has constitutional and constitutional protection, it is essential to establish legislation to regulate the matter, in order to enable some procedural and procedural conflicts to be resolved, as well as to disseminate this institute, making it accessible and knowledge of all Brazilians.

5. FINAL CONSIDERATIONS

It is cediço that the life expectancy has suffered considerable increase with the advances of medicine and sciences in general, having strong influence in the end of life process, because this stage no longer occurs as before, is accompanied by a possible artificial extension thanks to technological advances.

This advance, at the same time is cause for celebration and concern, the first because the human being seems to have found formula for longevity, although it is not yet the formula of immortality, it is already a breath, considered the life expectancy of the ancestors. On the other hand, it is a source of concern, because artificially delaying death can cost the very dignity of

MERITUM LAW JOURNAL • v.15 • n.4 • p. 27-41 • 2020

the person, who, given his or her ability to make decisions, can be imprisoned to frivolous treatments and medicines, contrary to his own historicity.

Then comes the Davs as a skillful instrument to declare the will about treatments, care, medicines and procedures that you want or do not submit when you can no longer consciously express the will; relevant mechanism to allow the person, the full exercise of their autonomy in relation to existential questions, notably as to the final stage of life, when the forces and consciousness no longer correspond to their desires. Therefore, a stage of vulnerability that calls for inclusion and respect for the experiences and experiences of being in the world.

Although there is no explicit legislation, it is a valid legal business and can be effective in the Brazilian legal system, however, the absence of regulation causes a multitude of debates, often sterile and which end up hindering the full exercise of the person's existential rights, hence the need to seek to debate and regulate the subject.

It is necessary to dialogue about the moments of the end of life and the Davs represent a path for this mister, after all death is the only certainty you have!

REFERENCES

ANGELUCI, Cleber Affonso. Considerations about existing: the directives of will and dignified death. Brazilian Journal of Civil Law - RBDCivil. Belo Horizonte, vol. 21, p. 39-59, jul./set., 2019.

BARROSO, Luís Roberto; MARTEL, Letícia de Campos Velho. Death as it is: dignity and individual autonomy at the end of life. Magazine of the Faculty of Law of Uberlândia. Uberlândia, MG, vol. 38, p. 235-274, 2010.

BODIN DE MORAES, Maria Celina. In the measure of the human person: studies of civil-constitutional law. Rio de Janeiro: Renew, 2012.

BODIN DE MORAES, Maria Celina; CASTRO, Thamis Dalsenter Nurseries of. Existential autonomy in the acts of disposition of the body itself. Pensar Magazine, Fortaleza, vol. 19, n. 3, p. 779-818, Sept. / Dec. 2014.

BRAZIL. Bill 52, 2009. Provides for the rights of the person in the terminal stage of illness. Diário do Senado Federal, issue n ° 188. Published on 26/11/2009. Session 25/11/2009, p. 62602.

BRAZIL. Bill no. 5,559, of June 22, 2016. Provides for the rights of patients and provides other measures. Available at: http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2087978. Accessed on: 15 jan. 2019.

BRAZIL. Federal Council of Medicine. Medical Code of Ethics. CFM Resolution no. 1931/2009. Brasília: CFM, 2010. Published in the Federal Official Gazette, on September 24, 2009, Section I.

BRAZIL. Federal Council of Medicine. Resolution no. 1,995 / 2012. Provides for the patient's advance directives. Brasília: CFM, 2010. Published in the Federal Official Gazette. 2012, Section I.

DADALTO, Luciana. Record aspects of advance will directives. Civilistica.com. Rio de Janeiro, a. 2, n. 4, Oct.-Dec./2013. Available at: http://civilistica.com/aspectos-registrais-das-diretivas-antecipadas-de-vontade/. Accessed date 17 Aug. 2017.

DADALTO, Luciana; TUPINAMBÁS, Unai; GRECO, Dirceu Bartolomeu. Anticipated directives of will: a Brazilian model. Bioethics Magazine. Belo Horizonte, MG, vol. 21, n. 3, p. 463-476, Aug.- Nov./2013.

DANTAS, Eduardo. I will respect all your opinions that agree with mine. The Federal Council of Medicine and its peculiar concept of patient autonomy. Revista Jurídica Luso-Brasileira (RJLB), Lisbon - Portugal, Year 5 (2019), n. 6, p. 581-597.

GODINHO, Adriano Marteleto. Anticipated Directives of Will: Vital testament, lasting mandate and its admissibility in the Brazilian Order. Magazine of the Brazilian Law Institute. Lisbon, Portugal, Year 1, n°2, p. 945-978, 2012.

LOPES, Ruth Gelehrter da Costa; OLIVEIRA, João Batista Alves de. Palliative care: The need in current medicine before the patient outside the therapeutic possibility of cure. Revista Prática Hospitalar, year IX, n. 51, May-Jun. 2007.

MELO, Vivianne Rodrigues de. Anticipated Directives of Will: Construction of Dogmatic and Legal Bases. Law Magazine. Viçosa, MG, vol. 10, n. 01, p. 251-279, 2018.

RAPOSO, Vera Lúcia. Anticipated Directives of Will: in search of the lost law. Magazine of the Public Ministry. Portugal. January, March 2011.

ROCHA, Eneyde Gontijo Fernandes M. Right to the truth and autonomy of the will in the sick. De Jure - Legal Magazine of the Public Ministry of the State of Minas Gerais. Belo Horizonte: Public Ministry of the State of Minas Gerais, n. 8 (Jan./Jun. 2007), 2007.

SÁ, Maria de Fátima Freire de. Autonomy to die: euthanasia, assisted suicide and advance directives of will. Belo Horizonte: Del Rey, 2012.

SOUZA, Hieda Ludugério de; ZOBOLI, Elma Lourdes Campos Pavone; PAZ, Cássia Regina de Paula; SCHVEITZER, Mariana Cabral; HOHL, Karine Generoso; PESSALACIA, Juliana Dias Reis. Palliative care in primary health care: ethical considerations. Bioethics Magazine. v. 23, p. 349-359, 2015.

SCHOPENHAUER, Arthur. About death: thoughts and conclusions about the last things. Translation by Karina Jannini; São Paulo: Editora WMF Martins Fontes, 2013.

TEIXEIRA, Ana Carolina Brochado. Existential autonomy. Brazilian Journal of Civil Law - RBDCivil, Belo Horizonte, vol. 16, p. 75-104, Apr./Jun. 2018.

TEIXEIRA, Ana Carolina Brochado; FREIRE DE SÁ, Maria Fátima. Palliative care: between Autonomy and Solidarity. New Legal Studies Magazine - Eletrônica, Itajaí / SC, vol. 23, n. 1, Jan./Apr. 2018.

Received/*Recebido:* 06.04.2020.

Approved/*Aprovado:* 04.07.2020.

MERITUM MAGAZINE • v.15 • n.4 • p. 42-57 • 2020

TRANSMEDIA EDUCATIONAL NARRATIVE AND PODCAST

NARRATIVA EDUCACIONAL TRANSMÍDIA E O PODCAST

Frederico de Andrade Gabrich[1]
Alessandra Abrahao Costa[2]

ABSTRACT

This research uses the hypothetical deductive method and has Resolution n. 5 of the Ministry of Education, of 12/17/2018, as theoretical reference, which establishes that the Law Course Pedagogical Project (PPC) should have as structural elements, among others, the realization of inter and transdisciplinarity, the incentive to innovation, the integration between theory and practice, the specification of the active methodologies used. The problem is that law professors and students usually don't know how to do this in practice. The research seeks to point out viable paths for this, from the transmedia educational narrative and the podcast.

Keywords: Educational narrative; Transmedia; Podcast.

RESUMO

Esta pesquisa usa o método hipotético dedutivo e tem como referencial teórico a Resolução n. 5 do Ministério da Educação, de 17/12/2018, que estabelece que o Projeto Pedagógico do Curso (PPC) de Direito deve ter como elementos estruturais, dentre outros, a realização de inter e transdisciplinaridade, o incentivo à inovação, a integração entre teoria e prática, a especificação das metodologias ativas utilizadas. O problema é que os professores e alunos dos cursos jurídicos normalmente não sabem como fazer isso na prática. A pesquisa busca apontar caminhos viáveis para isso, a partir da narrativa educacional transmídia e do podcast.

Palavras-chave: *Narrativa educacional; Transmídia; Podcast.*

1 Doutor, Mestre, Especialista em Direito Comercial/Empresarial e graduado em Direito pela mesma Universidade Federal de Minas Gerais (2007, 2000, 1993 e 1990). Professor Adjunto da Universidade Fumec (desde 1995). Responsável pelas disciplinas Direito Empresarial I e II (graduação), Estratégias Jurídicas das Organizações (mestrado), Metodologia de Ensino Jurídico (mestrado), Direito, Arte, Literatura e Transdisciplinaridade (mestrado). Coordenador de Projeto de Pesquisa, autor de livros e artigos científicos, e orientador de diversas dissertações de mestrado voltadas para Análise Estratégica do Direito, das Metodologias de Ensino e da Transdisciplinaridade. Diretor da Análise Estratégica, com experiência em negociação, mediação, arbitragem, direito societário, fusões e aquisições, estruturação de negócios, educação corporativa, design instrucional, inovação disruptiva. Conselheiro (voluntário) - Câmara Mineira de Arbitragem Empresarial (Caminas). E-mail: fredericogabrich@fumec.br.

2 Mestre em Direito no Programa de Pós-Graduação Stricto Sensu da Universidade FUMEC, na área de concentração: Instituições Sociais, Direito e Democracia. Linha de pesquisa: Direito Público (Esfera pública, legitimidade e controle). Bolsista pela Fundação de Amparo à Pesquisa de Minas Gerais (FAPEMIG). Parecerista "ad hoc" da Revista Meritum. Membro do Núcleo de Pesquisa do PPGD da Universidade FUMEC. Associada ao Conselho Nacional de Pesquisa e Pós-Graduação em Direito (CONPEDI). Possui pós-graduação em andamento em Direito Civil: Doutrina e Jurisprudência, pela Escola Paulista de Direito. Atuou como estagiária docente na Universidade FUMEC, na área de Direito Penal. Possui graduação em Direito (2017) pela Faculdade de Ciências Humanas, Sociais e da Saúde (FCH), da Universidade FUMEC e graduação em Jornalismo (2012) pela Faculdade de Ciências Humanas, Sociais e da Saúde (FCH), da Universidade FUMEC. Tem experiência na área de Comunicação Social, com ênfase em Comunicação e Linguagem. Atuou na Assembleia Legislativa de Minas Gerais (ALMG), onde constituiu equipe de Assessoria de Imprensa em gabinete de Deputado Estadual. Exerceu atividade de repórter e produtora da Rádio Band News FM, do Grupo Bandeirantes de Telecomunicação. Tem experiência na área de Direito, com ênfase em Direito Imobiliário, Direito Civil e Direito do Trabalho. Advogada. ORCID iD: https://orcid.org/0000-0002-1678-8950. E-mail: alessandracosta7@gmail.com.

How to cite this article/Como citar esse artigo:
GABRICH, Frederico de Andrade; COSTA, Alessandra Abrahao. Transmedia educational narrative and podcast. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 42-57, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.8181.

1. INTRODUCTION

Art, literature and transdisciplinarity can indicate ways to solve or to minimize some of the biggest current problems of Law courses: the lack of interest and / or the growing apathy of students, the lack of connection between theory and practice, the lack of innovation disruptive and the use of really active teaching and learning methodologies.

In fact, the curricular guidelines for Law courses, established by Resolution no. 5 of the Ministry of Education, on 12/17/2018, in article 2, paragraph 1, establish that the Law Course Pedagogical Project (PPC) must have as structural elements, among others, the realization of interdisciplinarity, the incentive to innovation , the integration between theory and practice, the specification of the active methodologies used, the mandatory inclusion of the TC - Course Work (BRASIL, 2018).

In addition, article 5 of the same MEC Resolution no. 5/2018, establishes in its §2º that "the PPC will include the three formative perspectives, considering the structural domains necessary for legal training, emerging and transdisciplinary problems and the new teaching and research challenges that are established for the intended training" (BRAZIL, 2018).

The problem is that teaching, research and extension currently developed do not always prepare students of law courses for all of this. What's more: students and teachers need to develop inter, multi and transdisciplinary, innovative content, activities and research that allow the integration between theory and practice, using active methodologies, and usually do not know how to do this in practice. Worse, the educational projects of educational institutions often do not demonstrate, in an objective and clear way, how this will actually happen during the course.

Based on the hypothetical deductive scientific method and based on the Ministry of Education's Resolution nº 5, of December 17, 2018, this research seeks to point out viable ways to solve the above problem, especially through the transmedia educational narrative, which can also occur through the production of podcasts that promote, in an innovative and active way, the interaction between Law, art and transdisciplinarity. All with the objective of favoring that the competences foreseen in the PPC become, in an effective and meaningful way for the students, in a concrete reality in the undergraduate courses in Law.

2. NORMATIVE FOUNDATIONS OF INNOVATIVE AND TRANSDISCIPLINARY EDUCATION

Education is a social right ensured by the Constitution of the Republic in its article 6 (BRAZIL, 1988), and constitutes one of the most important pillars for sustaining a truly democratic and free rule of law.

But this is not just a merely formal education and disconnected from the real interests of the people, but a real, concrete education focused on the full exercise of citizenship and the true qualification for work in the 21st century (and not necessarily for the employment), which needs to be increasingly innovative, collaborative, entrepreneurial.

MERITUM MAGAZINE • v.15 • n.4 • p. 42-57 • 2020

Accordingly, according to the provisions of article 205 of the Brazilian Constitution:

> Art. 205. Education, the right of all and the duty of the State and the family, will be promoted and encouraged with the collaboration of society, aiming at the full development of the person, their preparation for the exercise of citizenship and their qualification for work (BRAZIL, 1988).

In order to achieve this goal, the Brazilian Constitution guarantees teachers, at all levels of education, the guarantees provided for in Article 206, among which stand out, the "freedom to learn, teach, research and disseminate thought, art and knowledge ", as well as the" pluralism of ideas and pedagogical concepts ". All of this without mentioning the specific didactic-scientific autonomy of universities, determined by article 207 of the Constitution (BRASIL, 1988).

At the constitutional level, it is exactly these guarantees that enable teachers in higher education to develop innovative, transdisciplinary, active pedagogical practices focused on the full development of students for the exercise of citizenship and for better qualification for the world of work, which it constantly modifies and evolves, as well as that it increasingly values sustainable entrepreneurship, innovation, and the ability to solve complex and intergenerational problems. In theory, starting with the best teacher qualification, this is possible even when there is no suitable pedagogical project or when the best strategic educational guidelines previously determined by the educational institution do not exist.

In the infraconstitutional plan, it is worth mentioning, according to the Law of Directives and Bases of National Education (LDB), Law no. 9,394 / 1996:

> Art. 43. Higher education aims to:
>
> I - stimulate cultural creation and the development of the scientific spirit and reflective thinking;
>
> II - training graduates in the different areas of knowledge, suitable for insertion in professional sectors and for participation in the development of Brazilian society, and to collaborate in their continuous training;
>
> III - encourage research and scientific investigation, aiming at the development of science and technology and the creation and dissemination of culture, and, thus, develop the understanding of man and the environment in which he lives;
>
> IV - promote the dissemination of cultural, scientific and technical knowledge that constitute humanity's heritage and communicate knowledge through teaching, publications or other forms of communication;
>
> V - arouse the permanent desire for cultural and professional improvement and enable the corresponding implementation, integrating the knowledge that is being acquired in an intellectual structure systematizing the knowledge of each generation;
>
> VI - stimulate knowledge of the problems of the present world, in particular national and regional ones, provide specialized services to the community and establish a relationship of reciprocity with it;
>
> VII - promote extension, open to the participation of the population, aiming at the dissemination of the achievements and benefits resulting from cultural creation and scientific and technological research generated at the institution.
>
> VIII - act in favor of the universalization and improvement of basic education, through the training and qualification of professionals, the carrying out of pedagogical research and the development of extension activities that bring together the two school levels (BRAZIL, 1996).

There is no problem, therefore, when Resolution no. 5 of the Ministry of Education, of December 17, 2018, in article 2, paragraph 1, establishes that the Law Course Pedagogical Project (PPC) must have as structural elements, among others, the accomplishment of interdisciplinarity, the incentive to innovation, the integration between theory and practice, the specification of the active methodologies used, the mandatory inclusion of the TC - Course Work (BRASIL, 2018). Nor, either, when article 5 of the same MEC Resolution no. 5/2018, establishes in its §2º that "the PPC will include the three formative perspectives, considered the structural domains necessary for legal training, emerging and transdisciplinary problems and the new teaching and research challenges that are established for the intended training" (BRAZIL, 2018).

However, according to Horácio Wanderlei Rodrigues:

> The PPC, in addition to the clear identification of all these elements, must also contain the express indication of how they will be operationalized in the real world; formally including each is insufficient.
>
> It is necessary to indicate the forms (strategies, methods, methodologies and techniques) and the means (resources and instruments) by which what is said will be carried out. In addition to signaling how your content and skills will be worked on so that the desired professional is effectively trained.
>
> It is no longer enough to list a set of characteristics and capabilities that the future professional should have incorporated at the end. It is necessary to demonstrate how the course will do so that, in fact, they will be added to the graduate's personal patrimony (RODRIGUES, 2020, p. 134).

The big question is: how to make all of this become a concrete reality in Law courses, considering the deficiencies of pedagogical projects (many of them merely formal), the curricular structures very attached to traditionalism, mental models and the reality of teacher training, the current educational coordinators and managers? How to do this in a contemporary, innovative way, with meaningful language for students, planned, systematic and with the active participation of teachers and students?

3. TRANSMEDIATE EDUCATIONAL NARRATIVE AND PODCAST

Current teaching and learning needs to follow the reality of the students' lives, which is completely inserted in a multiplicity of data, information and knowledge, which circulates in a frantic way (free or almost free) in the most diverse media and communication media, which complement and complete each other in a transmedia narrative. For this reason, contemporary education must also be transmedia, as messages and educational content need to be communicated to students, they need to communicate with teachers and also among themselves, through the most varied media that complement and / or complete each other, such as: the teacher's narrative - live - in classrooms (physical or virtual); the recorded video lessons (by the teachers and also by the students themselves); the language of printed and digital articles and books; as well as radio and TV programs, reports published in newspapers and magazines, as well as games, apps, websites, social networks, blogs, vlogs and podcasts.

According to Vicente Gosciola, transmedia narrative is a term that first appeared in 1975 and was created by composer and instrumentalist Stuart Saunders Smith, when he composed different melodies, harmonies and rhythms for each instrument and for each performer. But the concept was only applied in communication in 1991, when Marsha Kinder reported the multiple connections that her son made, in movies, on TV, in games, in games, with the characters Ninja Turtles, what the aforementioned author called a supersystem of entertainment or "transmedia intertextuality" (CAMPALANS; RENÓ; GOSCIOLA, 2012, p. 8-9).

In this sense, the transmedia narrative is based, fundamentally, on a project in which the parts of a story (of information, an idea or knowledge that one wants to transmit, disseminate, collaborate with) are completely connected by multiple means of communication and interaction, through the most diverse media, which complement each other, communicate, explain, self-reference. It is not about data, information or ideas that are disconnected and arbitrarily separated, but that are deliberately transmitted in parts, by different media, to form a whole, with much more effectiveness and meaning for those who receive the message, the information, the knowledge.

In fact, teaching and learning currently need to be transmedia, communicated in parts, in different ways, but also in an innovative and disruptive way, rationally unified, to ensure the greatest possible efficiency of the educational process. In this context, the transmedia educational narrative also needs to value active teaching methods, which place students at the center of the educational process and allow them to develop a critical spirit, the ability to solve complex and life-related problems. real.

One of the possible media of this "transmedia educational narrative" can be the podcast, which allows, among others, the connection between the (legal) object of teaching, with literature and with the most diverse artistic manifestations (which are also media of communication). ideas, facts and feelings), including music, cinema, theater etc. Inserted in a transmedia narrative and educational strategy, the podcast can be an important piece not only for the transmission of information and knowledge, but also for the connection between the subject matter of study, the practice and the reality of the student's life.

According to Pablo de Assis, in one of the chapters of the book Reflections on the podcast:

> The podcast has already received several definitions, some more precise, others less. It has already been called a "kind of radio over the internet", or even "a way to download audio files". However, as much as those who have never heard of what a podcast is able to have an image of what it would be, these definitions do not account for this new medium.
>
> The podcast can be briefly defined as a media file, traditionally an audio format file, transmitted via podcasting. And podcasting can be defined as a way of transmitting digital files, over the internet, using feedRSS technology and an aggregator (ASSIS, 2014, p. 29-30).

To clarify the difference between radio and podcast, as well as the importance of feedRSS technology, the same author adds, that:

> With podcasts and the use of feeds, the media is automatically downloaded to the user's computer or device, by the aggregator, without the need for direct pull or involuntary push. It is almost as if the user chooses to automatically

> receive the media, in a mix of pull and push. And this is only possible through the use of the feed, as the user needs to choose which program to download to subscribe to his feed, but the download is automatic. However, the podcast is still recognized as a pull system, because, even though the file is automatically downloaded, the subscriber can choose how and when to access its content and the subscription is still active in the search for content.
>
> One last notable thing about podcast-related feeds is the ability to subscribe to a podcast and download old programs from that feed and listen to them. This allows a program to be "eternal, while it lasts" on the internet, as the information contained in this feed can be accessed long after it is launched. [...]
>
> This points to the central issue of the podcast: the listener is no longer "hostage" to the imposition of traditional media. Unlike broadcasting, also called broadcasting, where the listener passively receives audio information passed through electromagnetic waves through a distribution center that is received by a radio device only at the places and moments provided by the distribution center, the podcast is available at any time and to anyone who actively seeks these files on the internet.
>
> This exercise of freedom that the podcast offers is a good way to demonstrate to the user the power of their actions and decisions. Listening to a podcast is not like listening to a radio: "what is going on?", But it is another creative tool: "I will listen to what I want" (FRANCO, 2009) and when I want (ASSIS, 2014, p. 33-34).

For all these reasons, the podcast is a highly libertarian medium, both for those who produce content, who are free to deal with the themes and subjects they like, and for those who receive it, who choose which programs and themes they want to receive automatically in their content aggregator, or individually, through customized surveys. Furthermore, as Pablo de Assis comments:

> The podcast, because it needs the intention of the podouvinte, makes the process of listening more intimate. You don't listen to a "by chance" podcast, the same way you open a website by chance or read a blog post in any way. The podcast is aimed at an audience, at a niche and if the podouvinte is part of it, it perceives precisely this relationship (ASSIS, 2014, p. 39).

Hence, even, the strength and significance that the podcast can achieve in a transmedia educational narrative. Whoever produces the content has complete freedom to deal with the subjects that they consider relevant, for a specific niche of listeners, interested in using the information received as elements that complete other information accessed through other media, at other times. This connection and complementarity, not only establish more "intimate" links between the parties, but also more meaningful and effective for the teaching and learning process. More: the podcast makes it easier to promote critical and reflective thinking, through connections between theory, practice and the real life of those who receive the information, in addition to inter, multi and transdisciplinary approaches (including with literature and with arts), which can favor the emotional and binding understanding of all the educational content that one wants to transmit through the most diverse media.

MERITUM MAGAZINE • v.15 • n.4 • p. 42-57 • 2020

4. HOW TO USE PODCAST RIGHT AND PUT THE STUDENT IN THE CENTER OF THE LEARNING PROCESS

In fact, the podcast is a medium that can be used in a transmedia educational narrative, for teaching any discipline, in any science. It is enough that there is a transmedia educational planning (preferably planned and structured in the pedagogical project of the course), which promotes the complementarity between the contents transmitted and received (in two ways), through the most diverse media available, as demonstrated in the previous chapter. And in law it is no different.

The law professor can use the traditional expository method (instrumentalist), as well as combine these classes with others that use constructivist and constructionist methodologies, through active teaching and learning methods, such as: inverted classroom, peer instruction, hybrid teaching, mind maps, stage splitting, etc. But the law professor can (and should) make use of all this, through multiple media, which complement each other: the teacher's narrative - live - in classrooms (physical or virtual); the recorded video lessons (by the teachers and also by the students themselves); the language of printed and digital articles and books; as well as radio and TV programs, reports published in newspapers and magazines, as well as games, apps, websites, social networks, blogs, vlogs and podcasts.

Specifically in relation to the podcast, given the freedom and ease of creation, production and reception, this is a medium that can be produced by both teachers and students. In this sense, it should be used as a means of cross-exchanging information, content and knowledge.

For this, both teachers can produce podcasts with approaches complementary to those available in other media (classroom, recorded classes, books, articles, laws, judgments), as well as students can also produce podcasts with reflections, research results, debates, interviews etc. All of this with the potential of transdisciplinary connection between Law, art, literature and other artistic and cultural manifestations, which may allow greater significance and interest on the part of the students, both in relation to the disciplines and themes that integrate what in the past called "minimum curriculum", whether with regard to the transversal treatment of content required in specific national guidelines, such as policies on environmental education, human rights education, education for the elderly, education on gender policies, education of ethnic-racial relations and Afro-Brazilian, African and indigenous histories and cultures, among others (§4º, of art. 2º, of Resolution no. 5/2018 of the MEC).

5. EXAMPLE OF LEGAL AND TRANSDISCIPLINARY PODCAST: "NEVER AGAIN - THE CYCLE OF DOMESTIC VIOLENCE IN VERSIONS"

Producing a podcast can be an activity carried out by both teachers and students. This can happen both in undergraduate and graduate courses in Law, especially when the activity

is provided for in the pedagogical project of the course, as a strategy and method for the real implementation of a transmedia educational narrative.

In some cases, however, regardless of the formal or actual pedagogical project of the course, the production of the podcast may result from the professor's freedom of professorship (art. 206 of the Brazilian Constitution) and appear as a complementary activity to other teaching and learning methods and strategies used in the course or in a specific discipline.

In this sense, the following podcast script was written and then produced by the co-author of this research, as the final work of the optional discipline called Law, Art, Literature and Transdisciplinarity.

In the specific case, it is not a tight and super-specialized discipline, commonly found in legal courses, from undergraduate to graduate. It is a relatively open, avant-garde and dynamic discipline, which allows the student to develop innovative, transdisciplinary research, which makes sense to him, and which also end up promoting student activism, reflections and many connections with the real problems of society, in addition to changing the mental model of the most effective teaching and learning methods.

The podcast "Never Again: the cycle of domestic violence in verses" is, therefore, the result of reflection on the possibility of implementing a transmedia educational narrative, as well as the connection between legal science and the various artistic and cultural expressions, in a to favor greater effectiveness of the new guidelines established by Resolution no. 5/2018 of the Ministry of Education (BRASIL, 2018).

In fact, the aforementioned podcast related the song "Never Again", by the Canadian band "NickelBack", with the numbers of domestic violence in Brazil and with the (in) effectiveness of Law 11.340, of August 2006, better known as Lei Maria da Penha (BRAZIL, 2006).

The purpose of the podcast production was to demonstrate, also, the importance of transdisciplinarity in the development of the most varied legal themes. The purpose was also to diversify the way of transmitting knowledge (through contemporary media) and to demonstrate how the student can really be a protagonist in the teaching and learning process, in order to stop being a mere spectator and / or passive receiver of content often not contextualized with your real life.

The following shows, as an example, that can be used as a paradigm for other productions, the script used in the recording of the podcast, which was divided into six parts: introduction, explanations about the song, translations of the song, climax and closing. The stretches in bold and in capital letters identify the moments of greater intonation of the voice; the paragraphs were divided with lines to represent the moments of pause in the speech, during the recording; the parts have been delimited according to the content of the song, and for that reason, it is marked in seconds and minutes.

For a better understanding of the potential of the educational narrative through the podcast (which should complement or be complemented by other media), it is suggested that the script reading and listening to the podcast's audio be performed simultaneously, which can occur through the following access link: https://soundcloud.com/alessandra-costa-283153873/podcast-never-again-a-violencia-domestica-em-versos.

5.1 PODCAST SCREENPLAY AND STRUCTURE:

The podcast "Never Again: the cycle of domestic violence in verses" begins with the melody of the song "Never Again", until the first 28 seconds. The song is by the Canadian rock band Nickelback, formed in Hanna, in the province of Alberta, in 1995, by vocalist Chad Kroeger, bassist Mike Kroeger, guitarist and keyboardist Ryan Peake and drummer Brandon Kroeger. Between 1995 and 2005, the group's formation went through several changes, until Daniel Adair replaced drummer Ryan Vikedal.

After the instrumental that marks the beginning of the composition, the announcer and the objectives of the channel are presented. The purpose of the podcast is to demystify the idea that it is not possible to learn law by making connections with other areas of knowledge, including those that are not considered sciences, such as the arts, cinema, literature and music.

After the podcast opens, the listener understands what the topic will be dealt with in the first episode. From then on, the verses of the song chosen as the connection point of the episode's theme are explained.

The song "Never Again" was released in 2003, as a single from the album "Silver Side Up". Originally, there was a music video made for the song. However, because it was considered too violent, the video was banned from being shown on some music channels.

The podcast "Never Again: the cycle of domestic violence in verse" relates the musical excerpts to the social reality of victims of domestic violence, followed by a brief introduction about the message of the song and some explanations about domestic abuse.

Part 1: INDROTUDORY MELODY AND CHANNEL PRESENTATION (28 ")
The podcast starts with the first beats of the song. Subsequently, the presentation of the announcer and the channel is made.
Part 2: EXPLANATIONS ABOUT THE MUSICAL PLOT
In the first episode, "NEVER AGAIN": THE CYCLE OF DOMESTIC VIOLENCE IN VERSES, we will unravel the verses of the song by the band Nickelback making a connection with domestic violence and the "Law Maria da Penha".
NEVER AGAIN is a little-used song by the Canadian band Nickelback, which portrays the life of a woman who suffers violence from her husband every time he drinks. The ending is surprisingly legal.
Domestic abuse is a heavy subject in its own right. In this song, the band decided to deal with the theme from the perspective of a child who witnesses his father abusing and raping his mother. Music production brings seriousness to the topic and exposes anger and frustration, with a beautiful shout in the voice of vocalist Chad Kroeger.

In the following excerpt, the announcer's explanations are interrupted so that the listener hears a few more seconds of the song. Then, a translation of the verses into Portuguese is made, relating the lyrics to the reality of the victims of domestic violence.

In addition, the listener knows a little about the life of Maria da Penha, the woman who gave rise to the Law against domestic and family violence in Brazil, and about the objectives of the Legal Diploma that took her name.

In 2017, the Maria da Penha Institute launched the "Watches of Violence" project, which estimates how many women are physically or verbally assaulted daily in Brazil. The data collected is part of a survey conducted by the Datafolha Institute, in partnership with the Brazilian Public Security Forum, which shows that every two seconds, a woman is a victim of physical or verbal violence in Brazil.

In fact, domestic and family violence against women started to be considered a crime, after the approval of Law nº. 11,340, on August 7, 2006, which became known as the Maria da Penha Law (BRASIL, 2006).

Indeed, this legal norm created in Brazil mechanisms to restrain and prevent aggression set in family life, and has become an instrument of social transformation over more than 13 years of existence. Accordingly, according to article 1 of Law no. 11.340 / 2006:

> Art. 1 This Law creates mechanisms to restrain and prevent domestic and family violence against women, under the terms of § 8 of art. 226 of the Federal Constitution, the Convention on the Elimination of All Forms of Violence against Women, the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women and other international treaties ratified by the Federative Republic of Brazil; provides for the creation of Courts for Domestic and Family Violence against Women; and establishes assistance and protection measures for women in situations of domestic and family violence (BRASIL, 2006).

Maria da Penha Maia Fernandes, born in Fortaleza, Ceará, in 1945, is now 74 years old. As a pharmacist, she was one of countless women victims of domestic violence.

In 1983, Maria da Penha suffered two homicide attempts by her then husband, Marco Antônio Heredia Viveiros. In the first attempt, after shooting a firearm, Maria was seriously injured and was hospitalized for four months. As a result of the aggressions, she suffers from irreversible paraplegia and uses a wheelchair to get around (IACHR, 2001):

> The petitioners indicate that Mr. Heredia Viveiros' temperament was aggressive and violent and that he assaulted his wife and daughters during the duration of their marriage relationship, a situation that, according to the victim, became unbearable, as he did not dare, for fear, to take the initiative to separate. She maintains that her husband sought to cover up the assault on the grounds that there had been an attempted robbery and assault by thieves who had fled. Two weeks after Mrs. Fernandes returned from the hospital, and while she was in recovery, due to the homicidal assault of May 29, 1983, she suffered a second attempt on her life by Mr. Heredia Viveiros, who would have tried to electrocute her while bathing. (IACHR, 2001, emphasis added).

Penha denounced the tolerance of the State, which for more than 15 years acted with negligence, and did not comply with the necessary steps to prosecute and punish the aggressor, despite the denunciations made by the Public Ministry.

In 1991, the crime was tried for the first time. The defense alleged irregularities in the jury procedure. Again, in 1996, Penha's ex-husband was convicted a second time. However, the defense has repeatedly alleged irregularities (IACHR, 2001).

The process remained open and the aggressor was released. Only in 2002, after 19 years, Maria da Penha's ex-partner was arrested, but he was only two years in a closed regime (IACHR, 2001).

Penha's story is particular and, at the same time, so common to that of other women. His battle revealed a social, political and ideological phenomenon, camouflaged by a macho and unequal culture, which severely affects many people.

Part 3: TRANSLATIONS AND HISTORY OF MARIA DA PENHA (50 ")
"He's drunk again, it's time to fight. She must have done something wrong tonight. The living room becomes a boxing ring. It's time to run when you see him clenching his fists. She's just a woman ... Never again ".
Here, the listener knows the life story of Maria da Penha, who inspired the publication of Law 11.340, August 2006.

To reach the climax of the podcast, a few more verses of the song "Never Again" are shown. The chorus, with a few more translations, seeks to thrill the listener and sensitize him. Then, explanations are made about the phases and cycle of domestic violence.

In 2015, Law No. 13,104 amended article 121, of the Penal Code, which started to provide for femicide as a qualifying circumstance for the crime of homicide and included it in the list of heinous crimes (BRASIL, 2015). Thus, Article 121 of the Penal Code now provides for the following:

> Art. 121. To kill someone:
>
> Penalty - imprisonment, from six to twenty years. (...)
>
> Feminicide (Included by Law No. 13,104, 2015)
>
> VI - against women for reasons of female condition:
>
> (Included by Law No. 13,104, 2015)
>
> VII - against authority or agent described in arts. 142 and 144 of the Federal Constitution, members of the prison system and of the National Public Security Force, in the exercise of the function or as a result of it, or against their spouse, partner or consanguineous relative up to third degree, due to this condition:
>
> (Included by Law No. 13,142, 2015)
>
> VIII - (VETOED): (Included by Law No. 13.964, of 2019)
>
> Penalty - imprisonment, from twelve to thirty years (BRASIL, 1940).

Nevertheless, it is in this part of the episode that the listener knows the definition of domestic violence and the role of domestic violence provided for in the Law.

Part 4: EXPLANATIONS ABOUT DOMESTIC VIOLENCE (1'38")
NEVER AGAIN! NEVER.
Women who are victims of domestic and family violence are subjected to the cycle of violence. Three main stages of aggression are identified: The first phase is an increase in tension; followed by the act of violence; going through the phase of regret and loving behavior. This cycle of violence is portrayed in the verses of the song. "I hear her scream down the hall Amazing how she can still speak She cries out to me: "go back to bed" I'm afraid she might end up dead in his hands She's just a woman ... Never again I've been there before, but not like this I had seen it before, but not like this I've never seen it get this bad She's just a woman ... Never again"
Over time, the intervals between one phase and another become shorter, as well as the aggressions happen without obeying the order of the phases. In some cases, femicide is reached, which is the murder of the victim.
In 2015, the Penal Code began to provide for femicide as a qualifier for the crime of homicide, and included it in the list of hideous crimes.
The most used definition of domestic violence is that adopted by the "Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women in Belém do Pará", held in 1994. The Convention defined as: "any action or conduct, based on gender, that causes death, harm, physical, sexual or psychological suffering to women, both in the public and private spheres".
Violence against women must be analyzed in a broad sense. It can be of a physical, sexual, psychological, moral, patrimonial nature, among others. The list of hypotheses is neither exhaustive nor exclusive.

Almost at the end of the program, more music is played, demonstrating the relationship of the verses to the legislative changes suffered due to the Maria da Penha Law, in order to guarantee the effectiveness of the fight against domestic and family violence.

We try to thrill here, when narrating the end of the song, because all violence suffered by the character of the song is seen through the eyes of a child. The ending is surprising.

MERITUM MAGAZINE • v.15 • n.4 • p. 42-57 • 2020

Part 5: TRANSLATIONS AND DEFINITION OF DOMESTIC VIOLENCE (2’33”)
“Just tell the nurse that you slipped and fell. It starts to hurt as it starts to swell. She looks at you and wants the truth. That is fine in the waiting room with those hands, With the sweetest appearance in the world.”
As in the song, women arrive in hospitals with broken arms, black eyes, beatings and burns. Often, the victim lies to health professionals, claiming that they fell off the stairs, tripped over or hit furniture.
In Brazil, since 2011, a health professional who attends a woman and suspects that she has been a victim of domestic violence is required to fill out a notification form and forward it to her state’s health department.
The end of the song is really surprising. In the child’s view, she sees the father once again drunk, but it is time to fight. The mother is fed up and decides to use a gun and pull the trigger. It’s the end. Never again. Never.

At the close of the episode, alarming data is reported. According to the 2015 Map of Violence: homicides of women in Brazil, in a group of 83 countries, Brazil ranks 5th in the ranking of those who kill the most women in the world. Only El Salvador, Colombia, Guatemala (three Latin American countries) and the Russian Federation show rates higher than those in Brazil. However, the numbers in Brazil are much higher than in several countries: there are 48 times more female homicides than in the United Kingdom; 24 times more female homicides than in Ireland or Denmark; 16 times more female homicides in Japan or Scotland (WAISELFISZ, 2012).

The hope of reversing the situation arose with the publication of the Maria da Penha Law. However, the issue goes beyond legal aspects, it concerns socio-cultural aspects of a patriarchal and slave-based society.

More than a legal aspect, the change in paradigms depends on social maturity, on the change in the behavior of aggressors, as well as on the proper application of legal provisions so that the Law is truly effective. Thus, in the episode, there is also an alert for complaints to be registered, through the Women’s Service Center (Dial 180).

Part 6: CLOSING (3’21”)
Finally, the listener knows the data collected by the 2015 Map of Violence: Homicide of women in Brazil.
(3’50”) To encourage “complaints”, the channel invites you to keep silence from contributing to the numbers of domestic and family violence.

6. CONCLUSION

As shown in this research, according to the new curricular guidelines for Law courses, established by Resolution no. 5/2018 of the Ministry of Education, the Law Course Pedagogical Project should have as structural elements, among others, the realization of interdisciplinarity, the incentive to innovation, the integration between theory and practice, the specification of the active methodologies used, the inclusion mandatory of the TC - Coursework, besides allowing the mastery of the solution of emerging, complex and transdisciplinary problems, linked to the regional and national reality. More than that, the Pedagogical Project must guarantee the transversal treatment of contents required in specific national guidelines, such as environmental education policies, human rights education, education for the elderly, education in gender policies, education ethnic-racial relations and Afro-Brazilian, African and indigenous histories and cultures, among others (§4º, of art. 2º, of Resolution no. 5/2018 of the MEC).

As if that were not enough, according to the current curricular guidelines of Law courses, students and teachers need to develop inter, multi and transdisciplinary, innovative content, activities and research that allow the integration between theory and practice, using methodologies active.

The problem is that teaching, research and extension currently developed do not always prepare students of law courses for all of this. Worse: the educational projects of educational institutions are often just formal documents, disconnected from real pedagogical practice, and they also do not demonstrate, in an objective and clear way, how all of these guidelines will actually happen during the course, through integrated work and of the Teaching Institution, teachers and students.

Based on the hypothetical deductive scientific method and having Resolution n. 5/2018 of the Ministry of Education, this research pointed out one of the feasible possibilities to solve the problem above: the planning and implementation of a transmedia educational narrative, which can also occur through the production of podcasts that promote, in an innovative and active way, the interaction between law, art and transdisciplinarity. All with the objective of favoring that the competences provided for in Resolution no. 5/2018 of MEC and PPC, become, in an effective and meaningful way for students, a concrete reality in undergraduate (and also postgraduate) courses in Law.

To this end, the research also presented an example of a podcast script, which can be used as a paradigm for teachers and students of Law courses, to venture into similar endeavors, for the realization of a transmedia educational narrative, through a language contemporary; the podcast.

MERITUM MAGAZINE • v.15 • n.4 • p. 42-57 • 2020

REFERENCES

AZEVEDO, Antônio Fernando. ORÉLIO, Grégoire Balasko. EHLERS, Marcelo Geyer. *A* **Família Investidora e o Family Office**. Porto Alegre: Buqui, 2017 (ebook).

ASSIS, Pablo. *In*: LUIZ, Lucio (Org**.). Reflexões sobre o Podcast**. Nova Iguaçu (RJ): Marsupial Editora, 2014.

BRASIL 2019. **Lei 13.836, de 04 de junho de 2019**. Acrescenta dispositivo ao art. 12 da Lei nº 11.340, de 7 de agosto de 2006, para tornar obrigatória a informação sobre a condição de pessoa com deficiência da mulher vítima de agressão doméstica ou familiar.Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13836.htm. Acesso em 08 jan. 2020.

BRASIL, 1988. **CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL**. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Acesso em: 08 jan. 2020.

BRASIL, 1996. **Decreto nº 1973, de 01º de agosto de 1996**. Promulga a Convenção Interamericana para Prevenir, Punir e Erradicar a Violência Contra a Mulher [...]. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/1996/d1973.htm. Acesso em: 8 jan. 2020.

BRASIL, 2002. **Decreto nº 4.377, de 13 de setembro de 2002.** Promulga a Convenção sobre a Eliminação de Todas as Formas de Discriminação Contra a Mulher [...]. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/2002/D4377.htm. Acesso em: 8 jan. 2020.

BRASIL, 2006. **Lei 11.340, de 07 de agosto de 2006.** Cria mecanismos para coibir a violência doméstica e familiar contra a mulher [...]. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm. Acesso em: 08 jan. 2020.

BRASIL, 2015. **Lei 13.104, de 09 de março de 2015**. Altera o art. 121 do Decreto-Lei nº 2.848, de 7 de dezembro de 1940 - Código Penal, para prever o feminicídio como circunstância qualificadora do crime de homicídio, [...]. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/L13104.htm. Acesso em: 26 mar. 2020.

BRASIL, 2018. **Lei 13.641, de 04 de abril de 2018**. Altera a Lei no 11.340, de 7 de agosto de 2006 (Lei Maria da Penha), para tipificar o crime de descumprimento de medidas protetivas de urgência. Disponível em:

http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13641.htm. Acesso em: 19 dez. 2019.

BRASIL, 2019. **Lei 13.827, de 13 de maio de 2019**. Altera a Lei nº 11.340, de 7 de agosto de 2006 (Lei Maria da Penha), para autorizar, nas hipóteses que especifica, a aplicação de medida protetiva de urgência, pela autoridade judicial ou policial, [...]. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13827.htm. Acesso em: 08 dez. 2019.

BRASIL, Ministério da Educação. **Resolução n. 5, de 17/12/2018**. Institui as diretrizes curriculares nacionais do curso de graduação em direito e dá outras providências. Disponível em: http://portal.mec.gov.br/index.php?option=com_docman&view=download&alias=104111-rces005-18&category_slug=dezembro-2018-pdf&Itemid=30192. Acesso em: 17 mar. 2020.

BRASIL. Ministério da Saúde. **Portaria MS/GM nº 104, de 25 de janeiro de 2011**. Define as terminologias adotadas em legislação nacional, conforme o disposto no Regulamento Sanitário Internacional 2005 (RSI 2005), a relação de doenças, agravos e eventos em saúde pública de notificação compulsória em todo o território nacional e estabelece fluxo, critérios, responsabilidades e atribuições aos profissionais e serviços de saúde. Disponível em: https://bvsms.saude.gov.br/bvs/saudelegis/gm/2011/prt0104_25_01_2011.html. Acesso em: 08 jan. 2020.

CAMPALANS, Carolina. RENÓ, Denis. GOSCIOLA, Vicente. **Narrativas transmedia: ente teorias e prácticas**. Bogotá: Univesridad del Rosario, 2012.

COMISSÃO DE VALORES MOBILIÁRIOS – CVM. **Instrução 472**, **de 31 de outubro de 2008.** Dispõe sobre a constituição, a administração, o funcionamento, a oferta pública de distribuição de cotas e a divulgação de informações dos Fundos de Investimento Imobiliário - FII. Disponível em: http://www.cvm.gov.br/legislacao/instrucoes/inst472.html. Acesso em: 21 mai. 2019.

COMISSÃO DE VALORES MOBILIÁRIOS – CVM. **Instrução 555, de 17 de dezembro de 2014**. Dispõe sobre a constituição, a administração, o funcionamento e a divulgação das informações dos fundos de investimento. Disponível em: http://www.cvm.gov.br/legislacao/instrucoes/inst555.html. Acesso em: 21 mai. 2019.

COMISSÃO DE VALORES MOBILIÁRIOS – CVM. **Instrução 578**, **de 30 de agosto de 2016**. Dispõe sobre a constituição, o funcionamento e a administração dos Fundos de Investimento em Participações. Disponível em: http://www.cvm.gov.br/legislacao/instrucoes/inst578.html. Acesso em: 21 mai. 2019.

COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS (CIDH), **Caso 12.051, Relatório 54/01, *Maria da Penha Maia Fernandes v. Brasil***, 2001.

DIAS, Maria Berenice. ***A Lei Maria da Penha na justiça*: a efetividade da Lei 11.340/2006 de combate à violência doméstica e familiar contra a mulher**. 3. Ed. São Paulo: Revista dos Tribunais, 2013.

FEDERAL, Senado. ***A violência contra a mulher***. Disponível em: https://www12.senado.leg.br/institucional/omv/entenda-a-violencia/a-violencia-contra-a-mulherAcesso em: 10 dez. 2019.

FERNANDES, M. da P. M. ***Sobrevivi... Posso contar***. Fortaleza: Armazém da Cultura, 2010.

FERNANDINO, Matheus Bonaccorsi. ***Governança Jurídica nas Empresas Familiares***. Belo Horizonte: Del Rey Editora, 2016.

GABRICH, Frederico de Andrade. ***Análise Estratégica do Direito.*** Florianópolis: Conpedi, 2008. Disponível em: http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/brasilia/09_418.pdf. Acesso em: 17 mai. 2019.

GABRICH, Frederico de Andrade. ***Transdisciplinaridade no Ensino Jurídico***. Conpedi, 2013. Disponível em: http://www.publicadireito.com.br/artigos/?cod=57db7d68d5335b52. Acesso em: 25 mar. 2020.

INSTITUTO MARIA DA PENHA, **Relógios da violência**. Disponível em: https://www.relogiosdaviolencia.com.br/. Acesso em: 15 abr. 2020.

LUIZ, LUCIO (org.). **Reflexões sobre o podcast**. Nova Iguaçu (RJ): Marsupial Editora, 2014.

NEVER AGAIN (**CANÇÃO DE NICKELBACK**). *In*: WIKIPÉDIA, a enciclopédia livre. Flórida: Wikimedia Foundation, 2019. Disponível em: https://pt.wikipedia.org/w/index.php?title=Never_Again_(can%C3%A7%C3%A3o_de_Nickelback)&oldid=55778901. Acesso em: 25 mar. 2020.

NICKELBACK. *In*: WIKIPÉDIA, a enciclopédia livre. Flórida: Wikimedia Foundation, 2020. Disponível em: https://pt.wikipedia.org/w/index.php?title=Nickelback&oldid=57472624. Acesso em: 18 fev. 2020.

RODRIGUES, Horácio Wanderlei**. Cursos de Direito no Brasil: diretrizes curriculares e projeto pedagógico.** 2ª ed. Florianópolis: Habitus, 2020 (formato e.pub).

WAISELFISZ, J. J. ***Mapa da Violência 2015*: Homicídios de Mulheres no Brasil.** Brasília, UNESCO, 2015.

Received/*Recebido:* 06.08.2020.

Approved/*Aprovado:* 19.12.2020.

MERITUM MAGAZINE • v.15 • n.4 • p. 58-72 • 2020

HUMAN DIGNITY AND THE RIGHT TO RECOGNIZE PERSONAL IDENTITY: AN ANALYSIS FROM EXTRAJUDICIAL PROTECTION INSTRUMENTS

DIGNIDADE HUMANA E DIREITO AO RECONHECIMENTO DA IDENTIDADE PESSOAL: UMA ANÁLISE A PARTIR DOS INSTRUMENTOS DE PROTEÇÃO EXTRAJUDICIAIS

Aloísio Alencar Bolwerk[1]
Neuton Jardim dos Santos[2]

ABSTRACT

This article sought to establish a link between the principle of the dignity of the human person and the right to recognition of personal identity, addressing some protection instruments, especially extrajudicial ones, such as the provisions of the National Council of Justice. An inductive method will be used to approach it, presenting an overview of the technique of bibliographic research, doctrine and legislation on the right to personal identity recognition, with concepts, nature and data on this recognition in Brazil, establishing a link with the principle of access to justice and on the principle of human dignity. Based on these considerations, a critical analysis will be carried out on the effectiveness of these extrajudicial protection instruments, with the objective of contributing to the realization of the fundamental rights of access to justice and the dignity of the human person.

Keywords: Human dignity. Personal identity. Extrajudicial protection.

1 PhD in Private Law from PUC Minas. Associate Professor at the Federal University of Tocantins - UFT and Permanent Professor of the Professional Master's Program in Jurisdictional Provision and Human Rights of UFT/Esmat. Leader of the Research Group on Human Rights and Jurisdictional Rendering. Attorney at Law. ORCID iD: http://orcid.org/0000-0003-4229-4337. E-mail: bolwerk@uft.edu.br.

2 Mastering in Jurisdictional Provision and Human Rights at the Federal University of the State of Tocantins in partnership with the School of Magistrature of the State of Tocantins (ESMAT). Graduated in Law from Unirg University Center. Specialist in Civil Law and Civil Procedure by Unitins. Specialist in Public Law by ITOP. Specialist in Constitutional Law and Procedure by the Federal University of Tocantins. He is a Public Defender in the Public Defender's Office of the State of Tocantins and Director of the Superior School of the Public Defender's Office of the State of Tocantins. ORCID iD: https://orcid.org/0000-0002-0160-8072. E-mail: neutonjardim@hotmail.com.

How to cite this article/Como citar esse artigo:
BOLWERK, Aloísio Alendar; SANTOS, Neuton Jardim dos. Human dignity and right to recognition of personal identity: an analysis from extrajudicial protection instruments. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 58-72, 2020. DOI: https://doi.org/10.46560/meritum.v15i4.7946.

1. INTRODUCTION

Since prehistoric times, dating back to the moment in which man began to congregate and the first communities emerged, individuals started looking for ways to identify themselves, in order to create their own personal identity, to individualize themselves.

According to Calissi(2016),

> Identity is a term of recognition before the "other" and a term of self-knowledge. On one end, the person exists because they are internally composed as a manifestation of their mind, their thought, but they also exist, socially, because they are perceived by the "other". Therefore, identity is the knowledge of the subject from within oneself and from the other. (CALISSI, 2016, p. 115)

The right to personal identification goes beyond the traditional boundaries of Private Law and Public Law, meaning that we must safeguard it in an interdisciplinary approach, in or out of judgement - be it in a repressive way, by repairing damage to identity, or in a fostering way, by disseminating and instigating the protection of this right. In this segment are the rights to a name, to cultural identity, to know one's origins, to freedom of sexual orientation, among others (KONDER, 2018). The right to a name and identity require substantial and legitimate official records, can protect a culture (as in the case of indigenous ethnicities), reference a genetic origin, as well as reclassify gender as a self-perceived or self-declared condition, in the case of a transgender person.

According to the Brazilian Institute of Geography and Statistics (IBGE in the Portuguese acronym, 2019), in the northern region, the coverage of the Civil Registry of Natural Persons is only 87.5% while in all other regions of the country it exceeds 93.1%. The most affected with under-registration are indigenous people, the street population, rural workers, and the LGBTQ+ population, which translates into a violation of the dignity of the human person (BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS, 2019).

Errors and omissions in the public registry records of birth, marriage and death in the civil registry offices of natural persons are common, which also hinders or delays the practice of rights such as housing, freedom of movement, property and other public services. Therefore, there is a need to seek the fostering of activities that enable the effective commitment of these fundamental rights that guarantee the exercise of citizenship.

Recently, the Federal Supreme Court (STF, acronym in Portuguese), in the Direct Unconstitutionality Action (ADI, acronym in Portuguese) No. 4275, authorized the change of birth or marriage civil register to adapt to the declared reality of the transgender person. The National Council of Justice (CNJ, acronym in Portuguese) has issued several provisions, allowing extrajudicial registries and rectifications by the civil registry offices of natural persons[3], indicating, in both situations, the primacy of the right to dignity of the citizens.

This article has the purpose of justifying the recognition of the right to personal identity as a fundamental right, based on the principle of human dignity, guiding north in the Brazilian Federal Constitution. On the basis of the rights of personhood, a connection was established with the right to personal identity with the purpose of affirming that it is a right that must receive judicial or extrajudicial protection, always in light of the human dignity principle.

Another point of focus was the access to full justice to fulfill these rights, which was done by exploring constitutional principles, laws and administrative enactments of the CNJ. In order to analyze the matter, the inductive approach was employed, out of the necessity of proving that the right to personal identity and its protection are fundamental rights, and that this conclusion is based on constitutional principles and ethical values. As a study technique (procedural methods), the bibliographical, doctrinaire and legislation research were used, since the theme under study is related to these research elements.

The essay is structured, aside from this introduction, in three parts. The first section discusses the right to dignity of the human person, concepts, as well as international and domestic norms and/or principles. The second deals with identity, human identity, recognition, and the right to personal identity from a doctrinal and constitutional perspective, defining concepts and their legal nature. In the third section, considerations are made about judicial and extrajudicial tools of protection regarding these rights based on the law and on technical norms issued by CNJ, focusing on access to justice and on the reasonable timeframe of the process, highlighting the positive and negative measures to extend the protection of the right to identity and citing, in a specific topic, the concrete case of ADI no. 4275 and CNJ's Provision no. 73/2018.

The intention of this work is to contribute to furthering the social knowledge of law, as it discusses teachings on human rights, constitutional principles of the dignity of the human person, and means of access to justice through extrajudicial response.

2. CONSIDERATIONS REGARDING THE DIGNITY OF THE HUMAN PERSON

The Universal Declaration of Human Rights states, in its preamble, that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", and, in its first article, that "all human beings are born free and equal in dignity and rights" (UNITED NATIONS, Brazil, 1948, p. 2).

According to Piovesan (2019), the 1948 Declaration introduces the contemporary conception of human rights, emphasized by universality and indivisibility. The former because it calls for the universal extension of human rights based on the belief that the condition of being a person is the only requirement for the ownership of rights; and the latter because the guarantee of civil and political rights is a condition for the observance of social, economic and cultural rights, and vice versa.

Human rights consist in a set of rights considered indispensable for a human life based on freedom, equality and dignity. They also emphasize that the dignity of the human person is a legal category which, by being at the origin of all human rights, gives them ethical content and axiological unity to a legal system, providing a material substrate for the rights to flourish. Therefore, the concept of human dignity is polysemic and open, in a permanent process of development and construction (RAMOS, 2020).

The dignity of the human person was included in Article 1 of the Federal Constitution of 1988 (CF/88) as a foundation of the Federative Republic of Brazil, being a unique and

[3]CNJ Provinces 28, 63, 73 and 82

irradiating principle of the constitutional text. Bulos (2018) states that the dignity of the human person is a directive cogent for the design of the State, determining its way and form of being, and that it guarantees constitutional unity and guides interpretations for decision making.

About the principle of the dignity of the human person, the author further highlights that:

> [...] This vector aggregates around itself the unanimity of the fundamental human rights and guarantees expressed in the 1988 Constitution. When the Constitution proclaims the dignity of the human person, it is consecrating an imperative of social justice, a supreme constitutional value. Its compliance represents a victory against intolerance, prejudice, social exclusion, ignorance, and oppression. Human dignity reflects, therefore, a set of civilizing values incorporated into the heritage of man [...] The instrumental character of the principle is notorious, after all it provides access to justice to those who feel aggrieved by its disregard.(BULOS, 2018, p. 513)

In philosophy, there is the Kantian approach, which argues that man is the end in himself and that human dignity is based on the human capacity to propose ends and not only autonomy. In other words, all human beings have dignity, regardless of their condition, so we must always respect humanity as an end in itself and never merely as a means (KANT, 2009). Human dignity exists as a finalistic goal in favor of humanity, as a moral rule and a necessary and universal "ought-to-be". People have, always, dignity.

For Reale, "man is not a simple psychophysical or biological entity, reducible to a set of facts explained by Psychology, Physics, Anatomy, Biology". The author continues his thought, affirming that in him there is something that represents the possibility of innovation and improvement. Man represents something that is an addition to nature as an initiator of new objects of knowledge, as in the constitutive act of new forms of life (REALE, 2002, p. 211).

The link that connects the dignity of the human person to the right of personal identity, as a way to establish the longings of belonging, whether individual pertaining to his particular world, or collective belonging, to a cultural context (CALISSI, 2016), is clear.

Accordingly, the dignity of the human person reinforces that the right to personal identity must be perfected as a humanitarian goal, towards the full realization of man as an end in himself.

3. THE RIGHT TO PERSONAL IDENTITY

Social relations are ordered by rules and principles, which aim not only to protect them but also to ensure their rights and impose duties on them.

It is imperative to establish the concepts of identity, human identity, identification, and recognition. In forensic anthropology, forensic medicine states that identity is "the set of characteristics proper and exclusive to people, animals, things, and objects. It is the totality of

signs, marks, and positive or negative characters that, as a whole, individualize a human being or a thing, distinguishing it from others" (CROCE JR., 2011, p. 63).

A distinction must be made between human identity and identification. For Croce Junior (2011), human identity is "the set of personal and peculiar characteristics that differentiate the individual from others and give him a specific temporal-spatial situation and unique social status while identification is the determination of identity, i.e., individuality. It is the delimitation of individuality."

França (2015) distinguishes between recognition and identification, saying that the former means only the act of certifying oneself, knowing anew, admitting as certain or claiming to know; and identification consists of a set of scientific means or specific techniques employed in order to obtain identity.

In a psychological view, Jacques (1998apud HOGEMANN; MOURA, 2018) argues that personal identity is the way people see themselves and is closely related to self-image, while, from a sociological viewpoint, it is a construction of oneself through the socialization process, which takes place until death.

The Declaration on the Human Genome and Human Rights (DUGHDH) guarantees, in its article 1, that "the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it constitutes the patrimony of Humanity". Personal identity, under this view, goes through the determination of the genetic origin, granting the characteristic to all those who belong to the human species, and, in particular, expresses the characters of the individualizing genetic heritage received from the parents at conception, fundamental to full psychic integrity (UNESCO, 1997).

Being evidenced that human identity is a set of personal characteristics found by the identification process - which is the means to demarcate it - it is worth noting that human identity must be seen as a psychological, social, individual, cultural, and genetic need.

The context of the dignity of the human person expresses that the man is the center, so that the individual exists, but in a dignified way, with his identity, his differences and his culture, and that the State provides the means for this realization. Emerges from the dignity of the human person, the right to personal identity, also recognized by the Universal Declaration of Human Rights in its Article 6, which states that, "everyone has the right to recognition everywhere as a person before the law" (UNITED NATIONS BRAZIL, 1948, p. 6).

Although the recognition of the right to personal identity is not restricted to the recognition of the right to a name, this element is used here to take into consideration the other needs, because it must be ensured that psychological, social, individual, cultural, and genetic needs are added to the name, a birthright and a very personal right.

One of the elements of personal identity is the name. From the coherent and timely doctrinal classification of Orlando Gomes (2019) for the discussion at hand, there are, in summary, three main theories to explain the legal nature of the right to the civil name: property theory, state theory and personality right theory.

The first understands that the name is a patrimonial nature that the subject enjoys absolutely. The second holds that the name is a fact protected by the legal system. And the third,

which will be further explained in this article, establishes that the name belongs to the rights of personality, a theory adopted by the current Brazilian Civil Code.

The recognition of personal identity goes through personal and social existence, so that every person has the right to a name, including first name and last name, as proposed in Article 10 of the Civil Code. These are rights of personality, foreseen in Book I, Title I, Chapter II of the Brazilian Civil Code.

For Almeida (2017), we must

> Recompose the system, regarding the protection of the name in light of the principle of human dignity means to realize a civil qualification consistent with a real individualization before oneself and one's fellows. In other words, the name should serve, as an external and visible distinctive sign of individualization, as a concrete expression of the principle of human dignity. (ALMEIDA, 2017, p. 1,153)

Konder (2018) has been conceptualizing that:

> The right to personal identity must give shelter to the collective and dialogical construction of identities, protecting the very process by which identities are intersubjectively constructed [...] it is essential to resort to the scientific developments of psychology, anthropology and sociology, and also, within the law, to the studies of philosophy of law, constitutional law and, of course, civil law. (KONDER, 2018, p. 4-5)

To be the holder of a personality right is a guarantee that the individual may have a name, a specific character and a distinctive feature. This individualization requires, in its formatting, elements that reflect his satisfaction and respectability, without any exposure to ridicule or personal embarrassment, and also that he can express his origins, his culture, and his way of perceiving himself in the cosmos. The need to establish personal and social recognition has made personal identity gain body, with normative matrixes that ensure its protection.

Recognition as a person, individually or socially, is materialized as a personality right, which is born with the human being and reflects the need for substantial defense before society, with guarantees of effective instruments for this protection.

3.1 THE PROTECTION OF THE RIGHT TO IDENTITY: AN ANALYSIS BASED ON EXTRAJUDICIAL INSTRUMENTS

As a logical and balanced roadmap, where there is establishment of rights, there must surely be means of protection. There is no point in establishing rights without rules for protection.

The defense of the rights to personal identity, in the most varied aspects - civil name, adaptation of the name to the biological sex, inclusion in the name of the cultural aspects of a people, name of the biological parents, right to have the name officially registered, as well as its rectifications or alterations - is only possible if the citizen has full access to justice.

At the international level there are covenants and conventions that corroborate the scope of the principle of access to justice and the inalienability of jurisdiction, such as the Universal Declaration of Human Rights, in terms of article 10, the European Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with article 6, 1, the International

Covenant on Civil and Political Rights, in terms of article 14, 1 and the American Convention on Human Rights of San Jose da Costa Rica, in terms of article 8, 1. The Brazilian Federal Constitution expresses that the law shall not exclude from the appreciation of the Judicial Power, injury or threat of injury, pursuant to article 5, XXXV.

In Brazil, the Law of Public Records, Law No. 6.015/73, guides the state service committed to the authenticity, security, and effectiveness of legal acts; one of the roles of this service is the civil registration of natural persons, such as birth, emancipation, marriage, and death. This law came to embody the existential right, to correct flaws and, above all, to guarantee the means to obtain citizenship.

So that they can fulfill, correctly and efficiently, their duty to watch over the validity and effectiveness, publicity and security of business. Registrars must have extensive knowledge of private law and aspects of public law, which is why they are considered legal professionals. This is so true that the law gives them the functional duty to keep up to date regarding the matters of law and the corresponding administrative regulations that concern their activity, considers Loureiro (2018).

The protection of the rights of personality occurs in various fields of the legal system and may be accomplished in a preventive or repressive way, given the constitutional provision of the principle of the non-obviation of jurisdiction. Preventive protection logically includes the promotional character of this defense.

The protection of personal identification, supported by law or technical standards, can be processed judicially or extra-judicially. It meets the preventive, repressive, or promotional character of the right to personal identity, so that it is an instrument capable of being used by all, with full effectiveness in the results desired by the interested parties. Thus, the dignity of the human person, access to justice, and the celerity of the procedural process are preserved.

Judicial protection of the right to personal identity is always possible in order to obtain, among other things, modification, change or rectification of the name, change or deletion of the first name, correction of primary or accessory data of the civil register of birth, death or marriage. It aims to meet the principle of factual reality between the registration and the individual who bears it, and does not require the exhaustion of extrajudicial channels. Therefore, one can plead in court to defend the rights to an identity that has been authorized by the administrative (extrajudicial) route.

Loureiro (2018) understands that, as a rule, the name possess immutability, but exemplifies the permission of modification for rectifications or alteration of the civil register of natural persons in cases of gender change, as proposed by article 58 of Law No. 6015/73, with interpretation given by ADI 4275(STF).

As a measure of correct and effective protection, Constitutional Amendment No. 45/2004 established the reasonable duration of the process and the means to ensure its speedy processing, as proposed in Article 5, LXXVIII, CF/88, in order to ensure human dignity in the provision of jurisdiction, and created the CNJ, the highest administrative body of the national Judiciary. The Code of Civil Procedure (CPC, in the Portuguese acronym), in its 4th article, as an emphasis on access to justice, echoed Constitutional Amendment 55/2004, making an identical provision.

About the extrajudicial protection, with the creation of the CNJ, it became possible to issue several normative acts such as provisions and resolutions, authorizing the protection of the right to identity through an extrajudicial request directly by the interested party to the civil registry offices of natural persons.

At this point, one can see the effective and necessary action of the CNJ to obtain, without the need for intervention by a law judge or a member of the Public Prosecutor's Office, the alteration, modification or rectification of registrations. The exercise of the right to petition in defense of personal rights can be direct, without a lawyer, without a public defender or without an attorney.

The de-judicializing measure is the expression of the facilitation of access to justice and was also based on technical, jurisprudential, and managerial grounds of the Judiciary, but always aiming at the dignity of the citizen and his full harmonization with his existential onto-logical order. The extrajudicial guardianship can be sheltered, among others, from the CNJ's provisions.

Thus, there is the provision that deals with late birth registration by civil registry of natural persons (Prov. No. 28/2013); the one that provides for the birth registration and issuance of the respective certificate of children born by assisted reproduction by civil registry of natural persons (Prov. No. 63/2017); the provision on the annotation of the change of name and gender in birth and marriage records of transgender people in the civil registry of natural persons (Prov. No. 73/2018); the provision on the annotation of the change of name and gender in birth and marriage records of transgender people in the civil registry of natural persons (Prov. No. 74/2018). No. 63/2017); the provision on the annotation of the change of name and gender in birth and marriage records of transgender persons in the civil register of natural persons (Prov. No. 73/2018); Prov. No. 82, which provides for the procedure and annotation in the birth and marriage records of children and change of the genitor's name, and other provisions; and Joint Resolution CNJ/CNMP No. 3 of April 19, 2012, which enables the civil registration of indigenous people.

In Provision No. 28, for example, it seeks to combat the occurrence of under-registration of civil births in Brazil, which, in the North Region, represents 12.5% of births (Brazilian Institute of Geography and Statistics, 2019), giving interested parties the direct possibility to have their existence and their belonging embodied before society, no longer living in invisibility. It is the provision that regulates extemporaneous birth registration, i.e., after the deadline.

Provision no. 73, a consequence of the judgment by the Supreme Court of Justice of ADI no. 4275, - which authorized the alteration of the birth or marriage civil register to adapt it to the declared reality of the transgender person -, allows the interested party, without a lawsuit or the opinion of the Public Prosecutor's Office, to have his or her fundamental right to gender identity recorded directly in the registry office, establishing the reality of the psychological sex. The self-perceived reality was privileged as a way to guarantee the fundamental principle of human dignity and the effective access to justice.

The civil registration of non-integrated indigenous people is optional. However, the cultural identity of indigenous peoples is also fostered by Joint Resolution CNJ/CNMP No. 3 of April 19, 2012, in order to enable civil registrations of indigenous people also by extrajudicial means.

Recently, Provision 82/2019 was issued, making life much easier for people who have had changes in their parents' names by adding their spouse's surname due to marriage, separation or divorce. This provision allowed people to go back to using their maiden name, making it possible to register this addition in the birth certificates of their children to reflect the current name of their parents, as well as to register the change in the parents' names when they go back to their maiden names (spouse's surname due to marriage). This will henceforth be possible directly in the civil registry office, under the terms of the aforementioned resolution.

An example of the application of Provision no. 82/2019 is that, in case of divorce or legal separation and the spouse returns to use the single name, he/she may request a modification in the birth certificate of the children, changing the mother's or father's name, modified by the divorce or legal separation, without a court order, to adapt to the current reality of the parents' status. The same postulation was allowed, in case of death of one of the spouses, in which the surviving spouse may request the return to use the single name, directly in the registry office, where the marriage certificate was made, without a court order or the opinion of the Public Prosecution Service.

Such provisions are listed as a demonstration that the principles of human dignity and citizenship are guides to the policies and access to justice. However, it is notorious that justice, although more accessible, can be hindered by the costing system of the activities of the extrajudicial notaries in the country, since the officers and notaries are not paid by the Judiciary, which is the responsibility of those who request the delegated service, according to the fee law of each unit of the Federation. Therefore, the normative affectivity of these protection policies is questioned in face of the need of payment of emoluments by the low income users, as proposed in article 28 of Law no. 8,935/94.

In this circumstance, free acts for people declared to be poor before notaries public are also an efficient instrument to guarantee the full protection of the right to identity. The Federal Constitution, according to Article 5, LXXVII, established that acts necessary for the exercise of citizenship are free of charge, according to the law.

In order to regulate the constitutional norm of contained effectiveness and to guarantee social development, Brazil edited Law nº 9.534/97, establishing in its article 1 that "the acts necessary for the exercise of citizenship are free of charge: ...] the civil registration of birth and death, as well as the first respective certificate". Such norms certainly facilitate access to civil registration services and can reduce the under-registration of births.

There are many causes, for example, that lead to under-registration of civil birth. Guimarães (2015) cites, among others, misinformation, neglect, and ignorance. Córcova (1998) refers to the opacity of law and proposes to inform that, between the law and its addressee (common man), there is an opaque barrier, which is not transparent, making the common man without possibilities to absorb the message and the meanings of the law, as well as to use the instruments from which he could benefit.

The absence of access to information on education policies and dissemination of citizenship rights contributes to hindering full access to the instruments that guarantee full satisfaction of human rights, especially the protection of personal identity.

The ineffectiveness or insufficiency of de-judicialization measures can compromise access to justice, so we must discuss ways to increase their incidence, either by disseminating them or through orientation measures.

For Cappelletti (1988), the meaning of access to justice has basic purposes of how the legal system should be equally accessible to all, and that the results produced need to be individually and socially fair. Furthermore, the author argues that access to justice can therefore be considered as a fundamental requirement of a modern and egalitarian legal system that intends to guarantee, and not only, proclaim rights for all.

Therefore, the extrajudicial rectifications or alterations of the civil register of natural persons emerges as a paradigm to complement the judicial model in the Public Registry Courts, overcoming the limitations of these, because it presents itself as an instrument of extrajudicial conflict resolution based on the dignity of the human person and the rapid duration of the process, on social inclusion, seeking to harmonize access to justice.

3.2 THE CASE OF ADI NO. 4275 AND CNJ PROVISION NO. 73/2018: A CONCRETE ANALYSIS OF PUBLIC DOMAIN

Aiming to demonstrate the strength of the protection of personal identity rights, we cite the judgment of ADI No. 4275, March 1, 2018, by which the STF understood that it is possible to change the name and gender in the civil registry seat directly in the civil registry offices of natural persons, even without performing a surgical procedure for gender reassignment, without submitting medical or psychological reports and without the need for a lawsuit and an opinion from the Public Prosecutor's Office.

The lawsuit was filed by the Attorney General's Office with the purpose of establishing an interpretation, in conformity with the Federal Constitution, of art. 58 of Law 6.015/73, which deals with the possibility of changing one's name and prename.

The Brazilian Judiciary, with this interpretation, took a historical step towards the valorization of gender identity and self-declared by transgender persons, in order to give them dignity in their personal and psychological identification, being able to show in their documents what they really feel in their psychic and social reality, observable by all.

The reasons for the judgment were guided by the founding principle of human dignity, the right to an inclusive legal order, self-identification, non-discrimination on the basis of sex or gender orientation, freedom, and equality.

As Menezes and Lins(2020) pondered

> We start from the premise that the human person is free in the process of developing his or her personality and, consequently, in his or her identity affirmation. It is reiterated that gender is not an innate biological condition, crystallized in the determinants of karyotypic sex. It results from a subjective construction throughout life, which must be accepted as a manifestation of personality, to be recognized by the State and respected by society, regardless of 'any' body readjustment of the genetic sex. Therefore, it is not too much to emphasize that gender identity in disagreement with biological sex does not constitute a pathological effect to be corrected, nor a moral deviation to be reprimanded. (MENEZES; LINS, 2020, p. 18)

Soon after the judgment by the STF, there was a national regulatory vacuum on how these administrative requests would be made to the notaries. This occurred for three months from the date of the judgment, when the CNJ then issued Provision No. 73, of June 28, 2018, based on the power of guidance and establishment of technical standards, with the step-by-step to finally standardize the requests of interested parties throughout the country.

Providence No. 73 requires, in order to make the name and gender endorsement, a minimum age of 18, attendance at the civil registry office of natural persons, as well as mandatory and optional requirements. Among the mandatory documents are personal documents of the interested party, proof of address, certificate from the civil, criminal, and criminal execution offices of the place of residence for the past five years (state and federal), certificate from the protest notary's offices, from the Electoral Justice and Labor Justice of the place of residence for the past five years, and certificate from the Military Justice, if applicable. As optional documents, medical reports and psychological opinions that attest to the transsexuality/transvestitability and the completion of gender reassignment surgery.

The arrival of the normatization was much celebrated, but without proof of comprehensive effectiveness that would contemplate a considerable range of transgender people, especially due to the difficulty in obtaining the free-of-charge service in the civil registry offices, since most of the potential interested parties suffer from social and family exclusion.

Although it is important for the enforcement of the rights of the transgender community, Provision no. 73 could be more emphatic when it comes to structuring the sources of funding for these services, expressly and directly foreseeing, in the document, the standardization and simplification of procedures, either in the registry offices or in the Civil Registry Information Center (Provision No. 38/2014 of the National Inspectorate of Justice), for example, to exempt interested parties from directly appearing in registry offices to formalize the request, which could be done by proxies (individuals, lawyers, public defenders).

4. FINAL CONSIDERATIONS

Given the approaches presented in this article, it is imperative to recognize that human rights are necessary for the construction of a social pact, establishing a set of directive values. They constitute the ethical and informative element of an entire legal system and evolve at every historical moment, given the high dynamics of its content and indispensable for a human life based on freedom, equality and dignity.

The legal system focuses on the human being and the state has the duty to promote the dignity of its people. It focuses on the citizens. Man is the center, surely, and coexists with state structures.

Human rights, in the Brazilian Federal Constitution, are inserted in the clause of non-exhaustiveness so that the foundations of the Federative Republic of Brazil are effective, and able to defer with greater concreteness the dignity of the human person, because this is a guiding measure for the interpreters and powers, both in public and private relationships.

It can be seen that human beings, as an end in themselves, should be given an identity, a representative sign of social constructions as an individual, psychological, social, cultural, and genetic need. To this end, an identification process is conferred that can be attested by the recognition of a personal identity.

One of the important elements of personal identification is the name, a personality right, according to the Brazilian Civil Code. We must assign a recomposition to the function of the name, as the north of the right of personal identity, in order to call the needs of those who bear it, especially for psychological purposes, as in the cases of transgender persons, or for cultural purposes, in the case of adding to the name the indigenous ethnicity to which it belongs, or in cases of recognition and late registration for recognition of the genetic identity of the biological father.

It is thus established that the right to personal identification, which in Brazil has the legal nature of a personality right, is the most legitimate expression of the principles of human dignity. To have your sign, your belonging, and your psychological characteristics adapted to the reality of your name represents an existential condition of peace and harmony with your being. Personal identity must be given an interdisciplinary character in order to guarantee greater satisfaction to the human person.

With regard to protection, one can act in preventive or repressive defense. The term “preventively” is added to the need for promotional activity of these rights, even before the imminent threat of injury. It is evident that, at any time, one can resort to judicial protection of this right, since the Federal Constitution did not establish a requirement for jurisdiction conditioned to the exhaustion of administrative channels. Judicial remedies are available to interested parties, even in cases where it is possible to obtain extrajudicial protection, since it is at the discretion of the interested party, as a way to strengthen protection and access to jurisdiction.

However, the emergence of new extrajudicial instruments corroborates the defense of the rights to personal identity. Besides the range, expressly provided for in the Law of Public Records, there is also Constitutional Amendment 45/2004, which brought the guarantee of a reasonable length of process and created the CNJ, the highest administrative body of the national Judiciary.

By acting administratively and regulating technical standards for extrajudicial registry offices, the CNJ has enabled access to justice, without the need for proceedings before a judge or the intervention of the Public Prosecutor’s Office, when it authorized the interested party to request directly from the natural person’s civil registry office changes, rectifications, and annotations to personal registry entries, in a clear demonstration of the human dignity vector.

In terms of legislation, it can be concluded that free civil life acts, such as birth and death certificates and the respective issue of the first copy of these acts, is an instrument that can also stimulate and promote the exercise of citizenship by having an official record of one’s name, including for obtaining other rights, such as electoral and Federal Revenue registration, as well as access to health and education services.

However, it is necessary to note that, even with such extrajudicial measures to promote human rights, it is verified that there is still a number, including under-registration of civil birth, especially in the northern region, given the lack of knowledge and misinformation on basic rights for people to effectively gain the realization of this guarantee.

MERITUM MAGAZINE • v.15 • n.4 • p. 58-72 • 2020

It is expressed in the judgment of ADI no. 4275, which established a concrete case in the public domain, making it possible for transgender persons to have their first name and gender registered directly in a registry office, without having to undergo a surgical procedure for sex reassignment, without having to present medical or psychological reports, and without the need for a lawsuit and an opinion from the Public Prosecutor's Office.

This judgment gave rise to CNJ's Provision no. 73/2018, which represents a breakthrough for the realization of the right to psychological sex, although it has been silent as to the source of funding for these services, which has led to difficulties in obtaining free services in natural person civil registry offices, since most potential interested parties suffer from social and family exclusion. In addition, it did not foresee the possibility of a proxy request, but required the personal appearance of the interested party at the registry office, culminating, in certain cases, in the impossibility of attendance and infeasibility of access to this service.

It is salutary to teach human rights, dialogue with public policies, in order to establish effective means of promoting the right to identity, guaranteeing access to effective justice, expanding extrajudicial measures, and increasing the incidence of free notary public services.

REFERENCES

ALMEIDA, Vitor. A Disciplina jurídica do nome da pessoa humana à luz do direito à identidade pessoal. **Revista Jurídica Eletrônica Direito Sociedade e Desenvolvimento**. (The legal discipline of the human name in the light of the right to personal identity. **Electronic Legal Journal Society and Development Law**). Year 3, no. 3, p. 1141-1205, 2017. Available at: http://www.ufrrj.br/SEER/index. php? journal=RJEDSD&page=article&op=view&path%5B%5D=3471. Accessed on: 28 Jun. 2020.

BRAZIL. [Constituição (1988)]. **Constituição da República Federativa do Brasil (**[Constitution (1988)]. **Constitution of the Federative Republic of Brazil).** Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 16 abr. 2020.

BRAZIL. Conselho Nacional de Justiça. **Provimento nº 28**, of February 5th, 2013. Available at: https://atos.cnj.jus.br/atos/detalhar/2525. Accessed on: 27 abr. 2020.

BRAZIL. Conselho Nacional de Justiça. **Provimento nº 63**, of November 14th, 2017. Available at: https://atos.cnj.jus.br/atos/detalhar/2525. Accessed on:27 abr. 2020.

BRAZIL. Conselho Nacional de Justiça. **Provimento nº 73**, of June 28th, 2018.Available at: https://atos.cnj.jus.br/atos/detalhar/2623. Accessed on: 20 abr. 2020.

BRAZIL. nationalConselho Nacional de Justiça. **Provimento nº 82**, of July 3rd, 2019. Available at: https://atos.cnj.jus.br/atos/detalhar/2973. Accessed on: 20 abr. 2020.

BRAZIL. Conselho Nacional de Justiça. **Resolução Conjunta 3**, of April 19, 2012. Available at: http://www.planalto.gov.br/ccivil_03/leis/lcp/Lcp132.htm#art1. Accessed on: 27 abr. 2020.

BRAZIL.**Decreto nº 5922**, July 6, 1992. Pacto internacional de direitos civis e políticos. (International covenant on civil and political rights). Available at: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm. Accessed on: 27 abr. 2020.

BRAZIL. **Emenda Constitucional nº 45**, of 30th December, 2004. Changes provisions of arts. 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 and 168 of the Federal Constitution, and adds arts. 103-A, 103B, 111-A and 130-A. Available at: http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm. Accessed on: 27abr. 2020.

BRAZIL. **Law No. 6.015**, of December 31, 1973. Provides on public registries, and makes other provisions. Available at: http://www.planalto.gov.br/ccivil_03/leis/L6015compilada.htm. Accessed on: 18 abr. 2020.

Law No. 8.935, of November 18, 1997. Regulates art. 236 of the Federal Constitution, providing for notary and registry services. (Notaries' Law). Available at: http://www.planalto.gov.br/ccivil_03/leis/l8935.htm. Accessed on: 28 jun. 2020.

BRAZIL. **Law nº 9.534**, of December 10, 1997. Gives new wording to art. 30 of Law nº 6.015, of December 31, 1973, which provides for public registries; adds an item to art. 1 of Law nº 9.265, of February 12, 1996, which deals with free of charge acts necessary for the exercise of citizenship; and changes arts. 30 and 45 of Law nº 8.935, of November 18, 1994, which provides for notary and registry services. Available at: http://www.planalto.gov.br/ccivil_03/leis/l9534.htm. Accessed on: 27 abr. 2020.

BRAZIL. **Law no. 10.406**, of January 10, 2002. Institui o Código Civil. Available at: http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm. Accessed on: 16 abr. 2020.

BRAZIL. **Law No. 13.105**, dated March 16, 2015. Code of Civil Procedure. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Accessed on: 18 abr. 2020.

BRAZIL. Superior Tribunal Federal. **STF reconhece a transgêneros possibilidade de alteração de registro civil sem mudança de sexo**. (Federal Supreme Court. **STF recognizes to transgenders the possibility of civil register alteration without sex change)**. Published on March 1, 2018. Available at: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp? idConteudo=371085. Accessed on: 28 jun. 2020.

Supremo Tribunal Federal. **Ação Direta de Inconstitucionalidade nº 4.275.** Applicant: Attorney General of the Republic. Rapporteur: Edson Fachin, March 1, 2018.Available at:http://portal.stf. jus.br/processes/downloadPeca.asp? id=15339649246&ext=.pdf. Accessed on:18 abr. 2020.

BULOS, Uadi Lammêgo. **Curso de direito constitucional**. 11. ed. São Paulo: Saraiva Educação, 2018.

CALISSI, Jamile Gonçalves. A Identidade como um direito fundamental articulado a partir dos direitos da personalidade. (Identity as a fundamental right articulated from the rights of personality). *In*: Simpósio Internacional de Análise Crítica do Direito, 7, 2016, Jacarezinho. **Annals** [...]. BREGA FILHO, Vladimir; MACHADO, Edinilson Donisete; SANCHES, Raquel Cristina Ferraroni (org.). Constitutional system of rights guarantee. Jacarezinho: UENP, 2016. Available at: http://siacrid.com.br/repositorio/2016/sistema-constitucional-de-garantia-de-direitos.pdf. Accessed on: 20 abr. 2020.

CAPPELLETI, Mauro. Acess to Justice: The Wordlwide Movement to Make Rights Effective. Translation and revision by Ellen Gracie Northfleet. Porto Alegre: Fabris, 1988.

CÁRCOVA, Carlos Maria. **The opacity of law**. Translation by Edilson Alkimim Cunha. São Paulo: Ltr, 1998.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. **American Convention on Human Rights of San José de Costa Rica**. San José, Costa Rica, 22 nov. 1969. Available at: https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm. Accessed on: 21 abr. 2020.

CROCE JÚNIOR, Delton. **Manual de medicina legal**. 8. ed. São Paulo: Saraiva, 2011. p. 63. Available at: https://integrada.minhabiblioteca.com.br/#/books/9788502149533/. Accessed on: 28 jun. 2020.

EUROPEAN COUT OF HUMAN RIGHTS COUCIL OF EUROPE. **European Convention for the Protection of Human Rights and Fundamental Freedoms**. Available at: https://www.echr.coe.int/Documents/Convention_POR.pdf. Accessed on: 20 abr. 2020.

FRANÇA, Genival Veloso de. **Medicina legal**. 10. ed. Rio de Janeiro: Guanabara Koogan, 2015. p. 138. Available at: https://www.passeidireto.com/arquivo/76438763/medicina-legal-10-ed-2015-franca-genival-veloso-1. Accessed on: 28 jun. 2020.

GAGLIANO, PabloStolze; PAMPLONA FILHO, Rodolfo. **Manual de direito civil**. 2. ed. São Paulo: SaraivaJur, 2018. Available at: https://integrada.minhabiblioteca.com.br/#/books/9788553172764/. Accessed on: 21 abr. 2020.

GOMES, Orlando. **Introdução ao direito civil**. 22. ed. Rio de Janeiro: Forense, 2019.

GUIMARÃES, Raphael Pinheiro Cavalcanti. The procedure of late birth registration in the light of the Provimento n° 28 of the National Council of Justice. Âmbito Jurídico, Rio Grande, XVIII, n. 142, nov. 2015. Available at: http://

www.ambitojuridico.com.br/site/index. php? n_link=revista_artigos_leitura&artigo_id=16583&revista_caderno=7. Accessed on: 20 abr. 2020.

HOGEMANN, Edna Raquel; MOURA, Solange Ferreira de. The fundamental right to personal identity and the stigma of abandonment. **Interdisciplinary Journal of Law**, v. 9, n. 1, p. 55-68, May 2018. ISSN 2447-4290. Available at: http://revistas.faa.edu.br/index. php/FDV/article/view/504. Accessed July 1, 2020.

BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS. **Civil registration statistics 2017**. Estat. Reg. Civ., Rio de Janeiro, v. 44, p. 1-8, 2019. Available at: https://biblioteca.ibge.gov.br/visualizacao/periodicos/135/rc_2017_v44_informativo.pdf. Accessed on: 20 abr. 2020.

KANT, Immanuel. **Foundations of the metaphysics of manners**. Translated by Guido Antonio de Almeida. São Paulo: Discurso Editorial: Barcarolla, 2009. Available at: http://www.dhnet.org.br/direitos/anthist/marcos/hdh_kant_metafisica_costumes.pdf. Accessed on: 25 May 2020.

KONDER, Carlos Nelson de Paula. The scope of the right to personal identity in Brazilian civil law. **Pensar**, Fortaleza, v. 23, n. 1, p. 1-11, jan./mar. 2018. Available at: https://periodicos.unifor.br/rpen/article/view/7497. Accessed on: 20 Apr. 2020.

LOUREIRO, Luiz Guilherme. **Public registries**: theory and practice. 9. ed. rev., atual. eampl. Salvador: Juspodivm, 2018.

MENEZES, Joyceane Bezerra de; LNS, Ana Paola de Castro e. Gender identity and transsexuality in Brazilian law. Revista Brasileira de Direito Civil. Belo Horizonte, v. 17, p. 17-41, jul./set. 2018. Available at: par. Accessed on: 1 July 2020.

UNITED NATIONS BRAZIL. Universal Declaration of Human Rights. 1948. Available at: https://nacoesunidas.org/wp-content/uploads/2018/10/DUDH.pdf. Accessed on: 20 abr. 2020.

PIOVESAN, Flávia. **Human rights and international justice**: a comparative study of the European, inter-American, and African regional systems. Foreword by Celso Lafer. 9. ed. rev. e atual. São Paulo: Saraiva Educação, 2019.

RAMOS, André de. **Carvalho curso de direitos humanos**. 7. ed. São Paulo: Saraiva Educação, 2020.

REALE, Miguel. **Philosophy of Law**. São Paulo: Saraiva, 2002.

RODRIGUES, Marcelo Guimarães. **Tratado de registros públicos e direito notarial.** 2. ed. São Paulo: Atlas, 2016.

UNESCO. Universal Declaration on the Human Genome and Human Rights. *In*: 29th Session of the General Conference of UNESCO. November 11, 1997. Available at: http://www.ghente.org/doc_juridicos/dechumana.htm1. Accessed on: 28 June 2020.

Received/*Recebido:* 30.05.2020.

Approved/*Aprovado:* 09.07.2020.

THE EXTRAJURISDICTIONAL EFFECT OF PRECEDENTS ON BRAZILIAN CIVIL PROCEDURAL SYSTEM

O EFEITO EXTRAJURISDICIONAL DOS PRECEDENTES NO SISTEMA PROCESSUAL CIVIL BRASILEIRO

JEAN CARLOS DIAS[1]
SAMIRA VIANA SILVA[2]

RESUMO

This study aimed to analyze the relationship between binding judicial precedents and arbitration, regulatory agencies and parajurisdictional bodies, in order to verify whether in non-jurisdictional environments the precedents also have binding effect. Through bibliographic research, it was possible to verify that, despite the great doctrinal divergence on the subject, the most appropriate understanding is that according to which the precedents bind the public administration and arbitration, in compliance with constitutional principles that are cornerstones in the Brazilian legal system, such as legal certainty and isonomy, as well as for a systemic coherence between the understandings signed on the same right both in the Judiciary and in extra-jurisdictional environments.

Keywords: Judicial Precedents; Extrajurisdictional; Binding Effect.

ABSTRACT

The main objective of this work was to analyze the relation between judicial precedents and arbitration, regulatory agencies and parajursdictional bodies, in order to verify if in these non-jurisdictional environments the precedents have binding effect. Through a bibliographical research, was possible to verify that, in spite of the great doctrinal divergence about this subject, the more appropriate understanding is that precedents bind the public administration e the arbitration, due to principles that are corner stones in the brazilian legal system,

1 Doctor in Fundamental Rights and Social Relations from the Federal University of Pará (2006). Master in Legal-Political Institutions from the Federal University of Pará (2002). Postgraduate in Civil Law and Civil Procedure from Unesa Rio de Janeiro (2000). Graduated in Law from the Federal University of Pará (1993). He is currently a Lawyer, Senior Partner at Bastos & Dias s / s, an office specializing in Business Law. Professor of Law Theory, Civil Procedural Law, General Theory of Process and Economic Law in the undergraduate and graduate courses at Centro Universitário do Pará-CESUPA, where he also coordinates the Graduate Program in Law. Visiting Professor at the Superior School of Magistracy of the State of Pará, the Training Center of the Public Ministry of the State of Pará, the Superior School of Law, the Judiciary School of the Court of Justice of Amapá, the Judiciary School of the Regional Labor Court of the 8th . Region. He is a member of the Instituto dos Advogados do Pará, the North-Northeast Association of Professors of Process, the Brazilian Institute of Information Technology Law and Law, and the Brazilian Foundation for Economic Law. He is part of several Editorial Boards of legal journals. Member of Public Tender Boards. He has participated as a Lecturer and Professor in several congresses, postgraduate courses, seminars and legal meetings in several Brazilian states. He is the author of several books and articles published nationally. ORCID iD: https://orcid.org/0000-0002-8372-9758. E-mail: jean@bastosedias.com

2 Graduated in Law from the University Center of the State of Pará (CESUPA). Postgraduate student in Civil Procedural Law at CESUPA. Lawyer. E-mail: samiraviana7@gmail.com.

How to cite this article/Como citar esse artigo:
DIAS, Jean Carlos; SILVA, Samira Viana. The extrajurisdictional effect of precedents on brazilian civil procedural system. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 73-87, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.7874.

such as legal certainty and isonomy, as well as for there to be systemic coherence between the understandings made about the same right, both within the Judiciary and in extrajurisdictional environments. However, it's still necessary that the brazilian system of precedents undergo some adaptations, that this understanding may be strengthened.

Keywords: Judicial Precedents; Extrajurisdictional; Binding Effect.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 73-87 • 2020

1. INTRODUCTION

The system of precedents established in our current Code of Civil Procedure has assumed, as the tradition already consolidated in the international experience, the vertical and horizontal linkage. This means that, instituted the precedent, in the manner established by the legislation, the obligation of attendance is required both in relation to the judges attached to a given Court and also in relation to the Court itself that edited it.

Even if, on occasion, one disagrees with the obligatory character of precedents, in fact the introduction of this model in our legal system would have no reason to be other than to ensure the uniformity of judicial decisions. Uniformity, in turn, presupposes the lack of power in the application of the normative standards already fixed by the system of production of precedents understood as a legitimate source. Since progress can be made in refuting all the central theses of this argument, we will not deal with the subject here.

It is true that the standardization, by the Courts, of legal theses by means of judicial precedents directly impacts on socially relevant issues, which ends up causing a legal regulation and control of these issues, particularly as regards public services. Dessarte, if a judicial precedent generates these effects in relation to relevant aspects of a particular right, would this precedent be enforced in extra-jurisdictional environments where there is a conflict over this same right?

The point in question is to investigate the extent to which it is possible to maintain the mandatory adoption of precedents in non-jurisdictional environments, or to put it another way, what is pervasive is the possibility of an extra-jurisdictional binding effect. Therefore, this essay will demonstrate that the field of precedent is a problematic issue and can have serious consequences from the point of view of institutionalized conflict resolution.

2. A LINKAGE OF PRECEDENTS

Judicial precedent consists of a previous ruling applied to future cases that have identity as to factual and legal circumstances. The part of the precedent that gives it binding is called ratio decidendi. In this sense, Cláudia Aparecida Cimardi (2015, p. 43) indicates that:

> [...] it is necessary that, in carrying out the activity of the reasoning elaborated by the judge, is unveiled the part of the previous decision that effectively must be observed with binding force. This part of the decision, called ratio decidendi (or holding), can be considered the core of the precedent (emphasis added by the author).

According to the thoughts of Jean Carlos Dias and Samira Viana Silva, (2017, p. 182), "[a] ratio decidendi is considered to be the binding, binding party of the precedent, in which the court sets out the essential grounds for the decision and the legal solution of the case, which can be linked analogously to other cases". It is interesting the understanding of Hermes Zanetti Jr. (2017, p. 315) about the role of the Supreme Courts in the theory of precedents:

> The theory of precedent is a theory for Supreme Courts. This means two things: first, that the Supreme Courts are the main recipients of a theory of precedents because they are vertex cuts and depend on them the uniformity of the interpretation of the law; second, because also the Supreme Courts must be linked to the precedents themselves from the point of view of the argumentative burden to depart from the application of a precedent or overcome an old precedent in the current application.

This thought corroborates the fact that not only the lower instances are linked to the precedents emanating from the Supreme Courts, but they themselves, even more correctly, are linked to them. This is because the Supreme Courts' respect for their own precedents demonstrates that the standardization of understandings - in order to ensure consistency and integrity to the organization - must be taken seriously.

It is imperative to point out that the connection of a previous system is not automatic. Even in the English tradition the precedent was "born" binding, that is, not even the country known for having a legal tradition marked by deciding on the basis of precedents had, at its origin, a system of mandatory precedents. According to Daniel Mitidiero (2017, p. 27),

> [...] the meaning of precedent in English law has changed profoundly from its medieval origins to the contemporary era. It is an evolution that can be well synthesized in three significant expressions: illustration, persuasion and linkage (emphasis added).

The author (2017, p. 28-30) teaches that since the Middle Ages judges used precedents in cases. However, they did so only as a way of illustrating or explaining the Law to be applied in the specific case, which thus demonstrates the illustrative function of the precedent in the formation of English law, so that any case was considered precedent, indistinctly. Neil Duxbury (2008, p. 32-33):

> [...] the notion of precedent which existed in the medieval courts was very Different from that which was to emerge later. The medieval judicial precedent was, Strictly speaking, Nothing more than the judgment entered on the plea roll [...] Certainly, a precedent could make an Impression on Lawyers because it was Evidence of common Learning, but no single precedent would be accepted as Authority in preference to such Learning. Indeed Although, in the medieval courts, precedents Were sometimes treated as Evidence of what the law was commonly Held to be, the Occasional Judge or serjeant would precedent Remark that precedents must not be mistaken for law.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 73-87 • 2020

In the sixteenth century, more specifically in the early Tudor era (DUXBURY, 2008, p. 33), the precedents took another step towards linkage. As preleciona Mitidiero (2017, p. 31), the precedents began to play a slightly more relevant role than before in the decision-making process, serving as a criterion for the decision of the case - since they are not contrary to the Common Law -, thus achieving a persuasive function, which marks the beginning of the theory of precedent.

In this passage, the judicial precedent came to be seen as evidence of the very existence of Common Law (MITIDIERO, 2017, p. 32). Duxbury (2008, p. 34) states that "[t]his subtle shift in emphasis was certainly Evident to Coke in his Commentary upon Littleton: ?our book cases are the best Proofs what law is '[...]". That is, there was a great advance between the phases of transition concerning the linkage of precedent in England, since before the precedent could never be confused with the law, now it becomes an evidence of what it is.

Although the precedent, in its persuasive phase, had its relevance to the English legal system, in the words of Mitidiero (2017, p. 35) "the persuasive precedent did not amount to a standard itself, insofar as it was in the hands of the later judges, while acknowledging that the precedent conformed to the case, to deny its application to the solution of the case". This shows that the merely persuasive character of a precedent is not sufficient grounds for, as opposed to the interpretative freedom of the magistrates, causing the judges to abandon their freedom to decide and adopt a precedent not endowed with binding, even though they should. According to Cimardi (2015, p. 39):

> It is important to note that the so-called English doctrine of the Tare decisis was not born before the eighteenth century, and, despite the different meanings that the expression may have, it corresponds to the principles and rules that guide the use of precedents and their status as binding authority (Binding precedent).

In the nineteenth century, therefore, the precedent left its persuasive character and effectively passed to the link, especially from the influence of Bentham and Austin and with the advent of the Law Reports of 1865 and the Judcature Acts of 1873-1875 (MITIDIERO, 2017, p. 36). However, it is important to note that for the system of English precedents to reach the stage in which it is today, there was a long process that began in the nineteenth century.There is only one case, dated 1898, in which all the Lords of the House of Lords unanimously said that court precedents were binding. And only in 1966, from a Practice Statment, the Court understood that it could overcome its precedents (MITIDIERO, 2017, p. 37).

Such facts demonstrate that a system of precedents does not consolidate quickly, many adaptations and maturation are necessary, both of the Courts, and of society, to understand and learn to ration and work with precedents, as well as living a culture of valuing the precedent. In the case of Brazil, the first record of binding precedent comes from the Portuguese seats, at the time of Imperial Brazil. After this, in 1963, through Minister Victor Nunes Leal - then Minister of the Supreme Court (STF) -, It occurred the creation of case law summaries of the Supreme Court, which did not have binding character.

Other instruments, whether procedural or constitutional, were created before the Civil Procedure Code of 2015 (CPC/15), which can be considered as binding precedents. Among these, are the decisions coming from Direct Action of Unconstitutionality (ADI) and Declaratory Action of Constitutionality (ADC), whose Law is from 1999; the binding summary and the

general repercussion on extraordinary appeal, both instituted by Constitutional Amendment 45/2004; the repetitive special appeal, which was inserted in the Code of Civil Procedure 1973 through a Law of the year 2008.

The objective of the work is not to enter into the details of such institutes, however, it is necessary to recall a fact always commented by the doctrine: the CPC/2015 did not bring the idea of binding precedents for the first time in recent Brazilian procedural history, which does not rule out the fact that the novel code has taken a big step towards systematization of matter.

In the words of Ravi Peixoto (2019, p. 138), "[o] CPC/2015 appears as a consolidator of the previous reforms to try to establish the decisis Stare in Brazilian law". Such consolidation took place through a series of articles placed in the new code in order to ensure the application of precedents and especially through art. 927, which deals with the obligation to observe the precedents. The forecast contained in art. 927 of CPC/15 is considered by the doctrine as a fundamental norm of the new code, although it is not in the list of the first twelve articles of the Code, because it is not exhaustive. Among other authors, Carlos Frederico Bastos Pereira (2018, p. 107-110) and Fredie Didier Jr (2017, p. 71).

It should be noted that the formal binding process - that is, the legislative changes that were made until the CPC/15 was reached - represented the first step in the course of the adaptations necessary for a Brazilian system of precedents to be consolidated (PEIXOTO, 2019, p. 140). In fact, assuming that the linkage is a process, that is, it is not something automatic and that, currently, Brazil goes through a phase of adaptation to a system of binding precedents and that this is a system with its particularities, to what extent the binding of precedents influences extra-jurisdictional decision-making environments?

The question is extremely relevant, since the obligation reaches, according to the theory of precedents, the Court that edited the precedent (horizontal effectiveness) and lower courts and judges (vertical effectiveness). Therefore, traditionally, the effects of the binding precedent radiate only within the Judiciary. But what about extrajurisdictional sectors that are affected by court decisions? From then on, the possibility of binding effect in non-jurisdictional environments will be analyzed.

3. THE IMPACT OF PRECEDENTS ON ARBITRATION IN LAW

The relationship between arbitration and judicial precedents is very thorny. Long before the 2015 Civil Procedure Code was in force, it was discussed whether the arbitrators would be bound by the precedents of the court. However, with the advent of the new code, the discussion has intensified and there are currently at least three distinct positions on this subject. There are authors who defend the full sovereignty of arbitrators, so that judicial precedents are not mandatory in relation to arbitration. Other authors, differently, adopt a mixed position, advocating the linkage of the arbitrators only to binding summits and decisions of the Supreme Court in concentrated control. On the other hand, there are those who advocate refereeing to precedents.

Rômulo Greff Mariani (2018, p. 37) believes that jurisdiction, as a means of social pacification, can be exercised by both the judge and the arbitrator. The author says that such activity has been effectively recognized and that although the judicial activity is typical, it is not exclusive. Moreover, the aforementioned author understands that "arbitration will provide jurisdiction analogous to what would occur if the parties had sought the state judiciary, in what they resemble, in view of being arbitration, also a mechanism that proclaims the right" (MARIANI, 2018, p. 38-39).

In accordance with Mariani's thought (2018, p. 75), the arbitration process and the judicial process have in common their "conflict resolution" nature, that is, both seek the pacification of disputes through an organized path, in such a way that the prerogatives and guarantees of the parties are respected. However, despite this similarity, they are not confused. According to Ricardo Dalmaso Marques (2013, p. 8), three main premises can be established regarding arbitration:

> [...] it is important to establish the premises that (i) the arbitration office (in general, in the international context, and not only as established in the Brazilian legislation by Law No 9.307/1996 consists of a specific system, with its own rules, and marked, primarily, procedural flexibility and the autonomy of the will of the parties to the laws that must be applied; (ii) between those rules, those for the creation and application of precedents or jurisprudence (judicial or arbitral) also have, in arbitration, nuances quite diverse from those applicable in the judicial sphere, and (iii) the procedural and procedural rites (which includes the Recursal procedure, based on the hierarchy, and the eminently procedural tools and remedies) existing.

The understanding of Dalmaso Marques (2013, p. 9) is that when arbitration is elected as a procedural system to be applied to the specific case, it renounces the state procedural system and the analysis of the merits by the judiciary, so that this implies the renunciation, also, the rules and procedural tools that are inherent to the judicial system and that, therefore, would not extend to the arbitral. From Mariani's perspective (2018, p. 76-87), the arbitration procedure would be an autonomous subsystem in relation to the state process and based on this, highlights three main conclusions: the Code of Civil Procedure does not apply to the arbitration procedure, judicial precedents also do not apply to arbitration proceedings and the arbitrator is sovereign in its decisions:

As a logical consequence, it is possible to establish a general rule that the agents involved in the arbitration are not subject to state institutions, especially for what matters here, the trial and binding techniques laid down in the state procedural diploma, so that these "precedents" do not bind the arbitrator. The provisions contained in the current Code of Civil Procedure, as a rule, do not apply, even if in a supplementary or subsidiary way, to the arbitral procedure, except where the parties so agree or even provide for the rules applicable to the arbitral procedure (not recommended) (MARIANI, 2018, p. 87).

For the author, to point out that the arbitrator is sovereign in the application of the Law means to say that it is not linked to the view of the State Judiciary, because even in English Law, the English Arbitration Act was motivated by the fact that the arbitration is not an annex of the State Judiciary (MARIANI, 2018, p. 88). However, the precedent, as a technique of uniformization of jurisprudence, ends by expressing the view on the concrete application of State law, a view that the arbitrator may not agree to, and if he does not agree, will be applying the

law, even if not in the same way as the state judge and will be sovereign to sustain that position (MARIANI, 2018, p. 88-89).

In addition, the author asserts that the desire for coherence and integrity in the application of the law would determine the necessary adoption by the arbitrator of precedents, which, in his view, would subvert the logic of arbitration for being an undue advance in relation to the autonomy of the arbitrator, which exercises its function vis-à-vis the parties and not vis-à-vis the company. Therefore, he would not have the duty to safeguard the integrity or coherence of the legal order, thus demonstrating that the arbitrator's relationship with the law is different from the judge's relationship with the law (MARIANI, 2018, p. 90).

Therefore, according to the author (2018, p. 91), there is no need to talk about the linkage of the judicial precedents in the arbitral process, because the procedural law does not find shelter in the arbitral process (not even in a subsidiary way) and because the arbitrators are sovereign. Thus, the judicial precedent in relation to arbitral decisions would have merely persuasive effect, not due to undue interference of the judicial precedent in the arbitration, but with a view to a natural persuasive influence that precedents possess (MARIANI, 2018, p. 94). In the words of the author:

Thus, there may be a persuasive effect in the previous state decision, and it is natural that this is so. [...] Here the authority already mentioned that the past decisions enjoy, with greater or less force depending on some elements, as the quality of the reasons brought by the decision. And that's something you can't control. If the parties guide their conduct, if the lawyers make use to build their case and if the arbitrators may, in theory, be influenced by the state court, there is nothing that can be done to prevent this (MARIANI, 2018, p. 94).

Marcos Serra Netto Fioravanti (2017), on the other hand, takes a mixed position on the problem. For the author, the binding officers have mandatory observance by the arbitrators, as well as all the sources of the right chosen by the parties at the time of the arbitration election, so that summary entries cannot be ignored or contradicted by the arbitrators without distinction being made (FIORAVANTI, 2017, p. 82).In addition, the author argues that the decisions of the Supreme Court in concentrated control of constitutionality are mandatory observance by the arbitrators, since they have erga omnes effect and binding effectiveness. Thus, the arbitrators must apply them as a way to decide in accordance with the Brazilian legal order, as expected by the parties that elected the arbitration (FIORAVANTI, 2017, p. 91).

However, as for the other species of precedent listed in art. 927 of CPC/15, the author is emphatic in declaring that the arbitrators are not bound by such precedents. He defends the binding of arbitrators to binding summits and the decisions of the Supreme Court in concentrated control due to the integrity of the normative system and the arbitration agreement, and not, according to him, the mistaken idea of application of the Code of Civil Procedure to the arbitration process, so that the other chances of art. CPC/15 927 are not binding on arbitrators (FIORAVANTI, 2017, p. 96).

This position, therefore, assumes that among the precedents, as systematized in the current Code of Civil Procedure, there are distinct degrees of binding, and only those arising from constitutional jurisdiction are mandatory. The arguments raised by the author, in a way, refute the idea defended by the current of the inapplicability of precedents, but it lacks a deeper foun-

dation derived from the theory of law itself, which, as will be shown below, could not assume the existence of competing and incompatible regulatory systems.

4. THE IMPACT OF PRECEDENTS ON THE REGULATION OF PUBLIC SERVICES

Regulatory agencies are considered to be special municipalities in view of certain peculiarities they possess, such as decision-making autonomy, which means that they have a wide autonomy to decide administrative issues involving regulated agents, as well as the users of the service regulated by it. That is, the regulatory agencies hold revisional power of their acts in last administrative instance (CARVALHO FILHO, 2018, p. 577).

Although the decision-making autonomy of these municipalities, nothing prevents the concessionaires, permissionary or authorized to provide public services, in case of disagreement with the administrative decision, enter the Judiciary with action against these administrative acts, especially if they are against the legal system, either in contradiction with the law or with precedent. And, if such acts reach a large number of stakeholders, especially users of the service, it is entirely possible that a Repetitive Demand Resolution Incident (IRDR) will be instituted if all the authorization requirements of the installation are met.

In this regard, the great discussion revolves around art. 985, §2º, of CPC/15, which deals with the relationship between precedents and regulatory agencies. The aforementioned article stipulates that when the thesis adopted in the outcome of the IRDR judgment deals with the provision of service granted, permitted or authorised, the decision will be communicated to the regulatory body, entity or agency responsible for monitoring the effective implementation.

André Guskow Cardoso (2016, p. 12-15) added that the ratio legis would be in the sense that the communication mentioned in the aforementioned legal provision does not refer to a command, order or determination to regulatory agencies. For the author, it is, differently, a communication for such agencies to become aware of the thesis adopted within the scope of the IRDR, so that such decision would not have binding effect in relation to regulatory agencies.

Another argument contrary to the incidence of precedents in relation to regulatory agencies is the argument of the unconstitutionality of art. 985, §2º, of CPC/15, which is being discussed in ADI 5492, proposed by the State of Rio de Janeiro in 2016. Weber Luiz de Oliveira (2019, p. 163) deals with the Law of Regulatory Agencies (Federal Law nº 13,848/2019), which, in its art. 6º, provides that the amendment of normative acts of general interest of economic agents, consumers or users of the services provided must be preceded by the Regulatory Impact Analysis (AIR).Oliveira (2019, p. 164), then, affirms the impossibility of imposing, through the jurisdictional route, the theses adopted in the trial of repetitive cases to the regulatory agencies without prior RIA. In addition to this argument, the author states that the Code of Civil Procedure usurps the constitutional competence defined in art. 175, sole paragraph, section I, of the Federal Constitution, as well as in art. 174 of the Magna Carta, in order to undermine the principle of separation of powers.

This means that, according to the author, the civil procedural law would not have the power to assign the judicial decision as would be the way the regulatory agencies act, because only specific law could do it (OLIVEIRA, 2019, p. 167). However, the understanding of both authors have inconsistencies. Initially, it should be clarified that the provisions in the art. 985, §2º, of the Code of Civil Procedure does not refer to a mere communication to be made to regulatory agencies. On the contrary. The article makes the following mention: «regulatory agency competent to monitor the effective implementation» (BRASIL, 2015).This means that the regulatory agency will be communicated, but for it to effectively apply the understanding conveyed in the decision that established the thesis in IRDR. That is, it will be communicated to apply understanding to which it is bound, because it has to effectively monitor the application of the understanding adopted in the decision.

Moreover, regarding the argument of need for prior realization of RIA, it is essential to clarify that such an argument is inconsistent in systematic and thus practical terms. First, it must be said that art. 6 of Federal Law 13.848/2019 states that if there is a proposal to amend a normative act of general interest, this should be preceded by AIR. Normative act to which the device refers are all normative acts made by the regulatory agencies themselves, in their regulatory power. Extending the argument, the suggestion would be to subject judicial decisions to a judgment of convenience and opportunity, which is obviously incompatible with the rule of law. Also,With regard to the argument of separation of powers, there is a consolidated shared understanding in contemporary studies that judicial control is warranted when dealing with issues in which fundamental rights are under debate, essentially those served by the public services. This level of judicial review has become everyday, addressing issues ranging from the realization of the right to health, past the right to education and even achieved social rights. In this regard Dias (2016, p. 190), in a specific study, pointed out:

> It is worth saying that judicial control is a very effective technique of institutional arrangement, in which the Judiciary Power assumes the custody of the Constitution, being able to exercise this function in order to put it to the Executive Power and the Legislative Power. We have already demonstrated that the actions of the Cortes do not represent in itself a violation of the democratic principle, but a true way of its guarantee from the protection of citizens who for that democratic purpose compete and interact. Judicial control is closely related to a constitutional democracy. Since a society is structured in the form of the rule of law, the political line of conduct is submission to the protection of fundamental rights. The control of variant political behavior is therefore an absolutely logical consequence of that system.

Therefore, the contemporary view of control relations between state functions is in no way incompatible with the judicial action of editing precedents that must be incorporated, obligatorily, into the regulatory agenda of regulatory agencies. It is worth saying that the formulation of precedent is derived from the solution of a jurisdictional conflict that, for this reason, is in the proper area of action of the Judicial Power, however, before the fundamental nature must be reinforced by the other state functions.

It should be remembered that the IRDR has as requirements multiplicity of demands (real or potential), that there is no need for evidentiary instruction, as well as demonstration that if there is different treatment, there will be break to the isonomy and legal certainty. Therefore, if there is a matter of mass that deals with service granted, permitted or authorized, but the matter meets the requirements, the IRDR may be instituted. It also needs to be put in place so that

there is uniformity of understanding and so that the regulatory agency itself adopts a single understanding.If the regulatory agency considers that the decision that established the thesis in the IRDR is mistaken, it can appeal to the Superior Courts. However, according to the understanding of Lucas Gil Carneiro Salim, the linkage of the regulatory agencies to the precedents is essential, as it is necessary to open the dialogue between the judiciary and the regulatory agencies, in order to avoid actions and, perhaps increase the efficiency of the court. See:

> As previously demonstrated in the CNJ Report, "100 largest litigants", 24% of the 100 million processes analyzed refer to telephone companies and utilities. In these terms, it is essential to open dialogue between the judiciary and the regulatory agencies, precisely in order to avoid mass litigation, when matters can be decided within the internal administrative framework of the supervisory bodies. (SALIM, 2015, p. 11).

Thus, it is undeniable that the understanding according to which the regulatory agencies are linked to the precedents is the most correct, in view of the observance of something very expensive to the Civil Procedure Code of 2015 and to the whole legal order: the standardization of understandings.

5. THE IMPACT OF THE PRECEDENTS BEFORE THE PARAJURISDICTIONAL COURTS

Parajurisdictional bodies, in a broad sense, are administrative units separate from the Judiciary and the Legislative. For the purposes of this work, the term "parajurisdictional" is used specifically to characterize administrative bodies competent to judge - administratively - appeals.In this article, given the multiplicity of bodies with such functions, the relationship of the judicial precedents with the decision process of the Administrative Council of Fiscal Resources (CARF) will be examined, which, however, can be widely extrapolated to other administrative instances. Before properly entering the relation of precedents with CARF, it is interesting to clarify the understanding expressed by Weber Luiz de Oliveira about the application of precedents in the Public Administration.

According to Oliveira (2019, p. 232-234), only the precedents provided in art. 927 of CPC/15 are applicable to public administration. However, the author makes an unnecessary differentiation between directly and indirectly binding precedents. For the aforementioned doctrinaire, the directly binding precedents are only the binding summary and the decisions in concentrated control, since there is constitutional authorization for them to be applied in relation to the Public Administration.The indirectly binding, on the other hand, are the remaining ones, which would depend on the edition of an authorizing law, that is, it should be edited law that allows the application of the other precedents to the Public Administration. Such a position is mistaken.First of all, one should not differentiate between the precedents, as if one had greater strength than the other. Furthermore, a systematic interpretation of the precedent system should be established. The actions of concentrated control and binding summary were created, respectively, in 1999 and 2004, at which time a whole system of precedents had not yet been considered.

This idea matured over the years and other types of precedents were introduced, gradually, as shown in the second topic. With the advent of the 2015 Civil Process Code, such a system was implemented. Therefore, the systematic reading would be in the sense of interpreting, in the light of the Federal Constitution, the other precedents as also linked to the Public Administration.There are not now only two types of precedent, there are several, of equal weight of the summits and decisions of concentrated control, and they should be interpreted as binding in relation to the Public Administration. Even, the CARF, in its internal regulations, provides in art. 62 that CARF advisers may not depart from understanding treaty, international agreement, law or decree on the grounds of unconstitutionality, unless one of these normative acts substantiate tax credit subject to binding summary or decision of the Superior Court of Justice (STJ) or Supreme Court (STF) in repetitive appeals.

Such a forecast is so serious that it is supported by art. 45 of the aforementioned regiment, according to which the counselor who fails to comply with the provisions of art. 62, may lose the mandate. In addition, there is the forecast in art. 80 that the decisions made in disagreement with binding summary or decision of the STJ or STF in repetitive appeals are void. However, according to the lessons of Cassiano Menke (2018, p. 93), there are two types of normative force, a formal and a material:

> Formal normative force is the binding effect of which the precedent is endowed as a result of express legal provision. These are the situations in which normative statements establish the binding of a certain body to the precedents. An example of this formal link is in art. 62 of the Internal Rules of CARF. Note that, in the hypotheses listed by the aforementioned device, it is due to the members of CARF follow the judicial precedents. Material normative force, on the other hand, stems from the content of the decision and its prolator organ (ÁVILA, 2014b, p. 498). The binding nature of the precedent, in this case, stems from the wish to remain and the definitive nature of these decisions. This is because they have content capable of being universalized to solve similar cases. It also comes from the fact that they were delivered by supreme courts, which, according to CF/88, is responsible for giving the last word in certain matters.

According to the author, in most CARF decisions, only the formal normative force is admitted, that is, CARF understands to be bound only in the hypotheses foreseen in art. 62 of the Internal Rules of Procedure of the Administrative Council of Fiscal Resources (RICARF), so that it would not have the duty to adopt other types of precedents. Egon Bockmann Moreira (2016, p. 321) peremptorily states that it is no longer possible to make administrative decisions that are inconsistent with the case law:

> Thus, the time has passed when it could be considered of prestige to administrative decisions in disregard of jurisprudence. Such obligation of knowledge and obedience is cogent and externalized from various angles. On the one hand, there is a duty to “standardize its jurisprudence and keep it stable, upright and consistent” (art. 926). This device is of high relevance in the administrative process: in the case of administrative courts, the cogent rule of uniformization (quality of something that does not vary in form or content), stabilization (firmness, solidity, constancy and predictability) appliesintegrity (maintenance of its fullness, without aggression) and coherence (cohesion, comprehensibility and respect for consequences) of collegiate decisions (emphasis added by the author).

Moreover, the author (2016, p. 322-323) demonstrates that the duties contained in the art. 926 of CPC/15 aims to preserve the principle of legal certainty and that the Courts, including the administrative ones, must preserve their jurisprudence, since this is also a way of ensuring internal stability, in order to achieve a level of reduction of procedural costs, such as time, volume of proceedings and appeals, etc. And concludes that:

> Soon, all administrative bodies and entities equivalent to Courts - rectius: colegiados decisorios -, without exception, from the Courts of Auditors to the National Council of Justice (CNJ), passing through the Administrative Council of Economic Defense (CADE)as well as advice from taxpayers, Internal Affairs and regulatory agencies, has been assigned the procedural duty to enhance legal certainty stemming from the stability of previous decisions, which need to become uniform over time (the same form and decision-making content) (emphasis added by the author).

Therefore, in view of the principle of legal certainty, the precedents contained in Art. 927 of CPC/15 must be applied by the Public Administration, especially by the Administrative Courts. This is an extremely necessary application, so that there is a consistency of understandings between the judiciary and these courts, so that disputes can be resolved promptly in the Administrative Courts, with a view to avoiding new demands.

6. BY A SYSTEMATIC APPROACH TO LEGAL RULES DERIVED FROM PRECEDENTS.

The current stage of the Theory of Law argues for a comprehensive vision of the juridical phenomenon, as much as possible, seeking a uniformity in the recognition of norms and their application. Profoundly different approaches assume the integrative perspective when establishing criteria that select the standards that, being legal, should be considered mandatory, and therefore be applied by all bodies with authority.Although one cannot summarize all possible theoretical variables here, an illustrative exposition may be adequate to demonstrate that any conception of contemporary law would support a uniform understanding of the norms derived from precedents. It is in this sense that Dworkin, in a non-positivist view, demands that the solutions constructed by the applicators should be integral, taking into account the historical argumentative theme, under penalty of being considered illegitimate. In this sense, Dias (2019, p. 98) teaches:

> It is in this sense that Porto Macedo points out: “For Dworkin, the interpretation of law means to see law as a coherent body, integrated and articulated to an intentionality (which is not confused with the intention of legislators). For him, the description of the measure of the normativity of law presupposes and requires the incorporation of an interpretative dimension”. This explains why the correction of a response is theoretically possible within a proposal that rejects external criteria of correction and requires that conceptual definitions and their practical articulation depend on an interpretative practice conceived in such a way that the due contextualization leads to correct answers.

Therefore, as an integrated normative body, there can be no decisions that recognise rights in one area and, at the same time, deny them in another. Within the framework of Dwor-

kinian thinking, such a system cannot be called Law.In the extreme, that of the exclusive positivists, the definition of the legal system also depends on a system of recognition that gives unity to law, in this exact sense, even under a positivist approach, the coexistence of partially existing decision-making standards could not be accepted. In this sense Dias (2019, p. 148), analyzing the thought of Joseph Raz, points out:

> Raz, however, emphasizes that the key to the identification of an institutionalized system is not in the investigation of the organs that create the norms, but in those that apply them, because they indicate which norms are effectively in force. In this particular case, the aim is to refute the thesis of the normative nature of the source at the legislative level and to justify the multiplicity of recognition rules. These implementing bodies are decisive for the characterisation of a system of norms as institutional, as they ensure the unity of the system, since: a) they establish individual standards of conduct; b) they apply existing norms; c) they exercise binding determinations; that is, that should be decided regardless of the recipient's consent.

The above counterpoint made, between extremes of the current Theory of Law, does not exclude the fact that other competing theories, starting from distinct premises and own formulations, in no way admit the possibility of coexistence of cogent and non-acogent rules on the same right. Although in none of the fields of incidence previously presented there is unanimity of understanding, an approach from the Theory of Law suggests that one cannot admit a partial incidence or no incidence of precedents in the decision-making environments examined.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 73-87 • 2020

7. CONCLUSIONS

In view of the different positions exposed, it can be seen that the theme addressed is not peaceful. However, the most correct understanding on the main issue that pervades this article is that the precedents are mandatory not only in the jurisdictional context, but also for the Public Administration, either for parajurisdictional courts, such as CARF, be for regulatory agencies, especially in the case provided for in art. 985, §2º, of CPC/15, in addition to being binding on arbitrators.Thus, Administrative Courts, regulatory agencies and arbitrators are subject to legal precedents due to basic principles of our legal system, such as legal certainty and isonomy. However, not only does respect for such principles lead to the unspeakable conclusion that judicial precedents are binding in non-jurisdictional environments, but in particular from an analysis of different positions within the Theory of Law, which point to an integrity (Ronald Dworkin) or unity (Joseph Raz) of the Law, so that the concomitant existence of diametrically opposed positions in relation to the same right is not admitted.as far as the Public Administration is concerned, if the judicial precedents were effectively adopted and the understanding that they are binding prevailed, there would be greater legal certainty and stability between the decisions of the Judiciary and the Public Administration, without this representing an affront to the separation of powers, because the applied understanding would not be a command of the Judiciary to the Executive, but rather the application of the law in force, uniformly, in both spheres.The arbitrator, on the other hand, remains sovereign under the terms of the arbitration agreement, but he must bind himself to the judicial precedents precisely for the sake of systemic coherence, for he cannot rule contrary to the law, ignoring the precedents

that have become, over the years, the primary source of law.The regulatory agencies, on the other hand, continue to have autonomy of decision-making as municipalities under special arrangements. The binding of precedents in relation to regulatory agencies does not mean the withdrawal of this autonomy. Differently, it represents the compatibility of the administrative and normative acts of these agencies in relation to the law and the precedents, because the ultimate purpose of art. 985, § 2º, of the CPC/15 is the improvement of the provision of public services and their own regulation, in order to better guarantee the rights of users.For this association to occur in the extrajurisdictional context, it is necessary, however, that, as stated in the second topic, the system of Brazilian precedents continue going through its adaptation process, since many adjustments are still necessary.

REFERÊNCIAS

BRASIL, Código de Processo Civil. Vade Mecum. 4ª Ed. Salvador: Juspodivm, 2018.

CARDOSO, André Guskow. O Incidente de Resolução de Demandas Repetitivas – IRDR e os serviços permitidos, concedidos ou autorizados. Disponível em http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RDAdmCont_n.23.06.PDF. Acesso em: 23 nov. 2019.

CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo. São Paulo: Atlas, 2018.

CIMARDI, Cláudia Aparecida. A Jurisprudência Uniforme e os Precedentes no Novo Código de Processo Civil Brasileiro. São Paulo: Revista dos Tribunais, 2015.

DIAS, Jean Carlos. O Controle Judicial de Políticas Públicas. 2ª ed. Salvador: Juspodivm, 2016.

DIAS, Jean Carlos; SILVA, Samira Viana. O Direito Sumular Brasileiro: Uma Abordagem Crítica à Luz da Teoria dos Precedentes e da Análise Econômica do Direito. In: DIAS, Jean Carlos; BRITO FILHO, José Cláudio Monteiro de; MOUTA, José Henrique (Org). Concretização dos Direitos Fundamentais e Sua Fundamentação: Abordagens a partir da teoria do processo, da análise econômica do direito e das teorias da justiça. Rio de Janeiro: Lumen Juris, 2017.

DIAS, Jean Carlos. Teorias Contemporâneas do Direito e da Justiça. 2ª. Ed. Salvador: Juspodivm, 2019.

DIDIER JR, Fredie. Curso de Direito Processual Civil: Introdução ao Direito Processual Civil, Parte Geral e Processo de Conhecimento. 19ª Ed. Salvador: Juspodivm, 2017.

DUXBURY, Neil. The Nature and Authority of Precedent. Cambridge: Cambridge University Press, 2008.

FIORAVANTI, Marcos Serra Netto. A Arbitragem e os Precedentes Judiciais: Observância, Respeito ou Vinculação? 2017. 137 f. Dissertação apresentada no Programa de Pós-Graduação em Direito, Pontifícia Universidade Católica de São Paulo. 2017.

MARIANI, Rômulo Greff. Precedentes na Arbitragem. Belo Horizonte: Fórum, 2018.

MARQUES, Ricardo Dalmaso. Inexistência de Vinculação do Árbitro às Decisões e Súmulas Vinculantes do Supremo Tribunal Federal. Disponível em: https://www.academia.edu/38532293/Inexistência_de_vinculação_do_árbitro_às_decisões_e_súmulas_judiciais_vinculantes_do_Supremo_Tribunal_Federal. Acesso em: 05 nov. 2019.

MENKE, Cassiano. O dever de fundamentação estabelecido no art. 489, §1º, do Código de Processo Civil: um novo paradigma de conhecimento e aplicação do direito e alguns dos seus impactos no processo administrativo fiscal. In: GOMES, Marcos Lívio; Oliveira, Francisco Marconi de. Estudos Tributários e Aduaneiros do III Seminário CARF. Disponível em: http://idg.carf.fazenda.gov.br/publicacoes/estudos-tributarios-e-aduaneiros-do-iii-seminario-carf.pdf. Acesso em: 07 de nov. De 2019.

MITIDIERO, Daniel. Precedentes: da persuasão à vinculação. 2ª Ed. São Paulo: Revista dos Tribunais, 2017.

MOREIRA, Egon Bockmann. O Novo Código de Processo Civil e sua aplicação no Processo Administrativo. Disponível em: https://bibliotecadigital.fgv.br/dspace/handle/10438/27009. Acesso em: 07 de nov. 2019.

OLIVEIRA, Weber Luiz. Precedentes Judiciais na Administração Pública: Limites e possibilidades de aplicação. 2ª Ed. Salvador: Juspodivm, 2019.

PEIXOTO, Ravi. Superação do Precedente e Segurança Jurídica. 4ª Ed. Salvador: Juspodivm, 2019.

PEREIRA, Carlos Frederico Bastos. Norma Fundamental do Processo Civil Brasileiro: Aspectos Conceituais, Estruturais e Funcionais. Civil Procedure Review: Munique, vol. 9, n. 1, p. 107-110, jan./apr. 2018.

SALIM, Lucas Gil Carneiro. A Aplicação da Teoria dos Precedentes na Administração Pública. Disponível em: http://www.periodicos.ufes.br/?journal=ppgdir-semanajuridica&page=article&op=view&path[]=12806. Acesso em: 07 nov. 2019.

ZANETTI JR, Hermes. O valor vinculante dos precedentes. 3ª Ed. Salvador: Juspodivm, 2017.

Received/*Recebido:* 09.05.2020.

Approved/*Aprovado:* 04.06.2020.

CONSTITUTIONAL LIMITATIONS TO THE REGULATORY POWER OF REGULATORY AGENCIES

LIMITAÇÕES CONSTITUCIONAIS AO PODER NORMATIVO DAS AGÊNCIAS REGULADORAS

Ana Keuly Luz Bezerra[1]
José Machado Moita Neto[2]
Maria Carolina Oliveira de Araújo[3]

ABSTRACT

This is a qualitative study based on content analysis, about the legality of normative acts issued by Brazilian Regulatory Agencies. It aims to analyze, in the light of the Federal Constitution, the limitation of the normative power of environmental agencies, using the discourse analysis of Direct Actions of Unconstitutionality (ADI) that were proposed against normative acts of this nature. From this analysis, we also sought to understand the motivation of the decisions handed down in the ADIs, whether by motivations of a legal nature aiming at the application of constitutional precepts or motivated by acts of will resulting from individual purposes. It was concluded that the judicial decisions and administrative resolutions studied are biased, sometimes prioritizing the private interest over the collective interest.

Keywords: Constitutionality. Regulatory agencies. Normative Power

RESUMO

Trata-se de estudo qualitativo a partir da análise de conteúdo, acerca da legalidade dos atos normativos emitidos pelas Agências Reguladoras brasileiras. Tem como objetivo analisar à luz da Constituição Federal a limitação do poder normativo das agencias ambientais, utilizando a análise de discurso das Ações Diretas de Inconstitucionalidade (ADI) que foram propostas contra atos normativos desta natureza. Dessa análise buscou-se também entender a motivação das decisões proferidas nas ADIs, se por motivações de cunho legal

1 Master and Doctorate in Environment and Development from the Federal University of Piauí, Bachelor in Administration and Law. Professor of Business Management at the Piauí Federal Institute, Campus Dirceu Arcoverde, Collaborating Professor of the Postgraduate Program in Development and Environment at the Federal University of Piauí. ORCID iD: http://orcid.org/0000-0002-6234-2474. Lattes: http://lattes.cnpq.br/9779727227180112. E-mail: analuz@ifpi.edu.br.

2 He holds a bachelor's degree in Science - Hab. in Chemistry from the Federal University of Piauí (1982), a bachelor's degree in Civil Engineering from the Federal University of Piauí (1989), a bachelor's degree in Philosophy from the Federal University of Piauí (2004), a law degree from the Federal University of Piauí (2017), a master's degree in Chemistry from the State University of Campinas (1987), and a doctorate in Chemistry from the State University of Campinas (1994). He retired as a full professor from the Federal University of Piauí in 2016 but continued researching and advising theses and dissertations in the Postgraduate Program in Development and Environment as a volunteer professor. ORCID iD: http://orcid.org/0000-0003-3268-1907. Lattes: http://lattes.cnpq.br/5047924139977100. E-mail: jose.machado.moita.neto@gmail.com.

3 Bachelor's degree in Law from UFPI (2017), PIBIC Fellow in the years 2016/2017, practicing lawyer in real estate and civil law, Postgraduate student in Business Law at FMU.ORCID iD: http://orcid.org/0000-0002-5362-2378. Lattes: http://lattes.cnpq.br/3295821274547896. E-mail: carolraiara@hotmail.com.

How to cite this article/Como citar esse artigo:
BEZERRA, Ana Keuly Luz; MOITA NETO, José Machado; ARAÚJO, Maria Carolina Oliveira de. Limitações constitucionais ao poder normativo das regulatory agencies. **Revista Meritum** 2020, Belo Horizonte, vol. 15, n. 4, p. 88-104. DOI: https://doi.org/ 10.46560/meritum.v15i4.7921.

visando a aplicação dos preceitos constitucionais ou motivadas por atos de vontade decorrentes de propósitos individuais. Concluiu-se que as decisões judiciais e resoluções administrativas estudadas são tendenciosas, por vezes, priorizando o interesse privado em detrimento do interesse coletivo.

Palavras-chave: *Constitucionalidade. Agências Reguladoras. Poder Normativo.*

1. INITIAL CONSIDERATIONS

The separation of powers, the basic principle of Brazilian democracy, is nowadays an arduous task, made difficult by various interpretations of the constitutional text. At this point a question arises: Does the will of the people prevail? Is the original constituent power extra-legal or political? These questions arise because there is a marked judicial activism, which sometimes results in politicized interpretations of the Federal Constitution.

The study's main objective is to analyze, in light of the Federal Constitution, the limitation of the normative power of environmental agencies. Its secondary objectives are: a) to identify the environmental agencies/bodies with normative power; b) to verify in the constitutional text the legal provision of the competence of these institutions to regulate and its limitations; c) to identify the existing environmental norms not issued by the legislative power and its scope; and d) to verify if there are lawsuits in the judiciary claiming the unconstitutionality of environmental norms issued by regulatory agencies.

The analysis of the normative power of environmental agencies in light of the Federal Constitution, as well as the multiple realities that the judicial system encompasses, allows for a reflection on the performance of these institutions.

Three regulatory agencies were selected due to the social role they play, the high number of resolutions that are issued by these agencies and mainly because they are constant targets of Direct Unconstitutionality Actions (ADI, in the Portuguese acronym), they are: the National Council of Justice (CNJ, in the Portuguese acronym), the National Health Surveillance Agency (ANVISA, in the Portuguese acronym) and the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA, in the Portuguese acronym). In this paper we will analyze their constitutional functions, as well as the legitimacy or illegitimacy of the actions of these bodies, through the analysis of resolutions adopted by them. The aim is to demonstrate whether the Regulatory Agencies respect the constitutional limits imposed on them, and if they exceed these limits, whether the necessary measures are taken by the competent authorities in an impartial manner.

Therefore, through the content analysis of the decisions pertinent to the subject, we tried to understand if the Constitutional text referring to the competencies and attributions of the Regulatory Agencies is interpreted by virtue of legal precepts or if the diverse interpretations are the result of a way to protect the interest of some social groups, fomenting even more the insecurity, not only legal, but also political and moral, that accompanies the current society.

2. MATERIAL AND METHODS

Initially it was identified which environmental agencies/bodies in Brazil have regulatory and disciplinary power. Then, the constitutional text was read in order to seek the legal support for these agencies to issue these rules and, in this sense, to verify if the public administration can require their compliance as a legal precept.

After determining the legal grounds for the normative action of the environmental agencies/bodies, a search was made for the regulations issued by these bodies, verifying their legal purpose and scope and the relationship with the existence of federal, state, or municipal laws that deal with the same theme that the normative act regulates.

Finally, a theoretical discussion was held, in the light of the constitutional text, about the legality of normative acts issued by environmental agencies/agencies, using as background for the discussion possible direct actions of unconstitutionality of normative acts of this nature, which were interpreted based on content analysis.

MERITUM MAGAZINE • v.15 • n.4 • p. 88-104 • 2020

3. REGULATORY AGENCIES: CONCEPT AND ATTRIBUTIONS

The regulatory agencies, nowadays with strong presence in the Brazilian administrative structure, began to be outlined in England in 1834, when they used, for the first time, the word "agency" to refer to a regulatory entity of a certain economic activity. However, it was in the United States of America (USA) that the use of autonomous agencies to regulate economic activities was consolidated. Ferreira Filho teaches us that

> In the United States, since the nineteenth century decentralized entities emerged, with a regulatory function for specific activities. The first of these was the Interstate Commerce Commission, established in 1887. (...) They are generically called agencies. This term, as defined by the Administrative Procedures Act of 1946, designates any entity that participates in the "authority of the Government of the United States (...) with the exclusion of Congress and the Courts". (FERREIRA FILHO, 2002, p. 63)

In Brazil, regulatory agencies emerged in the mid-1990s, during the government of Fernando Henrique Cardoso. Due to the need to decentralize the monopoly that the State held over some economic activities, agencies were set up to supervise these services. Based on this reality, regulatory agencies were created to discipline the players in the economic scenario, curb excesses, foster development, reconcile conflicting interests, allow fair exchanges, all in order to protect the market, in the absence of which both users/consumers, providers/investors and the State are harmed. The Brazilian legislator instituted the regulatory agencies in the form of Autarchy, however, when granting them regulatory power, it differentiated them from the existing ones in our legal system - and gave them the denomination of Autarchies of Special Regime (FERREIRA FILHO, 2002).

The legal concept of Autarchy is found in Article 5, I, of Decree-Law No. 200, of February 25, 1967, which defines it as: "an autonomous service, created by law, with its own legal per-

sonality, assets, and revenue, to perform activities typical of the Public Administration, which require, for their best operation, decentralized administrative and financial management" (BRASIL, 1967).

According to Di Pietro (2016), there is consensus among scholars that autarchies have the following characteristics: Creation by law; Public legal personality; Capacity for self-administration; Specialization of purposes or activities; Subjection to control or guardianship. As previously mentioned, the regulatory agencies have a special regime, as explained by Moraes:

In Brazil, the Regulatory Agencies were constituted as autarchies of special regime integrating the indirect administration, linked to the Ministry competent to deal with the respective activity, although characterized by administrative independence, absence of hierarchical subordination, fixed term of office and stability; absence of the possibility of dismissal ad nutum of its leaders and financial autonomy. (MORAES, 2002, p. 35)

However, this special regime to which agencies are subjected is subject to criticism, Di Pietro (2016, p. 89) understands that:

> It is often said that regulatory agencies enjoy a certain margin of independence in relation to the three branches of government: (a) in relation to the Legislative Branch, because they have a normative function, which justifies the name regulatory body or regulatory agency; (b) in relation to the Executive Branch, because the rules and decisions cannot be changed or reviewed by authorities outside the agency itself; (c) in relation to the Judiciary Branch, because they have a quasi-judicial function in the sense that they resolve, within the scope of the activities controlled by the agency, disputes between the various delegates who perform public service through concession, permission or authorization and between these and the users of the respective services. (DI PIETRO, 2016, p. 89)

However, these different "configurations" do not keep agencies away from the Brazilian Constitutional Regime, on the contrary, they should be in harmony with the Three Powers, since agencies are controlled by them, as well as by the Federal Audit Court.

The regulatory agencies, in relation to the segment in which they operate, are endowed with regulatory, supervisory, sanctioning and conflict mediation powers. Besides these powers, common to all regulatory agencies, others may be conferred by law for the benefit of the exercise of their functions. This is the case of the power to declare the public utility of certain goods for the implementation of electric power facilities, and the power to grant the operation of public services or the use of public goods.

The Magna Carta of 1988, provides in its Article 5, II, that "no one is obliged to do or not to do something except by virtue of law"; and further in Article 84, IV, informs that: "It is privately up to the President of the Republic to sanction, promulgate and make the laws public, as well as to issue decrees and regulations for their faithful execution" (BRASIL, 1988). At this point, doubts and criticisms arise about the legality of the resolutions issued by Regulatory Agencies.

The Administration is obliged to exercise the power conferred on it by law, within the limits of the law. There is no discretionary power, since without the exercise of power, either the administrative act is not perfected, or it is perfected in a flawed manner, or, even if not flawed, it does not reach the expected public purpose. The powers granted to Regulatory Agencies are fundamental to the performance of their activities. That is why the laws that establish regula-

tory agencies grant them the power to issue normative acts. Much has been debated about the nature of the normative acts issued by these agencies, and there are several positions. For the purposes of this study, some of them were examined.

Based on the Theory of Implicit Powers4, Aragão (2002) concludes that it is possible for agencies that are part of the Executive Branch to issue autonomous regulations5. The hypothesis does not violate article 84, item IV, of the Constitution, because regulatory authority is not exclusive to the Chief Executive Branch, and is often granted by law to other administrative bodies. The regulatory agencies, thus, exercise regulatory power with the purpose of concretely translating the concepts, the purposes and the abstract parameters contained in the law. Justem Filho (2002) understands that the abstract normative aptitude derives from the regulatory power held by the Chief Executive. The regulatory function belongs to the State, which exercises it through its non-personalized agencies (direct administration) or creates autonomous entities for this purpose (indirect administration).

In this second hypothesis, the regulatory function, with the inherent duties-powers, will be transferred to the customized entity. By virtue of the delegation operated, the agency may issue regulatory decrees that aim to facilitate the execution of the law.

For Di Pietro (2016), the generic and abstract rules issued by regulatory agencies expressly derive from the law. They do not constitute manifestation of regulatory power because such power was granted by the Constitution, privately, to the Chief Executive. Its delegation, in the hypotheses in which it is admitted, requires a manifestation of will from the holder of the competence, which, in the hypothesis examined, is not the legislator. The existence of constitutional support for autonomous regulation is ruled out, so that the agencies cannot issue norms in relation to subjects that are not covered by law. In other words, they cannot innovate in the legal field without a provision in the law.

Furtado (2007) sees in the regulatory power of agencies the exercise of administrative discretion. The regulatory power is exclusive to the Chief Executive, and, once exercised, is mandatory to all Administration. As a corollary, no agency, even if independent, can issue rules that overlap with the regulating decree. However, the law and the regulation do not always provide the best solution for the specific case. Therefore, the normative power of the independent regulatory agency arises, to use its technical knowledge to adopt the most adequate solution.

Starting from the distinction between regulatory function and regulating function, he affirms that the normative power of the agency is not to be confused with the regulatory power of the Chief Executive Officer. The regulatory function is eminently political, involving the interpretation of the law and the creation of mechanisms for its execution, which includes the elucidation of terms and concepts, and the establishment of procedures and routines. The regulating function, on the other hand, eminently administrative, aims to discipline a particular economic segment in order to ensure the proper functioning of the market (Guerra, 2012).

The regulatory function is exhausted in the issuance of the normative act that complements the law. The regulating function has in the issuance of a normative act the partial performance of its attributions. In this sense, the normative power of the regulating agency is merely instrumental, while the regulatory power is the exercise of constitutional competence and autonomous emanation of political power. Thus, the thesis of delegation of powers is ruled out.

Despite the various positions, a majority opinion has not yet been formed on the subject, in this sense, the courts that have analyzed these cases have considered the normative action of the agencies to be legitimate. What is understood through the constitutional text and specific legislation of the Regulatory Agencies is that the normative acts issued by them have a secondary nature, since they are exercised through existing laws.

However, an observation should be made regarding the subservience to the regulating decree. The exercise of normative activity, whether for the production of primary or secondary norms, is not a simple task. It requires reflection, debate, consideration of consequences, and sometimes the availability of resources. When dealing with a law, the debate takes place in the parliamentary arena; when dealing with an interna corporis act (such as internal regulations, legislative decrees, etc.), the discussion takes place among peers; and when dealing with an administrative normative act, the hearing of the technical areas involved is necessary. Normative activity cannot be rushed, under penalty of causing untold harm.

As previously stated, the regulatory agencies are established by law, and it is according to these that the greater or lesser amplitude of power conferred to them is given. The regulatory power is common to all agencies, and it is from this that the name “Regulatory Agencies” appears. They are granted the power to regulate through general and abstract infralegal normative acts, which may limit rights and impose obligations related to the regulated activity. Mendes (2000) explains that:

> Possessing normative power, then, we will consider the entity as a regulatory agency. This will be, therefore, not the entity that simply exercises regulation in any of the forms, but, above all, the one that has competence to produce general and abstract rules that directly interfere in the sphere of private law. (MENDES, 2000, p. 97).

We conclude that the normative power is inherent to the Agencies’ activities and, as long as these regulations are technical in nature and do not contradict rights and guarantees of constitutional nature, they would not suffer from illegality. Corroborating our understanding, Motta (2000) teaches us that:

> It would then be up to the regulatory agencies to issue administrative acts on strictly technical matters, without innovating the legal system. The standards would then be outlined in the laws. The laws creating the regulatory agencies establish the general bazilaments of regulation in telecommunications, for example, and it would be up to the regulatory agency, in the exercise of its normative function, to particularize the rule, providing the details for its implementation, preferably in technical matters. (MOTTA, 2000, p. 46)

In Brazil, as time went by, the figure of the Regulatory Agencies became more and more present and comprehensive due to the changes in the organization of the administrative structure of the State itself. There is an increasing number of public services that are granted or delegated to the private sector, leading to a need for greater supervision of services by the Administration. Furthermore, the political moment that the country is going through “pressures” our authorities to take attitudes that allow the public machine to work more efficiently, and it is in this scenario that the Regulatory Agencies have been gaining more space. In this paper we will study resolutions issued by two Brazilian Regulatory Agencies linked to different Branches of Power, in order to verify whether they preserve the principles by which the agencies were created or whether they are going beyond the power they hold and for what reasons.

MERITUM MAGAZINE • v.15 • n.4 • p. 88-104 • 2020

3.1 NATIONAL COUNCIL OF JUSTICE: BEYOND NORMATIVE POWER?

In the mid 90's Brazil was marked by a dissatisfaction of the population in relation to the Judiciary, and the need for an external control of its activity. As a result, Constitutional Amendment No. 45, known as the "Judiciary Reform", arose, which established the National Council of Justice (CNJ), an administrative body with the function of external control of the activities of the Brazilian Judiciary, and which became an administrative arm of internal control of the STF over the entire judiciary.

The structure and competencies of the CNJ are described in article 103-b of the Federal Constitution, and the competencies are specifically described, in clauses I to VII, of §4 of that article as follows:

> I watch over the autonomy of the Judiciary and the compliance with the Statute of the Judiciary, and may issue regulatory acts, within the scope of its competence, or recommend measures;
>
> II zeal for the observance of art. 37 and examine, ex officio or upon provocation, the legality of administrative acts practiced by members or agencies of the Judiciary, being able to deconstitute them, review them, or set a deadline for the adoption of measures required for the exact observance of the law, without prejudice to the competence of the Federal Audit Court;
>
> III to receive and hear complaints against members or agencies of the Judiciary, including its auxiliary services, notary and registry services rendering agencies that operate by delegation of the public power or are officialized, without prejudice to the disciplinary and correctional competence of the courts, being able to evoke disciplinary proceedings in progress and to determine removal, availability, or retirement with allowances or provisions proportional to the time of service and to apply other administrative sanctions, ensuring ample defense;
>
> IV to represent the Public Prosecution Service, in the case of crime against the public administration or abuse of authority;
>
> V to review, ex officio or upon provocation, the disciplinary proceedings of judges and court members tried less than a year ago;
>
> VI to elaborate every six months a statistical report on cases and sentences rendered, per unit of the Federation, in the different organs of the Judiciary;
>
> VII prepare an annual report, proposing the measures it deems necessary, on the situation of the Judiciary in the country and the Council's activities, which must be part of a message from the President of the Supreme Court to be sent to the National Congress at the opening of the legislative session (BRASIL, 1988, Art. 103-b, §4, I - VII).

Through the understanding of the attributions given to the CNJ by the constitution, it is understood that the CNJ was instituted with the purpose of exercising an administrative control of the Judiciary, due to flaws that it had been pointing out, sometimes failing to effectively comply with constitutional principles. Hodiernamente arises many criticisms in the performance of the Council, because it is understood that sometimes it goes beyond its powers, usurping typical functions of the legislative and even of the judiciary itself.

On October 18, 2005, Resolution no. 07 was issued by the CNJ, which, according to its terms of reference: “Disciplines the exercise of positions, jobs and functions by relatives, spouses and companions of judges and public servants in management and advisory positions in the organs of the Judiciary and makes other provisions” (NATIONAL COUNCIL OF JUSTICE, 2005). As a way to implement the principles described in Article 37 of the Federal Constitution, among them impersonality, efficiency, administrative morality, among others.

There were and still are many controversies regarding the aforementioned resolution, because the CNJ was established as an Administrative body, being a judicial body, but not a jurisdictional one. According to Sampaio (2007, p. 35)

> The National Council of Justice is an administrative-constitutional body of the Judicial Power of the Federative Republic of Brazil with semi-autonomous status or relative autonomy. The constitutional stature derives from its presence in the text of the Constitution. The administrative nature is given by the list of attributions provided in the constitutional article 103-B, § 4, which escape the framework, obviously, legislative, since it cannot innovate the legal order as author of normative act, general and abstract, and, by submitting to judicial control, even if by the STF, escapes the jurisdictional feature (SAMPAIO, 2007, p. 37).

The Internal Rules of the CNJ in article 102, informs that: “The Plenary may, by absolute majority, issue normative acts, through Resolutions, Instructions or **Administrative Statements**, and also Recommendations.” [emphasis added] (National Council of Justice, 2009). Now the internal regulation itself tells us that the Normative Acts issued by the Council should be only of administrative nature, thus Resolution No. 07 of 2005, would be contrary to the Federal Constitution, given its normative character.

As a consequence of the discussion about the constitutionality or otherwise of Resolution no. 7 of 2005, a Constitutionality Action no. 12 (ADC 12 DF) was proposed, in whose judgment the STF upheld its validity, by majority vote. Reporting Justice Carlos Ayres Britto in his vote emphasizes that: “the CNJ did not invade the area reserved to the Legislative Branch, but limited itself to exercising the constitutional powers that were reserved to it” (STF, 2009), concluding that the resolution affects the provisions of article 103-b of the Federal Constitution, and is therefore constitutional.

The dissenting vote was cast by Justice Marco Aurélio, who made some important observations that were apparently ignored by his colleagues. According to him: “The CNJ, when issuing the Resolution, did so totally outside the powers provided for in the Federal Constitution, and I do not see the possibility of granting an injunction that ends up empowering the Resolution of the Council itself”, stressing that the Council has an administrative nature and not a jurisdictional one (STF, 2009).

It is understood that the Resolution issued by the National Council of Justice was intended to apply the constitutional principles, reduce problems related to corruption and consequently improve the service provided by the Judiciary. As previously stated, the Regulatory Agencies, in this case the CNJ, have an administrative nature and are not empowered to issue resolutions with normative force beyond their jurisdiction, emphasizing the exercise of the atypical function of the Powers.

MERITUM MAGAZINE • v.15 • n.4 • p. 88-104 • 2020

3.2 NATIONAL HEALTH SURVEILLANCE AGENCY: PUBLIC HEALTH PROTECTION.

During the Middle Ages there was an increase in the concentration of the population in the cities, without the cities offering adequate hygiene, housing, and food conditions to meet this growing demand. Given this situation, in which the basic conditions of the population were not met, there was a proliferation of diseases. As time went by, it became clear that these diseases were mostly caused by contaminated food and water.

From this observation, an inspection started in the markets, warehouses and ships that transported food. During the Second World War, with all the bacteriological discoveries, this type of inspection was articulated in order to protect the health of the population. Brazil in the 80s already had VISA - Sanitary Surveillance - and due to popular participation, soon the National Agency for Sanitary Surveillance (ANVISA) was created (PORTAL EDUCAÇÃO - Education Portal, 2017).

ANVISA was established by Law 9.782 of January 26, 1999, having the legal nature of an Autarchy under a Special Regime, and, as stated in the sole paragraph of Article 3 of that Law: "is a regulatory agency characterized by administrative independence, stability of its leaders during the period of their mandate and financial autonomy, and is linked to the Ministry of Health" (BRAZIL, 1999). As previously mentioned, the inspection of products arose as a result of human need, and it was through the improvement of this inspection that the Regulatory Agency emerged in order to improve the quality of life and protect the health of the population, as follows:

> Art. 6 The Agency will have the institutional purpose of promoting the protection of the population's health, through the sanitary control of the production and marketing of products and services subject to sanitary surveillance, including the environments, processes, inputs and technologies related to them, as well as the control of ports, airports and borders (BRASIL, 1999).

ANVISA's activities include health regulation and economic regulation of the market. The competencies of this regulatory agency are mainly listed in Articles 7 and 8, and their respective paragraphs and sections of the law that created it:

> Art. 7 The Agency is responsible for the implementation and execution of the provisions in items II to VII of art. 2 of this Law, and must:
>
> ...
>
> XV - to prohibit the manufacture, importation, storage, distribution, and commercialization of products and inputs, in case of violation of the pertinent legislation or imminent risk to health;
>
> ...
>
> Art. 8 It is the Agency's responsibility, in compliance with the legislation in effect, **to regulate, control, and supervise products and services that involve risk to public health. (our emphasis)**
>
> **...**
>
> **X - cigarettes, cigarillos, cigars and any other smoking product, whether or not derived from tobacco** (emphasis added), (BRASIL, 1999).

As already discussed, the Regulatory Agencies have the role of inspecting products and public services. In the case of ANVISA, these services and products are closely related to the quality of life and health of the population, being a serious matter of national and international interest, so much so that a specialized agency was created to regulate and supervise the quality of services and products related to sanitary surveillance. This regulation and supervision occurs mainly through the Resolutions of the Collegiate Directorate (RDCs), as follows:

> Art. 15 - The Collegiate Directorate is responsible for
>
> ...
>
> III - issue norms on matters within the Agency's competence, which must be accompanied by technical justifications and, whenever possible, by studies of economic and technical impact on the regulated sector and impact on public health, this requirement being waived in cases of serious risk to public health (BRASIL, 1999).

On March 15, 2012, ANVISA published the RDC No. 14, which provides for maximum limits of tar, nicotine and carbon monoxide in cigarettes and the restriction on the use of additives in tobacco products, and makes other provisions. This resolution prohibited the use of most additives in all tobacco products, with the intention of making them less attractive for consumption, since the additives would have the role of disguising the bad taste of nicotine and reduce the smoke coming from the cigarettes, therefore the use of tobacco products and the incidence of new smokers would decrease. The resolution finally granted a period of 18 months for manufacturers and importers of tobacco products to comply with it.

There was a lot of commotion at the time of the publication of the resolution cited above, especially in the industry. The Interstate Tobacco Industry Union (SINDITABACO, in the Portuguese acronym), filed a lawsuit requesting the suspension of the effects of some articles of the RDC-ANVISA n° 14/2012, because, according to it, there was no formal law in Brazil dealing with the use of ingredients in tobacco products, and that only a formal law could promote the ban intended by the regulatory agency. In the absence of a law, Anvisa could not create new restrictions or obligations.

The lawsuit was filed under No. 0002696-87.2013.4.01.0000 in the Federal Judiciary Section of Bahia, had a favorable decision to SINDITABACO in the first instance, but in the second instance the Federal Regional Court of the 1st Region in a decision issued on 26/12/2013, considered the RDC No. 14/2012 legal, emphasizing the lethality of cigarette consumption (TRF1, 2013).

On the other hand, the National Confederation of Industry (CNI), filed a Direct Action of Unconstitutionality (ADI no. 4874) with a request for an injunction to suspend the legal effectiveness of RDC No. 14/2012, arguing that ANVISA illegitimately "extended" its competence; such resolution violated the constitutional principles of isonomy, legal certainty, consumer freedom, among others, requiring finally that it was: "given an interpretation in conformity with the Constitution to the final part of Article 7, item XV, of Law 9.782/99, without reduction of text, to establish that the Agency may only ban products or inputs in the exercise of its strictly executive police powers, of a precautionary and exceptional nature" (STF, 2012).

The Direct Unconstitutionality Action n° 4874 was reported by Minister Rosa Weber, and was dismissed by the Full Court on 12/01/2018, even revoking the Injunction requested by CNI, which had been granted, as follows:

MERITUM MAGAZINE • v.15 • n.4 • p. 88-104 • 2020

> ... Taking into account the aspects invoked by the plaintiff, as well as the requests made by the amici curiae National Federation of Workers in the Tobacco and Allied Industries - FENTIFUMO and the Tobacco Industry Union of the State of Bahia/BA (petitions Nos. 45.695/2013 and 45.912/2013, also received on September 13, 2013), I hereby grant, based on the general power of precaution (arts. 798 of the CPC and 21, IV and V, of the RISTF) and in order to ensure isonomic treatment to all those potentially affected by the contested normative acts, the requested preliminary injunction to suspend the effectiveness of arts. 6th, 7th and 9th of the Collegiate Directorate Resolution (RDC) No. 14/2012 of the National Health Surveillance Agency until its consideration by the Plenary of this Court.

According to the WHO, cigarettes kill more than 5 million people annually in the world, both smokers and passive smokers. The number is alarming and we emphasize that ANVISA as a regulatory agency linked to the Ministry of Health should take action, as in fact it has tried to do; the problem lies in the medium used.

According to article 15, III, of Law 9287 of 1999, the resolutions issued by ANVISA must be accompanied by technical justifications and, whenever possible, by economic impact studies. In the case of RDC No. 14/2012, at the time of its publication, no economic impact studies had been conducted. Secondly, CNI itself released data on the economic impacts of the RDC: The measures adopted in the Resolution would reach approximately 98% of the national production of tobacco products, with systemic effects on the entire production chain involving various sectors from farmers to traders (ADI No. 4874-DF), directly affecting unemployment rates and the country's economy.

The injunction granted by Justice Rosa Weber is based primarily on studies of economic impacts, leaving the intrinsically constitutional issues to be discussed at trial.

The subject dealt with in the RDC is very controversial and it is understood that it involves other aspects beyond the simple prohibition of the use of additives, the period allowed for companies to adapt to the measures imposed was reduced, but ANVISA is doing its role as a regulatory agency, and it was in this sense that the full body of the STF judged the action.

The fact is that the tobacco market is the driving force behind the development of hundreds of municipalities, generating US$ 3.26 billion in exports, R$ 10.5 billion in taxes, and R$ 4.6 billion in revenues for the 165 thousand integrated producers in southern Brazil (ABRASEL-SP). In this case the private interests of industrialists who profit from the market override the questions about the constitutional competence dedicated to ANVISA.

The aforementioned Law 9782/99 in its article 8 entrusts ANVISA with the duty to regulate, control, and supervise products and services that involve risk to public health, provided that the legislation in force is respected. Now, there is no legislation in force that deals with the use of additives in smokers. In this sense, the decision of the STF was consistent with the actions of the executive branch in the fight against smoking and in raising the population's awareness about the harmful effects of smoking.

3.3 IBAMA AND CONAMA: INSUFFICIENT RESOURCES FOR EFFECTIVE ENVIRONMENTAL PROTECTION

The Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA, Portuguese acronym) was created by Law No. 7735 on February 22, 1989, with the legal nature of Federal Autarchy linked to the Ministry of Environment with the following purposes:

> I - exercise the environmental police power;
>
> II - to carry out actions of the national environmental policies, referring to the federal attributions, related to environmental licensing, environmental quality control, natural resources use authorization, and environmental supervision, monitoring and control, observing the guidelines issued by the Ministry of the Environment; and
>
> III - execute the supplementary actions of the Union's competence, according to the environmental legislation in effect (BRAZIL, 1989).

The National Environmental Council (CONAMA, Portuguese acronym) is the advisory and deliberative organ of the National Environmental System, established by Law 6.938/81, which was partially repealed by the Law that established IBAMA:

> I - to establish, upon IBAMA's proposal, norms and criteria for the licensing of effectively or potentially polluting activities, to be granted by the States and supervised by IBAMA;
>
> II - to determine, when deemed necessary, the performance of studies of alternatives and of the possible environmental consequences of public or private projects, requesting from federal, state and municipal agencies, as well as from private entities, the indispensable information for the appreciation of environmental impact studies, and the respective reports, in the case of works or activities of significant environmental degradation, especially in areas considered to be national heritage
>
> ...
>
> V - determine, upon IBAMA's representation, the loss or restriction of tax benefits granted by the Government, in general or conditionally, and the loss or suspension of participation in financing lines in official credit establishments;
>
> VI - to establish, privately, national norms and standards for the control of pollution by automotive vehicles, aircraft, and vessels, after hearing the competent Ministries;
>
> VII - to establish norms, criteria and standards related to the control and maintenance of the quality of the environment with a view to the rational use of environmental resources, especially water resources (BRASIL, 1991).

Both CONAMA and IBAMA are part of the National Environmental System (SISNAMA, Portuguese acronym) and are not subordinated to each other. The National Environmental Policy is constituted by CONAMA, while IBAMA is mainly responsible for the execution of the National Environmental Policy, exercising control and inspection over the use of natural resources.

As with fundamental rights in general, one can also identify with the environment a historical evolution that begins in antiquity and consolidates - albeit somewhat belatedly - with the formation of national states and that, in a more current phase, overflows national boundaries

MERITUM MAGAZINE • v.15 • n.4 • p. 88-104 • 2020

and becomes a concern of all mankind, embodied in international declarations and treaties (MARUM, 2002, p.128-129).

The right to an ecologically balanced environment is a third generation fundamental right. According to Bobbio (1992, p. 23), “the most important of the third generation rights is the one claimed by the ecological movements: the right to live in an unpolluted environment”. The Brazilian Federal Constitution consecrated the precepts related to the right to the Environment in its chapter VI:

> Art. 225. Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, imposing on the public authorities and the community the duty to defend and preserve it for present and future generations (BRASIL, 1988).

Today there is a worldwide concern in relation to the possible scarcity of natural resources, there are serious problems with lack of drinking water in many communities on the planet and risks of extinction of species of fauna and flora worldwide. For a long time there was the myth that everything in nature was renewable, infinite, and even today there is a certain resistance, especially from large companies that carry out activities that exploit the environment, such as construction companies and the livestock industry, to realize the importance of the conscious use of natural resources.

On September 06, 2002, CNI filed before the Supreme Court a Direct Unconstitutionality Action (ADI no. 2714) with a request for a preliminary injunction, of Resolution No. 03 of 1988 of CONAMA and IBAMA’s Normative Instruction No. 19 of 2001, which dealt with the creation and performance criteria of the position of volunteer environmental agent:

> The NATIONAL COUNCIL OF THE ENVIRONMENT - CONAMA, in the use of the attributions conferred upon it by Article 48, of Decree 88.351, of June 19, 1983, RESOLVES:
>
> Art. 1 - Civil entities with environmental purposes may participate in the surveillance of public or private Ecological Reserves, Environmental Protection Areas, Ecological Stations, Areas of Relevant Ecological Interest, other Conservation Units, and other protected areas.
>
> Art. 2 - The participation in the inspection, foreseen in this Resolution will be made through the constitution of Environmental Task Forces, integrated by at least three people accredited by the competent Environmental Agency (CONAMA, 1988).
>
> PRESIDENT OF THE BRAZILIAN INSTITUTE OF THE ENVIRONMENT AND NATURAL RESOURCES, in the use of his powers granted to him by Article 24, ANNEX I, of Decree No. 3.833, of June 5, 2001, published in the Official Gazette of the Union of the following day, in view of CONAMA Resolution No. 003, of March 16, 1988.
>
> ...
>
> Considering the need to establish rules of procedures for inspection actions, as well as for the processing and control of the Notices of Incrimination issued by the participants of the ENVIRONMENTAL MUTIRONS, resolves:
>
> Art. 1. The participants of ENVIRONMENTAL MUITIONS, indicated by environmentalist civil entities or similar, duly trained and accredited by the General Coordination of Environmental Inspection of IBAMA, are now called Voluntary Environmental Agents.

> Sole Paragraph. For the accreditation referred to in the head of this article, the Voluntary Environmental Agent must sign a Declaration with IBAMA (Attachment I), which will also be signed by the legal representative of the entity responsible for the indication.
>
> ...
>
> Art. 3. The Volunteer Environmental Agents are responsible for
>
> I - always act through ENVIRONMENTAL MUITIONS, as foreseen in article 2, of CONAMA Resolution # 003, of 1988;
>
> II - draw up detailed Notices of Incident (ANNEX II) duly signed by those present, whenever a violation of the environmental legislation is identified;
>
> III - retain, whenever possible, the instruments used in the commission of the criminal infraction and/or the products resulting from it, and immediately forward them to the nearest police authority (IBAMA, 2001).

The CNI argued that although the volunteer environmental agents were participants in environmental task forces appointed by civil environmental organizations and trained by IBAMA, they had no connection with the government, and IBAMA's granting of police power to these agents violated article 174 of the Federal Constitution (STF, 2002).

The STF, in turn, considered that the CNI did not meet the requirements to file this ADI. The majority of the justices considered that the questioned norms did not have a constitutional nature and could not be appreciated by the STF. They also concluded that there was a "lack of thematic pertinence" (STF, 2003).

Now, the Industry is the sector most inspected by IBAMA AND CONAMA, because their activities, as said before, are closely linked to the exploitation of natural resources. It is clear that the CNI is trying at all costs to protect the private interests of its confederates and, in this specific case, has attempted to use Constitutional Law as a weapon in this fight, to reduce the scope of services performed by IBAMA, services which, according to the data presented above, are already in a delicate situation due to the lack of employees and find in partnerships with other voluntary agencies and agents a way to fulfill their role more effectively. The STF, on the other hand, has placed the collective interest above the private interest, deciding in a wise manner, applying the constitutional precepts.

4. FINAL CONSIDERATIONS

Brazilian society has been going through a "revolution", on one hand the discredited political field of the country, which privileges private interests to the detriment of the collective interest, and on the other hand a judiciary that tries at all costs to solve problems, going beyond its jurisdiction. We exemplify this in the present work: The CNJ, in order to remedy a moral issue within the judiciary, went beyond its powers and even obtained the approval of the STF, exactly because we are living a moment of rescue of morality. From another perspective, we have the CNI, which tries at all costs to protect the economic interests of big businessmen, and most of the time it succeeds, even without sufficient legal backing, as we have seen in the cases of the ANVISA and IBAMA resolutions.

MERITUM MAGAZINE • v.15 • n.4 • p. 88-104 • 2020

We can see that sometimes judicial decisions and administrative resolutions are biased, serving as political and economic pawns, not effectively impartial. Harming the population that expects a social return, that needs better living conditions as a whole, a better education, a better health, as the old song “We don’t want only food / We want food, fun, and art” goes. The Federal Constitution is the guardian of the right of collective interests, where the principles that should govern this country are found, and the STF is the guardian of the constitution, it is not fair that those who should apply the FC suffer external influences to the point of inspiring decisions with particular grounds disguised as interpretation of the constitution.

Finally, we verify that the theme addressed is of utmost importance nowadays, where Constitutional Law is sometimes “taken by the tide”. There are heated discussions and uncertainties about the correct application of the Law. We need to understand, discuss, debate about the theme. The Brazilian population needs issues of national interest to be treated with the seriousness and respect due by the State. We cannot accept that the 1988 Federal Constitution be used to favor certain groups to the detriment of the collective.

REFERENCES

NATIONAL AGENCY FOR SANITARY SURVEILLANCE. Available at: http://www.anvisa.gov.br/institucional/snvs/index.htm Accessed on 20 May 2020.

NATIONAL AGENCY FOR SANITARY SURVEILLANCE. **Resolução da Diretoria Colegiada – RDC Nº 14 (**Resolution of the Collegiate Board of Directors - RDC No. 14), of March 15, 2012. Provides for the maximum limits of tar, nicotine and carbon monoxide in cigarettes and the restriction on the use of additives in tobacco products, and other provisions. Available at: http://bvsms.saude.gov.br/bvs/saudelegis/anvisa/2012/rdc0014_15_03_2012.pdf . Accessed on 20 May 2020.

ARAGÃO, Alexandre Santos de. **Agências reguladoras e a evolução do direito administrativo econômico. (**Regulatory agencies and the evolution of economic administrative law). Rio de Janeiro: Forense, 2002.

BATISTA JÚNIOR, Márcio Roberto Montenegro. Agências reguladoras. **Revista Jus Navigandi (R**egulatory agencies. Revista Jus Navigandi), ISSN 1518-4862, Teresina, year 19, n. 3883, 17 feb. 2014. Available at: https://jus.com.br/artigos/26712. Accessed on: 20 mai. 2020.

BOBBIO, Norberto.**A era dos direitos (T**he Age of Rights). Rio de Janeiro: Campus, 1992.

BRAZIL. Constitution (1988). **Constituição da República Federativa do Brasil (**Constitution of the Federative Republic of Brazil). Brasília, DF: Federal Senate: Graphic Center, 1988.

Law nº 9.782 of January 26, 1999. Defines the National Sanitary Surveillance System, creates the National Sanitary Surveillance Agency, and makes other provisions. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9782.htm. Accessed on 20 May 2020.

BRAZIL. Law No. 7.735 of February 22, 1989. Dispõe sobre a extinção de órgão e de entidade autárquica, cria o Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis e dá outras providências.Available at: http://www.faccar.com.br/normas-da-abnt/modelos-de-referencia. Accessed on 20 May 2020.

BRAZIL. Decree-Law No. 200, February 25, 1967. Provides the organization of the Federal Administration, establishes guidelines for Administrative Reform and makes other provisions. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del0200.htm. Accessed on 20 May 2020.

NATIONAL COUNCIL OF JUSTICE. Conselho nacional de justiça. **Resolução Nº 7 de 18 de outubro de 2005 (**National Council of Justice. Resolution No. 7 of October 18, 2005). Disciplines the exercise of positions, jobs and functions by relatives, spouses and companions of judges and public servants invested in management and advisory posi-

tions, within the scope of the organs of the Judiciary and makes other provisions. Brasília, 2009. Disponível em: https://atos.cnj.jus.br/files/resolucao_7_18102005_26032019133553.pdf. Accessed on: 6 jul. 2020.

NATIONAL COUNCIL OF JUSTICE. Conselho nacional de justiça. **Resolução Nº 67 de 03 de março de 2009 (**National Council of Justice. Resolution No. 67 of March 3, 2009). Approves the Internal Rules of the National Council of Justice and makes other provisions. Brasília, 2009. Disponível em: https://atos.cnj.jus.br/files/resolucao_67_03032009_22032019151610.pdf. Access on: 6 jul. 2020.

NATIONAL ENVIRONMENTAL COUNCIL. Conselho nacional do meio ambiente. **Resolução n° 03 de 16 de março de 1988. (**National Council of the Environment. Resolution n° 03 of March 16, 1988). Available at: http://www2.mma.gov.br/port/conama/res/res88/res0388.html. Accessed July 6, 2020.

DI PIETRO, Maria Sylvia Zanella. **Direito administrativo**. (Administrative Law). 33 ed. São Paulo: Atlas, 2020.

FERREIRA FILHO, Manoel Gonçalves. **Reforma do Estado:** O papel das agências reguladoras e fiscalizadoras (State Reform: The role of regulatory and inspection agencies). In: MORAES, Alexandre de. (org.). Regulatory Agencies. São Paulo: Atlas, 2002.

FURTADO, Lucas Rocha. **Curso de direito administrativo (C**ourse on Administrative Law). Belo Horizonte: Forum, 2007

GRAU, Eros Roberto. O direito posto e o direito pressuposto. 7. ed. São Paulo: Malheiros, 2008.

GUERRA, Sérgio. **Agências reguladoras: da organização administrativa piramidal à governança em rede (**Regulatory agencies: from pyramidal administrative organization to network governance). Belo Horizonte: Forum, 2012.

BRAZILIAN INSTITUTE OF THE ENVIRONMENT AND RENEWABLE NATURAL RESOURCES. Available at: http://ibama.gov.br/index.php?option=com_content&view=article&id=613&Itemid=863. Accessed on 20 May 2020.

BRAZILIAN INSTITUTE OF THE ENVIRONMENT AND RENEWABLE NATURAL RESOURCES. IBAMA Normative Instruction # 19 of November 5, 2001. Provides environmental task forces. Available at: https://www.normasbrasil.com.br/norma/instrucao-normativa-19-2001_74420.html. Accessed July 6, 2020.

JUSTEN FILHO, Marçal. **O direito das agências reguladoras independentes (**The law of independent regulatory agencies). São Paulo: Dialética, 2002.

MARUM, Jorge Alberto Oliveira de. Meio ambiente e direitos humanos. **Revista de Direito Ambiental** (Environment and human rights. Environmental Law Magazine), São Paulo, v. 7, n.28, p. 116-137, out./dez. 2002.

MENDES, Conrado Hubner, Reforma do Estado e Agências Reguladoras: Estabelecendo os Parâmetros de Discussão (State Reform and Regulatory Agencies: Establishing Discussion Parameters). In: SUNDFELD, Carlos Ari (org.). **Direito Administrativo Econômico (**Economic Administrative Law), São Paulo: Malheiros Editores, 2000.

MINISTRY OF HEALTH. Available at: http://www.saude.pr.gov.br/modules/conteudo/conteudo.php?conteudo=141. Accessed on 20 May 2020.

MINISTRY OF ENVIRONMENT. Available at: http://www.mma.gov.br/port/conama/. Accessed on 20 May 2020.

MORAES, Alexandre de. **Agências reguladoras (**Regulatory agencies). In: MORAES, Alexandre de. (org.). **Agências reguladoras (**Regulatory Agencies). São Paulo: Atlas, 2002.

MOTTA, Paulo Roberto Ferreira. **Agências Reguladoras de serviços públicos (**Regulatory Agencies of Public Services). Curitiba, 2000. Dissertation (Master of Laws) - Legal Sciences Sector, Federal University of Paraná.

PORTAL DA EDUCAÇÃO. (EDUCATION PORTAL). Available at: https://www.portaleducacao.com.br/conteudo/artigos/pedagogia/historia-da-vigilancia-sanitaria/50409 Accessed on 20 May 2020.

SAMPAIO, José Adércio Leite. **O Conselho Nacional de Justiça e a Independência do Judiciário. (**The National Council of Justice and the Independence of the Judiciary). Belo Horizonte: Del Rey, 2007.

SUPREME FEDERAL COURT. Available at: http://www.stf.jus.br/portal/jurisprudencia/menusumario.asp?sumula=1227. Accessed on 20 May 2020.

SUPREME FEDERAL COURT. ADC 12 DF, Rapporteur: Min. Carlos BRITTO, Judgment Date: 08/20/2008, Full Court, Publication Date: DJe-237 DIVULG 17-12-2009 PUBLIC 18-12-2009 EMENT VOL-02387-01 PP-00001 RT v. 99. n. 893. 2010. p. 133-149

FEDERAL REGIONAL COURT OF THE 1ST REGION. Available at: https://www2.cjf.jus.br/jurisprudencia/trf1/. Accessed July 6, 2020.

Received/*Recebido:* 22.05.2020.

Approved/*Aprovado:* 09.07.2020.

THE NUANCES OF ACTIVE LEGITIMACY AD CAUSE OAB IN PUBLIC CIVIL ACTION

AS NUANCES DA LEGITIMIDADE ATIVA AD CAUSAM DA OAB NA AÇÃO CIVIL PÚBLICA

Paula Martins da Silva Costa[1]
Zaiden Geraige Neto[2]
Juliana Castro Torres[3]

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

ABSTRACT

In this work, an exploratory analysis based on doctrine, legislation and jurisprudence is made, of the hypotheses for the suitability of public civil action, of the rights and interests protected by the so-called microsystem of the Brazilian collective process, as well as of the nuances of extraordinary active legitimation and completion the thematic relevance requirement. After this contextualization, the legitimacy of the Brazilian Bar Association for the filing of public civil action is examined. The thematic pertinence requirement had been verified, if it would be possible to defend any collective rights in a broad sense, among those listed in the items of art. 1 of Law no. 7,347 / 85 or whether the entity can only demand self-interest, concluding that it is possible to defend collective rights in the face of a more restrictive understanding. The second theme would be whether this legitimacy would affect only the Federal Council and Sectional Councils, or would also extend to Subsections. Finally, as for Subsections, whether active legitimacy is directly dependent on the legal personality

---

1 Graduated in Law from Universit of São Paulo - USP (1992). Specialization in Civil and Procedural Law at Franca University - UNIFRAN (2000). Specialization in Public Law at the University of Brasília - UNB (2010). Scientific Initiation by the Fundação de Amparo à Pesquisa do Estado de São Paulo - FAPESP (1992). Master's student in Collective Rights and Citizenship at the University of Ribeirão Preto - UNAERP with scholarship from CAPES-PROSUP (2019). Federal Attorney since 2000. Vice-President of the Public Attorneys Commission of the Brazilian Bar Association - Ribeirão Preto Section and Member of the Public Attorneys State Commission of the Brazilian Bar Association - São Paulo Section. Lattes: http://lattes.cnpq.br/9392915075834898. ORCID iD: http://orcid.org/0000-0003-1469-0156. E-mail: paula.costa.pmdsc@gmail.com.

2 Doctor in Law from PUC/SP (2007), Master in Law also from PUC/SP (2001) and Bachelor in Law also from the same institution (PUC/SP - 1994). Executive MBA in Hospital Management from FGV - Fundação Getúlio Vargas (2007). He was Municipal Secretary of Legal Affairs of Barretos/SP (2005-2008). University Professor and of the Masters and Doctorate Courses at University of Ribeirão Preto - UNAERP. Invited professor for the "lato sensu" post-graduation course in Civil Procedural Law at the Law School of USP - Ribeirão Preto (FDRP/USP). Invited professor for the post-graduation course in Civil Law and Civil Procedural Law at Faculdade Barretos. Member of CONPEDI - National Council for Research and Post-Graduation in Law and of SBPC - Brazilian Society for the Advancement of Science. ORCID iD: http://orcid.org/0000-0003-4732-9164. E-mail: zaidenneto@gmail.com

3 Master in Collective Rights and Citizenship at the University of Ribeirão Preto - UNAERP, 2019. Graduated in Law from the University of the State of Minas Gerais - Passos Unit, Specialist in Public Law Lato Sensu from Anhanguera University - UNIDERP. Professor of Criminal Law and Criminal Legal Practice at São Paulo State University -Unidade Passos, 2017. Fellow of Management in Science and Technology BGCT-III by FAPEMIG in the development of the Project "IMPLEMENTATION OF A NETWORK OF TECHNOLOGICAL INNOVATION OF THE MUNICIPALITY OF PASSOS-MG", 2012. Member of the Municipal Council of the City of Passos-MG. PROSUP-CAPES Scholar, 2019. Professor of Tax Law and Legal Practice at the University of the State of Minas Gerais - Passos Unit, 2019. Professor of General and Legal Sociology and Legal Practice at the University of the State of Minas Gerais - Passos Unit. Coordinator of the Center for Free Legal Assistance - NAJ at UEMG - Passos Unit. Lattes: http://lattes.cnpq.br/4486423547641606. ORCID iD: http://orcid.org/0000-0001-9094-4715. E-mail: jucastrotorres@hotmail.com.

How to cite this article/Como citar esse artigo:
COSTA, Paula Martins da Silva; GERAIGE NETO, Zaiden; TORRES, Juliana Castro. As nuances da legitimidade ativa ad causam da OAB na ação civil pública. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 105-126, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.7982.

requirement or not. As for the legitimated OAB body, it was understood that the active legitimacy attributed to the federal council and sectional councils can be extended to the Subsections, so that the absence of legal personality is not an impediment to its legitimation.

Keywords: Civil Procedural Law. Collective process. Ad cause legitimacy. Thematic relevance. Public Civil Action. OAB.

RESUMO

Neste trabalho, faz-se uma análise exploratória baseada na doutrina, legislação e jurisprudência, das hipóteses de cabimento da ação civil pública, dos direitos e interesses protegidos pelo chamado microssistema do processo coletivo brasileiro, bem como das nuances da legitimação ativa extraordinária e do preenchimento do requisito da pertinência temática. Após essa contextualização, examina-se a legitimidade da Ordem dos Advogados do Brasil para o ajuizamento da ação civil pública. Verifica-se o requisito da pertinência temática, se seria possível a defesa de quaisquer direitos coletivos em sentido amplo, dentre aqueles listados nos incisos do art. 1º da Lei n. 7.347/1985 ou se somente pode a entidade demandar interesse próprio, concluindo-se pela possibilidade de defesa de direitos coletivos frente a um entendimento mais restritivo. O segundo tema seria se essa legitimidade afetaria somente ao Conselho Federal e aos Conselhos Seccionais, ou se estenderia também às Subseções. Finalmente, quanto às Subseções, se a legitimidade ativa tem relação direta de dependência com o requisito de personalidade jurídica ou não. Quanto ao órgão da OAB legitimado, entendeu-se que a legitimidade ativa atribuída ao Conselho Federal e Conselhos Seccionais pode ser estendida às Subseções, de maneira que a ausência de personalidade jurídica não seja fator impeditivo de sua legitimação.

Palavras-chave: *Direito Processual Civil. Processo coletivo. Legitimidade ad causam. Pertinência temática. Ação Civil Pública. OAB.*

1. INTRODUCTION

The process of re-democratization of Brazil, which culminated in the promulgation of the Federal Constitution of 1988, brought profound changes to the Brazilian legal system, particularly about the institutional role of lawyers and the Brazilian Bar Association (OAB). In this vein, the Constitution provided, in article 133, that “the lawyer is indispensable to the administration of justice”. In the same way, Law nº 8.906/1994 (Statute of the Practice of Law), in regulating the Constitution, corroborates the character of the practice of law as an essential function to the administration of justice, by establishing the main purpose of defending the Constitution, the legal order of the Democratic State of Law, human rights, the social justice, and to strive for the good application of the laws, for the speedy administration of justice and for the improvement of legal culture and institutions, detailing the character of public service and the purpose of the institution foreseen in section 44 of the Statute of the Practice of Law.

In this way, supported in the deductive research method and in the bibliographic and documentary technique, in order to search in the theorists the pertinent fundamentalism to the theme, presented in books, articles, periodicals, and jurisprudence.

This article will initially analyze whether the Regional Councils of the Brazilian Bar Association have standing to bring public civil actions, with a focus on the Statute of the Practice of Law. Under the aspect of thematic pertinence, if it would be possible to defend any collective rights in a broad sense, among those listed in the items of article 1 of Law n. 7.347/1985 (Law

of Public Civil Action - LACP), which are the environment, consumers, goods and rights of artistic, aesthetic, historic, tourist and landscape value; any other diffuse or collective interest, for infringement of the economic order, the urban order, or if it can only demand its own interest. The second issue is whether this legitimacy only affects the Federal Council and Sectional Councils, or whether it also extends to the Sub-Sections. As to the latter, it will be analyzed whether their active legitimacy has a direct dependency relation with the legal personality or not.

Based on a historical and logical-systematic interpretation of the Constitution, more specifically of art. 103, which grants universal legitimacy to the OAB to file Direct Unconstitutionality Action (ADI) and Declaratory Action of Constitutionality (ADC) in the concentrated control of constitutionality, a position that even has the endorsement of the Federal Supreme Court (STF) by recognizing it as a corporate autarchy, It is defended the recognition of the lack of thematic pertinence of the OAB in the ambit of the Public Civil Action (ACP), both of the Federal Council and the Sectional Council, resulting from the parallelism of attributions registered in art. 59 of the Statute of the Practice of Law, provided that the issues invoked are of concern to their respective local sphere.

Finally, based on the sole paragraph of section 61 of the Statute of the Practice of Law, it is unequivocal that once the Council of the Sub-Section is created, the Sub-Sections automatically acquire their own legal personality, in the same manner as the Sectional Council, respecting the territorial area and the limits of competence and autonomy, therefore they would have the same prerogatives as the Federal Council in the handling of public civil action in defense of collective and diffuse rights.

On the other hand, in the absence of a Subsection Council, it is believed that, regardless of their legal personality, it is imperative to recognize the judicial personality of the OAB's Subsections to guarantee the effectiveness of their institutional mission of protecting the Brazilian society.

2. THE VARIOUS CATEGORIES OF INTERESTS

The protection of fundamental rights is a historical achievement, arising in different periods, according to the decisive historical conflict. All these rights coexist, which is why they can be called dimensions or generations. In this context, Norberto Bobbio emphasizes that the development of human rights has gone through three phases: in a first moment, the rights of freedom, that is, all those rights that tend to limit the power of the State; in a second moment the political rights, which conceive freedom not only negatively, but positively, as autonomy; finally, the social rights were proclaimed, which express the maturing of new values, such as welfare and material equality, of freedom through or by the State (BOBBIO, 2004, p. 32).

It is worth pointing out that:

> (...) This occurs because the origin of such rights goes back to the idea of defense of individuals against the abuses committed by the one and only holder of power that existed in the absolutist State model.

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

> In an attempt to limit this absolute power held by the State, the Liberal State model was presented, tying the state acts to what was expressed by law. The so-called "fundamental rights of the first dimension" appeared, "demarcating a zone of non-intervention by the State and a sphere of individual autonomy in the face of its power". Later, in the beginning of the 20th century, the "second dimension rights" appeared, which, along with the evolution from the Liberal State to the Social State, also evolved, because, besides defending the individual against the State, they generated positive obligations that should be provided by the latter. In this sense, the emergence of other (possible) dimensions of fundamental rights could be pointed out, however the objective at the moment is to demonstrate the prominence that these rights reached at the beginning of the 20th century, especially after the period of the Post-World War II." (GERVASONI; GERVASONI, 2014, p. 401)

Finally, the fourth-generation rights, born with political globalization, covering the rights to democracy, information and pluralism. The fourth generation is born with the globalization of the world economy and politics, with the objective of safeguarding democracy, pluralism, etc.

Mazzili, referring to Renato Alessi, states that it is essential to distinguish the primary and secondary public interest, a differentiation established by Renato Alessi when he realizes that the general good, the interest of the community as a whole, often the diffuse interest such as the environment in general, is the primary interest that does not always coincide with the secondary interest, in other words, the way in which the administration organs decide on the public interest. Nevertheless, he explains that some more recent scholars have sustained the emptying of the concept of public interest, or have even denied the existence of a single concept of common good, since the complexity and conflict in today's society causes the interests of groups and diffuse interests to clash, as in the example of the installation of a factory in a city which can generate jobs and increase tax collection, on the other hand it can cause serious damage to the environment of the region according to economic activity. Despite the conflict drawn, the author believes that the supremacy of the primary public interest is possible to view from the perspective of reasonableness and respect for the Constitution, even if it is not able to compose all interests at stake instantly (MAZZILI, 2007, p. 47-48).

Therefore, considering the complexity of contemporary society, transindividual interests have arisen, situated in an intermediate position between public and private interests, shared by groups, classes or categories of people, that exceed the strictly individual sphere, but do not constitute public interests. Such rights were in a sort of limbo, without jurisdictional protection because their ownership was not clear. Under the procedural aspect, its characteristic is that the legal system recognizes the need that the individual access of interested parties to Justice should be replaced by a collective process, able to avoid contradictory decisions and able to a more efficient solution, considering that the collective process is exercised for the benefit of the entire injured group. (MAZZZILI, 2007, p. 48)

The Brazilian system of collective litigation is based on a distinction between diffuse, collective (or essentially collective) and individual homogeneous rights. These categories are the basis of the procedural discipline of collective actions, directly conditioning the regime of legitimacy to act and the scope of the res judicata. (MOREIRA, 1984, p. 195-197)

The diffuse interests (*lato sensu*), provided in art. 81, sole paragraph, item I of the Consumer Protection Code (CDC), also called transindividual, metaindividual, of indivisible nature,

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

which can only be considered as a whole, held by a group of indeterminate people, empirically understood as utility relations, concerning goods or situations, which do not have individualized holders by law, aiming to protect the collectivity in general or part of it. (DIDIER; ZANETI, 2019, p. 90)

Collective rights *stricto sensu*, as per clause II of the same sole paragraph, also called transindividual rights, of an indivisible nature, held by a group, category or class of persons that are indeterminate, but determinable, as a group, category, or class, connected by a legal relationship among themselves by *affectio societatis* (for example lawyers enrolled in the Brazilian Bar Association) or with a basic legal relationship with the opposing part. The characteristic that differentiates them from diffuse ones is the possibility of determination of the members integrating the group, whose basic relationship is necessarily prior to the injury, that is, the cohesion as a group, category or class prior to the event, remaining the indivisible nature of the object, the unavailability of the object common to both species (DIDIER, ZANETI, 2019, p. 90-91).

Finally, the rights of collective nature only in the form in which they are protected, or homogeneous individual rights, are defined in item III of this sole paragraph. This is a peculiar category, because it is not about the defense of collective rights, but the collective defense of individual rights. In fact, these are typically individual rights, fractionable, to which the law grants the possibility of collective defense, because they have a common origin, the coincidence of legal situations between the several injured parties among themselves or between them and or the opposing part, having the law chosen to define them to avoid doctrinal discussions could prevent the effective protection of consumer rights.

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

3. THE SO-CALLED CLASS ACTION MICROSYSTEM

The extraordinary legitimacy requires express authorization according to art. 18 of the Code of Civil Procedure (CPC). Even before the new constitutional order took effect, Law 4.215/1963 provided for the legitimacy of the OAB to represent the interests of lawyers and the individual interests related to the exercise of the profession (GRINOVER, 1984, p. 45).

According to Teori Zavascki, the general rule is that the legitimatio ad causam in relation to individual unavailable rights requires the nexus of conformity between the parties of the material law relationship and the parties in the procedural relationship because the legitimacy by substitution of procedural means is admitted as an exception, and for this reason it is called extraordinary, according to the caput of art. 18 of the CPC. However, there is a tendency in the Brazilian procedural system to expand the hypotheses of substitution, aiming primarily at collective protection. The 1988 Constitution adopted this technique for the collective protection of transindividual rights (art. 129, III) and also for individual rights, in the provision of the collective writ of mandamus in defense of liquid and certain rights (CF, art. 5º, LXX, b[4]) and com-

4 Article 5 (....) LXX - a collective writ of mandamus may be filed by:
(a) political party with representation in the National Congress;
b) trade union, class entity, or association legally constituted and in operation for at least one year, in defense of the interests of its members or associates;

mon procedures to protect other types of rights (art. 5º, XXI[5] e art. 8º, III[6]), so that in the field of legitimacy for collective protection the substitution procedural is no longer an exceptional phenomenon, on the contrary, became the normal form of action (ZAVASCKI, 2005, p. 215).

The legislation that constitutes the so-called micro-system of collective lawsuit was a progressive legislative reward, initially with the effectiveness of the Law of Popular Action (LAP - Law No. 4.717/1965), which enabled the jurisdictional protection of diffuse rights linked to the environmental heritage, in a broad sense, through the legitimization of the citizen.

The public civil action was established in art. 129, III, of the Constitution as a constitutional action for the protection of diffuse and collective rights and interests, to be promoted by the Public Prosecutor's Office, without prejudice to the legitimacy conferred to other entities by law. This is the denomination given by LACP, when it instituted a special procedure destined to promote the protection of transindividual rights and interests, by means of a set of mechanisms to instrument preventive, reparatory and precautionary demands of responsibility for moral and patrimonial damages caused to the environment; to the consumer; to assets and rights of artistic, aesthetic, historic, touristic and landscape value; to any other diffuse or collective interest; for infringement of the economic order; of the urban order; of the honor and dignity of racial, ethnic or religious groups; of the public and social heritage. The sole paragraph of art. 1 expressly excludes the suitability of public civil action for claims involving taxes, social security contributions, the Employee Severance Indemnity Fund (FGTS) or other institutional funds whose beneficiaries can be individually determined.

After that, some variants of public civil actions were instituted, such as the protection of collective and diffuse interests of handicapped people (arts. 3 to 7 of Law No. 7.853/1989); of children and adolescents (arts. 280 to 224 of the Child and Adolescent Statute - Law No. 8.069/1990). With the enactment of the CDC, by express imposition of art. 5, XXXII of the Constitution and art. 48 of the Transitory Provisions Act (ADCT), a category of homogeneous individual interests or rights was created, together with LACP, interacting through the reciprocal application of the rules of the two legal diplomas, configuring in Brazil a micro-system of collective lawsuits.[7]

Consequently, sectorial codes and statutes were edited, as well as special legislations, which began to complement and integrate the system of protection of diffuse, collective *stricto sensu* and homogeneous individual interests. Along this line, the possibility of integration and joint use of several legal diplomas, destined to protect the rights emerging from mass societies, contributed, with greater effectiveness, to the protection of pulverized social rights, which, due to the absence of a conceptual and legislative model until then, remained adrift from judicial protection. In fact, it is undeniable the affection of a true microsystem of protection of collective rights determined through the corresponding guardianship, considering the meeting of several legal diplomas, on the various rights, which intercommunicate, garnished by the CDC

5 Article 5. (...) XXI - the associative entities, when expressly authorized, are legitimate to represent their affiliates judicially or extrajudicially;

6 Art. 8º (...) III - the union is responsible for the defense of the collective or individual rights and interests of the category, including in judicial or administrative issues;

7 "The CDC, by modifying Law No. 7.347/1985 (LACP), acted as a true unifying and harmonizing agent, employing and adapting to the procedural system in force of the Code of Civil Procedure and the LACP for the defense of "diffuse, collective and individual rights, where applicable, the provisions of Title III of Law 8.078, of 11.09.1990, which established the Consumer Protection Code." (DIDIER; ZANETI, 2019, p. 69)

and the LACP in the core, and on the periphery the Law of Administrative Improbity, the Law of Writ of Mandamus and other sporadic laws, dialoguing with the Federal Constitution and the new CPC (DIDIER; ZANETI, 2019. p. 70-76).

To Teori Zavascki, one can identify in the Brazilian procedural system a subsystem that expressly delineates the instruments for protecting collective rights, namely, public civil actions and popular action, and the means for collectively protecting individual subjective rights, that is, individual homogeneous interests, collective civil actions, despite the fact that this terminological distinction is not a scientific requirement, it is not being observed either by the legislator or by the jurisprudence that has given the denomination of public civil action to almost all the actions related to the collective process, including those that have individual homogeneous rights as their object. He mentions Law no. 7.913/1989, which denominates as public civil action the "(...) of liability for damages caused to investors in the real estate securities market, although it is evident that the rights injured have the character of homogeneous individual rights, also citing several judgments of the STF and STJ in the same sense. (ZAVASCKI, 2005, p. 45/50)

These laws, although they outline the main quadrants of the microsystem, are not, nor do they claim to be, exhaustive. There are other laws that, in a specific way, deal with the collective lawsuit, to compose the same microsystem.

Furthermore, the principle of non-exhaustivity or atypicality of the collective lawsuit is in force, provided in art. 83 of the CDC; in art. 212 of the Child and Adolescent Statute (ECA); in art. 82, of Law no. 10,741/2003 (Elderly Statute), being admissible all kinds of actions capable of providing the adequate and effective protection of the desired interests. This principle has two aspects: the first determines that access to justice cannot be denied to collective rights, since it is an open concept. The second establishes that any form of protection is admissible for the effectiveness or guarantee of these rights.

Precisely because they compose the same microsystem, all these legislations present themselves or, at least, should present themselves in a harmonic way, including with respect to the main procedural institutes.

4. STANDING TO SUE IN THE BRAZILIAN CLASS ACTION SUIT - THE NONPROVISION OF THE BAR AS A LEGITIMATE PARTY IN THE CDC AND THE LACP

Differently from the class actions of the American law, which adopted the legitimacy based on the adequacy of representation, that is, any member of the group, class or interested category is legitimized for the filing of the collective action, acting as representative of the other interested parties without the need for express granting of powers, through the adequate notification of the members of the group (*fair notice*) for the purposes of the *right to opt out*[8]; In

8 "The systems that are based on class action adopt legitimation based on "adequacy on representation". In other words, it means that the principles related to due legal process are confirmed, then, by the control of this legitimation by the judge. The parties "represent" the class, that is, the class is present at the trial. The adversary and the ample defense are guaranteed by

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

Brazilian public civil actions, the criterion adopted is that of the pre-constitution of legitimate associations, so that active legitimacy is attributed by law only to certain bodies or entities (GIDI, 2002).

The lawful parties to file a public civil action are listed in article 5 of Law no. 7. 347/1985 and they: the Public Prosecutor's Office, the Public Defender's Office, the entities of the federation (Union, States, Federal District and Municipalities), are the indirect administration bodies (autarchy, public company, foundation or society of mixed economy) and the associations that concomitantly have been constituted for at least 01 (one) year under the terms of the civil law and include, among its institutional purposes, the protection of the 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, touristic and landscape heritage.

According to the majority doctrine, ordinary and extraordinary legitimacy ad causam are fundamental procedural legal concepts, so that the collective legitimacy ad causam is extraordinary, by procedural substitution, an entity is authorized to defend in court the right whose ownership belongs to a group or a collectivity, therefore there is the need for legal authorization according to art. 18 of the CPC. Therefore, Brazil has adopted a multiple legitimacy, since there are several entities that are legitimized, and a mixed legitimacy, since it legitimizes entities from civil society and from the State. There are three legitimacy techniques that are most used in collective actions adopted in Brazil: the legitimacy of the private individual, such as the citizen in a popular action, for example; the legitimacy of legal entities of private law, such as unions, political parties and the legitimacy of Public Power agencies, such as the Public Prosecution Service and the Public Defender's Office. The elected technique was that of legitimacy by autonomous, exclusive, concurrent and disjunctive procedural substitution. Autonomous because the extraordinary legitimized party is legally authorized to conduct the lawsuit independently of the participation of the holder of the right in court; exclusive because as a rule only the extraordinary legitimated party can be a party in the lawsuit, exception made in the case of individual homogeneous rights in which the holder can intervene as a later litigation assistant. Concurrent among the various extraordinary legitimates by law so that any legitimate may file the collective action; disjunctive because each co-plaintiff may exercise it independently of the will of the other plaintiffs (DIDIER JR; ZANETI JR. 2019. p. 209-218).

It is clear that the CDC and LACP have not provided for the extraordinary legitimacy of the Brazilian Bar Association to file public civil actions.

Nevertheless, this systemic inconsistency was detected and the Senate Bill (PLS) 686/2015 or PL 2943/2019, authored by former Senator Cássio Cunha Lima from PSDB/PB, is currently in Congress. The project was approved by the Federal Senate Plenary and sent to the House of Representatives on May 16, 2019. It proposes the amendment of art. 5 of Law No. 7.437/85, in order to add an item, with the following wording:

> ""THE NATIONAL CONGRESS decrees:
>
> Art. 1 Art. 5 of Law No. 7.347, of July 24, 1985, shall be in effect with the addition of the following item VI:
>
> "Art. 5

---

the adequate notification of the group members (faire notice) - and, as a consequence, the right to opt out - right to exclude or "leave" the class member - and the binding effect - binding by subjective extension of the res judicata - are established. (DIDIER; ZANETI, 2019, p. 214)

> (...)VI - the Federal Council and the Sectional Councils of the Brazilian Bar Association." (NR)
>
> Art. 2 This Law goes into effect on the date of its official publication."

The bill was approved in 2017, by the Commission of Constitution, Justice and Citizenship (CCJ), rapporteur Senator Antonio Anastasia (PSDB-MG), who supported the initiative, adding that the Federal Council of the OAB was authorized by the Constitution to propose direct actions of unconstitutionality and declaratory actions of constitutionality to the STF (SENADO FEDERAL, 2015).

The project will add the OAB to the list of entities that can file a Public Civil Action contemplated in Law 7.347, of 1985, to act on national issues through the Federal Council and on local issues through the respective Regional Councils.

Likewise, the bill for the new Public Civil Action Law (PL 5. 139/09), whose purpose would be to act as a general law of collective lawsuits, proposes some innovations to collective lawsuit institutes, highlighting the establishment of principles pertinent to collective civil procedure, the revocation of the territorial limitation for res judicata, the determination of specialization of judicial bodies and the expansion of the list of active legitimates, expressly including the Brazilian Bar Association, which was rejected by the House of Representatives and is awaiting Appeal Deliberation at the Board of the House of Representatives since 2010 (CÂMARA DOS DEPUTADOS, PL 5139/2009).

This concern demonstrates that the purpose of granting the OAB extraordinary legitimacy for the protection of transindividual rights is not recent. As early as 1963, the Statute of the Brazilian Bar Association (EOAB) attributed to the Bar Association the power to represent the general interests of the lawyers' class and of other persons related to the exercise of the profession, a provision that was maintained in the 1994 Statute. Thus, its performance in the defense of the lawyers' class is certain, since the legal requirements for the adequate representation of associations are fulfilled. However, doubts remain as to the OAB's legitimacy to bring collective actions in defense of collective rights different from the group of lawyers in favor of the collectivity in general (COELHO, 2019, p. 253).

Even in the face of such a legislative gap, it is certain that art. 54 of the Statute of the Practice of Law expressly grants extraordinary legitimacy to the Federal Council of the Brazilian Bar Association to file a Public Civil Action.[9]

In a judgment issued on August 31, 2016, the Full Bench of the Federal Supreme Court (STF) concluded that the Brazilian Bar Association is constituted as a corporativist autarchy. In this context, the Plenary of the STF, in the trial of Extraordinary Appeal No. 595.332-PR, unanimously, considering topic 258 of the general repercussion, decided that it is up to the Federal Court to process and judge actions in which the Brazilian Bar Association, either through the Federal Council or Sectional, is part of the procedural relationship. In his vote, Minister Marco Aurélio clarified that the OAB, whether from the standpoint of the Federal Council or the Sections, is not a legal entity of private law. It should be noted that the purposes of the Brazilian Bar Association are established by Federal Law, which clearly demonstrates its peculiarity

9 Art. 54 The Federal Council is responsible for: (...)
XIV - to file direct actions of unconstitutionality of legal norms and normative acts, public civil actions, collective writ of mandamus, writ of injunction, and other actions whose legitimacy is granted by law; (our emphasis)

in relation to other associative entities. According to the rapporteur, it is a class body with legal discipline, which allows it to impose annual contributions and exercise supervisory activity, characterizing it as a corporative autarchy, able to attract the competence of the Federal Court.[10]

Therefore, it can be inferred that the OAB, as a corporative autarchy, is included in the list of lawful parties according to item IV of art. 5 of LACP, included by Law 11.448/2007.

Once these premises are established, it will be necessary to determine the thematic pertinence in the public civil actions filed by the OAB.

5. OF THEMATIC PERTINENCE: OVERVIEW

The doctrine diverges in Brazil on the issue of jurisdictional control of collective legal standing. Some believe that it was up to the legislator to establish a list of legal representatives, leading to an absolute presumption that they would always be adequate representatives, so that the verification of the adequacy would occur (*ope legis*) by law. However, there is a strong doctrinal current discussing the role of the Judiciary in the analysis of the adequate representation, and should relate the list of legal representatives to a possible abuse, spurious interests, possible persecutions or contradictions with the interests in litigation, so that in addition to the legal authorization for the collective legitimacy, the judge would control the adequacy of the legitimacy in concrete in order to assess the presence of the elements that ensure the adequate representation (CONCENTINO, 2009, p. 439-240).

The 1988 Constitution, which was promulgated to satisfy democratic desires after 21 years of military regime, made a colossal contribution to this phenomenon of jurisdictional expansion. Many innovations were brought by the new Constitution, regarding the legitimacy to file actions of constitutionality control, which in the 1969 Constitution was conferred only to the Attorney General of the Republic, which could have the logical consequence of blocking the filing of actions contrary to the interests of the Executive Branch, and in article 103 of the new Constitution, it is now conferred to a series of subjects. There are respectable positions contrary to the establishment of thematic pertinence, since the requirement of thematic pertinence for certain legal entities would represent a paradox, since the processes of concentrated control of constitutionality are of an objective nature, where the possible offense of a law or normative act against the Constitution is discussed, so that there are not exactly parties but participants, creating a subjective requirement in an objective process, adding that there is no normative basis in thematic pertinence being an option of the Ministers of the STF, limiting a constitutional guarantee without provision in the constitutional text or in infra-constitutional legislation (RANGEL, 2017. p. 101).

10 “ "The Brazilian Bar Association, whether under the angle of the Federal Council or of the Sectionals, is not an association, a legal entity of private law, in relation to which state interference in its operation is forbidden - subsection XVIII of Article 5 of the Brazilian Constitution. It is a class body, legally regulated - Law no. 8.906/1994 - and is responsible for imposing annual contributions and exercising supervisory and censorial activities. It is, for this very reason, a **Corporative autarchy, which attracts, in accordance with article 109, item I, of the Major Diploma, the competence of the Federal Justice to examine actions** - of whatever nature - in which it is part of the procedural relationship. It is improper to establish a distinction considering the other existing councils". (excerpt from the vote - our emphasis)

In the American system, the control of adequate representativeness is verified in the concrete case and requires minimum requirements: the legitimate party needs to demonstrate the interest and ability to represent the claims of the class in a vigorous and consistent manner, and that it is free from the conflict of interests, demonstrates adequate motivation to act on behalf of the group, technical and economic capacity, credibility (DIDIER JR; ZANETI JR. 2019, p. 225-227).

There are three stages in the examination of the legitimacy for collective protection. Firstly, the identification in the abstract of who may conduct a collective suit as a plaintiff; secondly, the concrete jurisdictional control of the adequacy of such legitimacy, and finally the control of the conduction of the suit, of the very performance of the legitimated party, to be done by the judge and by those who have been replaced, the latter still the new frontier of investigation of the Brazilian doctrine on the aspect of collective due process. Among the various factors that can be used to verify adequate representation, one that has practical utility is the thematic affinity between the lawyer and the litigious object. The STF jurisprudence has named such bond "thematic pertinence" (DIDIER JR; ZANETI JR, 2019, p. 222-232).

In fact, there is no provision in the homeland law for control of adequate representation by the judge, supporting the doctrine in the possibility created by art. 82, § 1 of the CDC, which allows the judicial exemption of the requirement of pre-constitution of associations, when there is manifest social interest evidenced by the size or characteristic of the damage, or by the relevance of the legal good to be protected, that is, once the absence of adequate representation is found in the case in question it was opted for the protection of effective jurisdictional protection in respect of the collective due process of law (COELHO, 2019, p. 252).

The "thematic pertinence" is the indispensable congruence between the statutory objectives or the institutional purposes of the plaintiff entity and the material content of the rule being challenged in the abstract control, among those who have standing for the concentrated control of rules (STF, ADI 1157-MC, 2006).

In this context, in the scope of collective actions, two classes of legal standing to defend diffuse, collective and individual homogeneous rights were created: the broad or universal legal standing, which are not subject to the requirement of thematic pertinence, and the restricted or special legal standing.

Thus, in relation to actions of concentrated control, the special legitimates are those who need to demonstrate thematic pertinence, described in items IV, V and IX of art. 103, in other words, the Bureaus of the Legislative Assemblies and the Legislative Chamber of the Federal District (STF, ADI 1307, 1995, Rel. Min. Francisco Resek; ADI 3.756, rel. min. Ayres Britto, j. 21-6-2007, P, DJ de 19-10-2007) 2007) and Governors of States and Federal District, with the requirement that the direct action of unconstitutionality is admissible as long as the impugned law or act concerns the respective federative entity (STF, ADI 733, 1992, Rel. Min. Sepúlveda Pertence) and trade union confederation or class entity of national scope (ADI 1.507 MC-AgR, rel. min. Carlos Velloso, j. 3-2-1997, P, DJ de 6-6-1997).

On the other hand, the universal legitimates are exempted from demonstrating any institutional relationship with the contested matter, whose generic interest derives from their institutional attributions. Thus, the President of the Republic, the Bureaux of the Federal Senate and House of Representatives, the Attorney General, the Federal Council of the Brazilian Bar

Association and the political parties represented in the National Congress are considered to have universal standing (ADI 1396, Rel. Min. Marco Aurélio), based on items I to VI, VII and VIII of art. 103 of the Federal Constitution. And of interest to the present study, the Federal Council of the Brazilian Bar Association (STF, ADI 1396, Rel. Min. Marco Aurélio).

However, the evolution of doctrine and jurisprudence has shown that not even the Public Prosecutor's Office could be considered a universal collective legitimized party, since its actions have also been mitigated in the jurisdictional control.

In this sense, with regard to the Public Defender's Office, its legitimacy for collective actions has been established when the result of the lawsuit may benefit a group of underprivileged people, revealing a "legal clause of potential benefit to the needy"[11], question which has been overcome by the STF's decision in the judgment of RE 733.433, appraising Theme 607 of the General Repercussion.[12]

The Public Prosecutor's Office is the most active entity in the filing of Public Civil Action, although it has no superiority over other entities. The Public Prosecutor's Office is the most active entity in filing a Public Civil Action, although it has no superiority over the other entities. This function was granted to it in art. 127, *caput*, of the Constitution, as a permanent and essential institution to the jurisdictional function of the State, being in charge of the defense of the legal order, of the democratic regime and of the social interests, and for the protection of individual unavailable and homogeneous unavailable interests, referring to indispensable values for the survival and development of the human being and for the welfare of the community, whose protection is reviewed as having a qualified social interest, in the presence of the social relevance of the protection, which may be objective or subjective, if derived from the special quality of the subjects or from the mass repercussion of the demand.[13] It can be inferred from the aforementioned provisions that, with regard to the active legitimacy of the Public Prosecutor's Office, it is authorized to protect the defense of transindividual interests of any issue, as long as the action is compatible with its institutional and constitutional functions.[14] This understanding is summarized in the jurisprudence of the Superior Court of Justice (STJ) regarding the defense of consumer interests.[15]

For the legitimacy of associations, the requirements of pre-constitution and thematic pertinence are provided for in art. 82, IV, CDC and art. 5, V, of LACP, provided that they are legally constituted for at least one year and that they include among their institutional purposes the defense of the interests and rights protected by this code, waiving the authorization of the assembly, which is justified since the associations can amend their statutes aiming to expand

11 Art. 4 The institutional functions of the Office of the Public Defender are, among others: (...) VII - to promote public civil action and all kinds of actions capable of providing adequate protection for diffuse, collective or individual homogeneous rights when the result of the lawsuit may benefit a group of persons in need.

12 "The Public Defender's Office has legitimacy to file a public civil action in order to promote the judicial protection of diffuse and collective rights held, in theory, by people in need."

13 Such understanding is corroborated by Precedent No. 7 of the Superior Council of the Public Prosecution Service of the State of São Paulo, as well as in the National Organic Law of the Public Prosecution Service (Law No. 8.625/1993 - LONMP) and in Article 6, item IV, letter "d" of Complementary Law No. 75/1993 (LOMPU).

14 Similarly, the Federal Supreme Court has recognized that, since DPVAT insurance is mandatory by law and its purpose is to protect the victims of car accidents, there is social interest, which is why the ministerial body has standing to file a collective lawsuit, thus rendering Precedent No. 470 of the STJ prejudiced.

15 Precedent 601 STJ: The Public Prosecutor's Office has active legitimacy to act in defense of diffuse, collective and individual homogeneous rights of consumers, even if arising from the provision of public services. (The Special Court, in the ordinary session of February 7, 2018, DJE 25/02/2018)

their powers, to the extent that they modify their ability to act. They are private entities and, in this sense, totally different from the OAB in its legal nature, therefore any analogy built in favor of thematic pertinence is not appropriate.

With respect to political parties, since they are represented by the national directory of the political party, the STF understands that the link of thematic pertinence is not required, provided that they are represented in the National Congress, and that they can, in abstract control, argue the unconstitutionality of federal, state or district normative acts, regardless of their material content, since the jurisprudential restriction derived from the link of thematic pertinence does not apply to party associations (ADI 1.407 MC, rel. min. Celso de Mello, j. 3-7-1996, P, DJ de 24-11-2000; ADI 779 AgR, rel. Celso de Mello, j. 8-10-1992, P, DJ de 11-3-1994).

According to article 8, III of the Federal Constitution, the actions of the Unions in Class Actions must be limited to the collective and individual interests restricted to the category (STF. ADI 1157-MC. Rel. Min. Celso de Mello, DJ de 17-11-06).

6. THE THEMATIC PERTINENCE OF THE OAB

Regarding the need of thematic pertinence for the OAB, such understanding seems to contradict several judgments of the STF in relation to the filing of a Direct Action, so that the OAB is not required to have thematic pertinence in a direct action, which by analogy leads us to believe that the STF would also not require it in a Public Civil Action.

In fact, according to art. 103 of the Constitution, as amended by EC no. 45/2004, the Federal Council of the Brazilian Bar Association is authorized, among other legitimate parties, to file direct actions of unconstitutionality and declaratory actions of constitutionality (item VII). Law 9.868/1999, in its article 2, reproduces *ipsis literis* the list of active legitimates for abstract control of art. 103 of the FC. In turn, the legal standing to file an action for breach of a fundamental precept provided for in Law 9882/1999 are the same legal standing to file a direct action of unconstitutionality.

To corroborate this assertion, item I of Article 44 of the Statute of the Legal Profession is clear in attributing to the OAB the task of defending the Constitution, the legal order of the democratical State of Law, human rights, social justice, and to strive for the good application of the laws, for the speedy administration of justice, and for the improvement of legal culture and institutions. Therefore, this legal provision grants the OAB the defense of collective rights and interests. The broadness of the wording of this item authorizes the conclusion that, in relation to the OAB, the mitigation of the requirement of thematic pertinence for the filing of the Public Civil Action.

Evidence of this are the statistics presented by Luiz Werneck Vianna and others, whose graphs reveal that the OAB has continuously used the Adins, making its presence felt among the members of the community of interpreters, and that the balance of the Adins against federal rules filed by the OAB reveals that its action is mostly for the control of the legal system, including a broad spectrum of issues and not restricted to the defense of corporate interests (VIANNA; BURGOS; SALLES, 2007, p. 75-76).

Furthermore, article 81, III, of the Statute of the Elderly, expressly granted the OAB, in a generic manner - without designating the competent body for such - the legitimacy to file civil suits to defend the diffuse, collective, individual unavailable or homogeneous interests of the elderly.

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

7. THE LEGITIMACY OF THE OAB'S INTERNAL BODIES

Once the universal legitimacy of the Federal Council of the Brazilian Bar Association has been analyzed for the filing of a Public Civil Action, it is appropriate to address the issue of the legitimacy of the Regional Councils of the Brazilian Bar Association.

The Statute of the Practice of Law provides that the following are organs of the Brazilian Bar Association: the Federal Council, the Sectional Councils, the Subsections, and the Bar Association (Art. 45, items I to IV). The same article, in § 3, grants autonomy to the Subsections, as autonomous parts of the Sectional Council, in the form of this law and of its constituent act, but does not grant them legal personality, which is granted to the Federal Council, the Sectional Councils, and the Bar Association, according to §§ 1, 2, and 4.

The OAB Statute expressly grants active legitimacy to the Federal Council to file a public civil action (art. 54, clause XIV). This legitimacy is extensive to the Sectional Council, by force of art. 57, which disposes that the Sectional Council exercises and observes, in the respective territory, the competencies, prohibitions, and functions attributed to the Federal Council, as applicable and in the scope of its material and territorial competence, and the general norms established in the Law, in the General Regulation, in the Code of Ethics and Discipline, and in the Provisions.

The General Regulation of the Brazilian Bar Association, edited by the Federal Council, provides that it is the Regional Council's responsibility, in addition to what is provided in arts. 57 and 58 of the Statute of the Brazilian Bar Association, to file, after deliberation, a Public Civil Action for the defense of general, collective, and homogeneous individual diffuse interests (art. 105, V, b).[16] However, this capability is not expressly foreseen in the list in article 61 of the Statute of the Brazilian Bar Association, which attributes to the Subsections, among others, the attributions foreseen in the General Regulation or by delegation of competence from the Sectional Council (item IV).

It is understood that if the Statute of the Brazilian Bar Association, in its article 44, attributes to the entity in two items, item I, the defense of the Constitution, of the legal order of the Democratic State of Law, of human rights, among others, in a comprehensive manner, it does not seem correct to restrict its right to file a Public Civil Action only when it is a matter of defense of the interests of the practice of law, which it is in charge of by force of item II of the same article 44.

16 Art. 105 - It is up to the Sectional Council, besides the foreseen in arts. 57 and 58 of the Statute
V - filing, after deliberation: (...)
b) public civil action, for the defense of diffuse interests of a general character and collective and individual homogeneous interests.

Hence, and based on the provisions of Art. 54, Subparagraph XIV of the Statute of the Brazilian Bar Association, which complements the provisions of Art. 44 of the same law, the Brazilian Bar Association, in the form of its Federal Council, may file direct actions of unconstitutionality, collective writs of mandamus, writs of injunction, public civil actions or other collective actions, following the example of its Regional Offices, within the exact limits of their spheres of action.

On the other hand, the Second Panel of the STJ, in Special Appeal No. 331.403-RJ, reporting Justice João Otávio de Noronha, decided that the Subsections of the Brazilian Bar Association, lacking legal personality of their own, do not have standing to bring a class action.[17]

According to this decision, the Subsections, for not having legal personality, do not have legitimacy to file public civil actions, not even by delegation of the Sectional Council, deciding also that, although article 54, XIV, of the OAB Statute authorizes the Federal Council to file public civil actions, it does so within the limits of the competence of the Bar Association. In other words, the Federal and Regional Councils of the OAB would have legitimacy to file public civil actions to guarantee their own rights and those of their associates, and not those of all citizens.

In other appeal, the STJ, in Amendment of Divergence No. 1.351.760, Reporting Justice Benedito Gonçalves, decided that the Sectional Councils of the Brazilian Bar Association, endowed as they are with their own legal personality, may file the actions provided for, including public civil actions dealt with in art. 54, XIV of the Statute of the Brazilian Bar Association, in relation to matters affecting their local sphere, that is, the respective territories of the Member States, the Federal District and the Territories (art. 45, §2).

Nevertheless, in the judgment of Special Appeal nº 135.176/PE, the Reporting Justice Humberto Martins brought an innovative interpretation with respect to the legitimacy of the Brazilian Bar Association to file a public civil action, by casting his vote in the sense that the Regional Councils may file the actions foreseen in the aforementioned art. 54, XIV of the Statute of the Practice of Law, including public civil actions, in relation to issues of interest to the federation unit where they are installed, such as in defense of local urban, cultural and historical heritage, as can be seen in the judgment's summary:

> CIVIL PROCEDURE. ADMINISTRATIVE. PUBLIC CIVIL ACTION. BAR ASSOCIATION OF BRAZIL. SECTIONAL COUNCIL. PROTECTION OF URBAN, CULTURAL AND HISTORICAL HERITAGE. LIMITATION BY THEMATIC PERTINENCE. UNACCEPTABLE. SYSTEMATIC READING OF ART. 54, XIV, WITH ART. 44, I, OF LAW 8.906/94. DEFENSE OF THE FEDERAL CONSTITUTION, THE RULE OF LAW AND SOCIAL JUSTICE. 1 This is a special appeal against the appellate decision that upheld the sentence that extinguished, without examination of the merits, a public civil action filed by the sectional council of the Brazilian Bar Association on behalf of the protection of the local urban, cultural and historical heritage; the appellant alleges violation of arts. 44, 45, § 2, 54, XIV, and 59, all of Law 8.906/94. 2 The sectional councils of the Brazilian Bar Association may file the actions provided for - including public civil actions - in

17 CIVIL PROCEDURE. SPECIAL APPEAL. COLLECTIVE ACTION. ILLEGITIMACY OF THE SUBSECTION OF THE OAB. PUBLIC LIGHTING FEE. ART. 54 OF LAW 8.906/94. 1 - The OAB Branches, lacking their own legal personality, do not have legitimacy to file a collective action. 2 - The OAB (Federal Council and Sectional Councils) only has legitimacy to file a public civil action to guarantee its own rights and those of its members, and not those of all citizens. (Special Appeal granted. (Special Appeal 331.403/RJ, Reporting Justice João Otávio de Noronha, Second Panel, DJ 29/5/2006))

> art. 54, XIV, in relation to the themes that affect their local sphere, territorially restricted by art. 45, § 2, of Law 8.906/84. 3. the **active legitimacy - established in art. 54, XIV, of Law 8.906/94 - for the Brazilian Bar Association to file public civil actions, either by the Federal Council or by the sectional councils, must be read in a comprehensive manner, due to the purposes granted by the legislator to the entity - which has a peculiar character in the legal world - through art. 44, I, of the same norm; it is not possible to limit the OAB's activities on the grounds of thematic pertinence, since it is responsible for the defense, including judicial defense, of the Federal Constitution, the Rule of Law and social justice, which inexorably includes all collective and diffuse rights**. Special Appeal granted. (REsp nº 1.351.760/PE. Reporting Justice Humberto Martins. Second Panel. Judged on 26/11/2013. DJe: 09/12/2013 - our emphasis)

This judgment changed the previous jurisprudence of the STJ, which held that the OAB's subsections, lacking their own legal personality, did not have legal standing to bring a class action; and that the sectionals would only be legitimate to bring a public civil action to ensure their own rights and those of their members.

He (the Minister) based his vote on the fact that the contemporary doctrine on the Statute of the OAB has treated as possible the filing of public civil actions, in defense of collective and diffuse interests, without thematic restrictions, since being of legal character the collective legitimacy of the OAB, there is no need to prove thematic pertinence with its purposes, when entering court. However, the minister pointed out, the parallelism of attributions between the Federal Council and the Sectional Councils, foreseen in its art. 59, which must be read with temperament, is undeniable.[18] A Sectional Council can only file the actions foreseen in art. 54, XIV, in relation to issues that affect its local sphere, restricted by art. 45, § 2, concluded the reporter. This paragraph establishes that the sectional councils have their own legal personality and jurisdiction over the respective territories of the States or the Federal District.[19] Furthermore, he understood that, as it happens to direct actions of unconstitutionality, the limitation on the filing of Public Civil Actions by the OAB due to thematic pertinence does not apply.

In his vote, the Minister brings up the thought of Luiz Werneck Vianna, in a paper about the relationship between law and politics, when he defends that the competence of the Brazilian Bar Association to file public civil actions is a result of the expansion of the coverage of social life by the law, by the expansion of the protection of society, by virtue of the Federal Constitution of 1988, in such a way that the expansion of public civil actions, without the requirement of thematic limitation, is a logical consequence of the parallelism of the competence for the filing of direct actions of unconstitutionality by the OAB.[20]

18 Art. 59 - The Board of Directors of the Sectional Council has an identical composition and attributions equivalent to those of the Federal Council, according to the internal regulations of the former.

19 Art. 45. The following are organs of the OAB
I - the Federal Council;
II - the Sectional Councils
III - the Subsections;
IV - the Lawyers' Assistance Funds.
§ The Federal Council, endowed with its own legal personality and headquartered in the capital of the Republic, is the supreme body of the Brazilian Bar Association.
§ The Regional Councils, endowed with their own legal personality, have jurisdiction over the respective territories of the Member States, the Federal District and the Territories.

20 As Luiz Werneck Vianna explains in a recent publication on the relationship between law and politics, the Brazilian Bar Association's competence to file public civil actions can only be read as a result of the increased coverage of social life by the law. That is, by the expansion of the protection of society, in attention to the dictates of the 1988 Federal Constitution."

The Ministers also understood that the active legitimacy granted in item XIV of article 54 of the Statute for the Brazilian Bar Association to file public civil actions, either by the Federal Council or by the Sectional Councils, should be read broadly, due to the purposes granted by the legislator to the entity, which has a special character in the legal sphere, as provided in item I of article 44.

They considered that it was not possible to limit OAB's activities on the grounds of thematic pertinence, since it is responsible for the defense, including judicial defense, of the Federal Constitution, the Rule of Law, and social justice, which inexorably includes all collective and diffuse rights.

This discussion was also the subject of Special Appeal No. 1.423.825-CE, judged by the Fourth Panel of the Superior Court of Justice, under the reporting of Minister Luís Felipe Salomão. The appeal was filed in a public civil action filed by the Brazilian Bar Association Ceará Section, against several banks, seeking compensation on the grounds of collective moral damages under the allegation of increased waiting time of consumers in bank lines due to the service system with the reduction of the number of tellers and branches aiming at maximizing profits. In the judgment, the STJ reiterated the active legitimacy of the OAB to file a public civil action in defense of consumers on a collective basis, recognizing the generic aptitude of the institution to act on behalf of supra-individual interests, not being subject to the thematic pertinence as to the collective jurisdiction, as can be seen in the judgment:

> (...) 4 **The Brazilian Bar Association, either through the Federal Council or through the sectional councils, has legal standing to file a Public Civil Action for the defense of consumers on a collective basis.**
>
> **5. Due to its specific constitutional purpose, the relevance of the protected legal assets and the manifest protective bias of social interests, the active legitimacy of the Brazilian Bar Association is not subject to the thematic pertinence requirement regarding the collective jurisdiction.**
>
> **6. However, "the sectional councils of the Brazilian Bar Association may file the actions provided for - including public civil actions - in art. 54, XIV, in relation to the issues affecting their local sphere, territorially restricted by art. 45, § 2, of Law 8906/84" (REsp 1351760/PE, Reporting Justice Humberto Martins, Second Panel, judged on 26/11/2013, DJe 9/12/2013)**
>
> **7. In the present case, since the OAB's appeal was not heard, the case must return to the Court of origin for reexamination of the case, and the plaintiff's illegitimacy thesis must be considered overcome.**
>
> **8. Special Appeal partially granted. (EDcl in EREsp 1423825 - 2013/0403040-3 of 04/20/2018. Min. Luís Felipe Salomão - our emphasis)**

In the same line of reasoning, in a trial concerning a public civil action before the Supreme Court, Minister Rosa Weber admitted the active legitimacy of the OAB to file a public civil action, taking into consideration the institutional purposes provided for in its Statute (art. 44, I). She added that the Federal Council of the Brazilian Bar Association and its Regional Offices, within the territorial limits of their respective activities, are not limited to proving thematic pertinence for purposes of filing a public civil action, taking into account the amplitude of the institutional purposes set forth in the Statute (ACO 2059/DF. Reporting Justice Rosa Weber. Judged on September 25, 2015. DJe: September 29, 2015).

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

Considering, as seen below, that the OAB is a corporate autarchy, a public service provider, and that it is up to the Subsection, within the limits of its circumscription, to effectively fulfill the purposes of the OAB (Article 61, item I of the Statute), it is necessary that the Subsection be equipped with adequate instruments to fulfill the functions entrusted to it, among which stands out the legal standing to file class actions.

In this way, the provisions of art. 105 of Law no. 8.906/94 were consecrated, in attention to the institutional purpose of the Brazilian Bar Association, which is not limited to the regulation of the Lawyers class, since it is also responsible for the Federal Constitution and for the Democratic State of Law, in which sphere the fundamental collective rights lato sensu are inexorably found, whose defense in court can be done, among other means, through the filing of the Public Civil Action, overcoming the obstacle of the limitation of the list of lawful parties of art. 5 of LACP, leaving patent the legitimacy of the OAB for the filing of public civil action in defense of diffuse interests of general character, collective and individual homogeneous, without proof of specific thematic pertinence, since it is already presumed before the purpose constitutionally provided for such institution (COELHO, 2019, p. 255).

In this sense, we support the understanding that the thematic pertinence of the public civil actions filed by the OAB, as well as all the other co-plaintiffs, must follow the doctrine postulated by Fredie Didier Jr and Hermes Zaneti Jr, quoted above, with regard to the adequate representation, with regard to the fulfillment of the three steps in the examination of the legitimacy for collective protection: the identification in the abstract of who may conduct a collective suit as an author; secondly the concrete jurisdictional control of the adequacy of such legitimacy, lastly the control of the conduction of the process, of the very performance of the legitimated party, to be done by the judge and by the substituted.

Furthermore, it is also understood that, regardless of legal personality, it is imperative to recognize the judicial personality of the OAB Branches to ensure the effectiveness of its institutional mission of protecting the Constitution and the legal order in the Democratic State of Law (CUSTODIO, 2015).

Mazzili explains that the Constitution and several laws have been broadening the active legitimacy in defense of transindividual interests, even allowing its defense by entities and bodies, even if without legal personality, so that bodies without legal personality may in some cases be given judicial personality.[21]

This need is all the more imperious the smaller the Subsection is, sometimes circumscribing municipalities in the interior of the State, sometimes outlying districts, because without the prerogative of autonomously resorting to collective jurisdiction, they are entirely at the mercy of the representation of the Sectional Council or the Public Prosecutor's Office.

21 "Although some public bodies may not have legal personality (the Public Ministry itself does not), they may, in some cases, have judicial personality, as occurs with the boards of the legislative chambers or with the state bodies that defend the environment or the consumer (such as the Procons), in municipalities and states where they are mere public services with no personality, etc.
Condominiums of apartment buildings may also defend in court the collective interests of the condominium members, as long as they are authorized to do so by the General Assembly". (MAZZILI, 2007, P. 315)

8. CONCLUDING REMARKS

The Public Civil Action seeks to protect the interests of the community in case of damage to the environment, to the consumer, to the urban order and to goods and rights of artistic, aesthetic, historical, touristic and landscape value. Not only the public administration, but any individual or legal entity that causes damage to the community can be the defendants.

Article 54, XIV, of the Statute of the Practice of Law granted the handling of several special actions to the Federal Council of the Brazilian Bar Association, a body endowed with its own legal personality and headquartered in the capital of the Republic, among which is the Public Civil Action, without foreseeing such prerogative for the sectional councils.

As provided in art. 133 of the Constitution, the lawyer is indispensable to the administration of justice, being inviolable for his acts and manifestations in the exercise of his profession, within the limits of the law. The importance of the practice of law has been attested by Brazilian democratic history itself, which found in the Brazilian Bar Association one of the most notable pillars in the conquest and consolidation of the Democratic State of Law. Its role, which today is defined by the Statute of the Practice of Law, stands out for the responsibilities that are not attributed to any other regulated professional class entity.

There are respectable opinions that the OAB is a class entity that pertains only to lawyers enrolled in it. In truth, OAB goes beyond being an organ of representation, defense, selection, and discipline of lawyers, it is an entity destined, preponderantly, to defend the Constitution, the Legal Order, the Democratic State of Law, Human Rights, Social Justice, besides fighting for the good application of laws, for the swift administration of Justice, and for the improvement of culture and legal institutions, in an absolutely independent way.

The OAB does not have any functional or hierarchical link with any public administration body. The entity has institutional purposes of protection of the supremacy of the constitutional text and of the legal-democratic order as a whole, indispensable for the direct defense of the interests of society as a whole and for the inspection of the acts of public power, affirmation of citizenship and of the constitutional order of values in which are embodied the fundamental rights that gravitate on the idea of human dignity.

In other words, as stated in the Statute of the Practice of Law, the most important function of the OAB is not in its corporate role, but in its role as an institution - guardian of the constitutional and democratic order, representative of civil society and defender of citizenship and human rights.

It was also shown that the universal legitimacy of the Brazilian Bar Association in the scope of the ACP arises from the recognition of the lack of thematic pertinence of the OAB to file a lawsuit in the abstract control of constitutionality, which was recognized by the 2nd Panel of the STJ in Special Appeal No. 1.351.760/PE. Thus, it was declared that the Regional Council of the Brazilian Bar Association has active legitimacy to file a public civil action, as a result of the parallelism of attributions established in article 59 of the Statute of the Practice of Law, as long as the issues invoked are related to its respective local sphere.

And, lastly, we understand that the OAB's Subsections also have legal standing to file a Public Civil Action, whether or not they have legal personality.

MERITUM MAGAZINE • v.15 • n.4 • p. 105-126 • 2020

On the first hand, it is unequivocal that once the Subsection Council is created, the Subsections automatically acquire their own legal personality in the same manner as the Sectional Council, respecting the territorial area and the limits of competence and autonomy. On the other hand, in the absence of a Subsection Council, it is believed that, regardless of the legal personality, it is imperative to recognize the judicial personality of the OAB's Subsections in order to guarantee the effectiveness of its institutional mission of protecting Brazilian society, in the local scope.

In fact, the OAB must remain faithful to its constitutional role as the spokesperson for society; and therein lies all of its legal, moral, and ethical authority that makes this institution one of the most respected entities in society, being a true refuge for those in need of social justice.

The protection of the Constitution and the democratic order is not a mere power of the Brazilian Bar Association, but a constitutionally assigned duty. For this reason, it is necessary to attribute remedies for such action to the OAB's Sections or Subsections as well.

Recognizing this reality, the Federal Council of the OAB was authorized by the original constituent, as an extraordinary legitimacy, to propose direct actions of unconstitutionality and declaratory actions of constitutionality before the Supreme Court, to protect the legal order. It would be a contradiction, therefore, to admit that the OAB, with respect to direct actions of unconstitutionality and declaratory actions of constitutionality, has extraordinary legitimacy for the protection of transindividual interests and, for others, such as public civil action, is left without legal standing for the most relevant issues of the protection of collective rights.

Besides the systemic incoherence pointed out, which would be more than enough to justify the understanding expressed here, it is also unreasonable that the Brazilian Bar Association should remain outside the protection of collective rights, inserted by the Constitution of the Republic itself as a fundamental right and, therefore, under the terms of § 1 of art. 5, with immediate application.

REFERENCES

BOBBIO, Norberto. *The Age of Rights.* Translation by Carlos Nelson Coutinho; presentation by Celso Lafer. New ed. Rio de Janeiro: Elseviver, 2004. 7th reprint.

BRAZIL. *Constitution of the Federative Republic of Brazil.* Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed 26 Aug. 2019.

BRASIL. *Consumer Defense Code.* Law No. 8.078, of September 11, 1990. Available at: http://www.planalto.gov.br/ccivil_03/leis/L8078.htm. Accessed on: 26 Aug. 2019.

Brazil. *Civil Procedural Code.* Law No. 13.105, dated March 16, 2015. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Accessed on: 17 May 2020.

BRAZIL. Law No. 7.347, of July 24, 1985. *Disciplines the public civil action of responsibility for damage caused to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, tourist and landscape value* (VETOED) and makes other provisions. Available at: http://www.planalto.gov.br/ccivil_03/leis/L7347orig.htm. Accessed on: 26 Aug. 2019.

BRAZIL. Law No. 4.717/1965, of June 29, 1965. *Regulates the Popular Action*. Available at: http://www.planalto.gov.br/ccivil_03/leis/l4717.htm. Accessed on: 26 aug. 2020.

BRAZIL. Presidency of the Republic. Civil House. Law No. 7.913, from December 7, 1989. *Provides on the public civil action of responsibility for damage caused to investors in the securities market.* Available at: http://www.planalto.gov.br/ccivil_03/leis/l7913.htm. Accessed on: 14 jul. 2020.

CÃMARA DOS DEPUTIES. *PL 5139/2009.* Disciplines the public civil action for the protection of diffuse, collective or individual homogeneous interests, and makes other provisions. Presentation on April 29, 2009. Available at: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=432485. Accessed on: 27 Jul. 2020.

CONCENTINO. Luciana de Castro. Res judicata in collective actions. *Meritum* - Belo Horizonte, v. 4, nº 1, jan./jun. 2009.

COELHO, Fernanda Rosa. *The active legitimacy of the Brazilian Bar Association for public civil action.* Collection of the III International Seminar Tutelas à Efetivação dos Direitos Indisponíveis. Porto Alegre: FMP, 2019.

CUSTÓDIO, Vinícius Monte. The active legitimacy of the subsections of the Brazilian Bar Association to file a public civil action. In *Revista de Direito da ESA Barra.* Vol: 5. Rio de Janeiro - Barra da Tijuca Subsection. 2015.

DIDIER Jr, Fredie & ZANETI Jr, Hermes. *Curso de Direito Processual Civil: processo coletivo*. 13 ed. Salvador: Ed. JusPodivm, 2019.

GERVASONI, Tássia; GERVASONI, Tamiris Alessandra. Constitutional jurisdiction and control of public policies: a necessary reality for the realization of fundamental rights. *Meritum Magazine***.** Vol. 9, No. 02 - July/December 2014. Available at: https://doi.org/10.46560/meritum.v9i2.3067. Accessed on: 27 jul. 2020.

Gidi, Antonio, The Adequacy of Representation in Brazilian Class Actions: A Proposal (Adequacy of Representation in Brazilian Class Actions: A Proposal) (December 13, 2012). *Journal of Procedure*, v. 108, No. 61, 2002; U of Houston Law Center No. 2007-A-41. Available at: https://ssrn.com/abstract=1016416. Accessed July 27, 2020.

GRINOVER, Ada Pellegrini (coord). *The protection of diffuse interests*. São Paulo: Max Limonad, 1984.

JUNIOR, Eloy Pereira Lemos; LEITE, Cristina Atayde. The unrestricted fundamental guarantee of the right of access to Justice in the face of thematic pertinence in the concentrated control of constitutionality. *Revista Cidadania e Acesso à Justiça,* v. 3, n. 1, 2017.

Mazzilli, Hugo Nigro. *A defesa dos interesses difusos em juízo: meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses*. 20 ed.

MOREIRA, José Carlos Barbosa. *Jurisdictional protection of collective or diffuse interests.* Themes of Civil Procedural Law. São Paulo: Saraiva, 3rd series, 1984.

RANGEL, Gabriel Dolabela Raemy. Criticism of the Thematic Pertinence. *Journal of EMERJ* - V. 19 - n. 4 - 2017, p. 101-124. Available at: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista19_n4/revista19_n4_101.pdf. Accessed on: 03 Sep. 2020.

Federal Senate. PL 2943/2019. Date2015. *Last name [PLS 686/2015].* Amends Law No. 7.347 of July 24, 1985 (Public Civil Action Law) to extend the standing to bring public civil action to the Federal Council and the Sectional Councils of the Brazilian Bar Association. Available at: https://www.lexml.gov.br/urn/urn:lex:br:camara.deputados:projeto.lei;pl:2019-05-16;2943. Accessed on: 27 Jul. 2020.

STJ. *REsp 1.351.760 PE* **(**2012/0229361-3). 2nd Panel. Reporting Justice Humberto Martins, w.v., j. 26/11/2013. Available at: https://ww2.stj.jus.br/processo/pesquisa/?num_registro=201202293613&aplicacao=processos.ea. Accessed on: 01 Sep. 2019.

STJ. *REsp No. 1.423.825 - CE* (2013/0403040-3). Reporting Judge Luis Felipe Solomon. j. 11/07/2017. DJe 18/12/2017. RSTJ vol. 249 p. 935. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201304030403&dt_publicacao=18/12/2017. Accessed on: 29 jul. 2020.

STJ. *REsp 331.403/RJ.* Reporting Justice João Otávio de Noronha, Second Panel, j. 07/03/2006, DJ 29/05/2006 p. 207. Available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/? num_registrar=200100808265&dt_publicacao=29/05/2006. Accessed on: 29 Jul. 2020.

STF. *ACO 2059/DF.* Reporting Justice Rosa Weber. Judged on September 25, 2015. DJe: 09/29/2015. Available at: http://stf.jus.br/portal/diarioJustica/verDiarioProcesso.asp? numDj=195&dataPublicacaoDj=30/09/2015&incidente=4335865&codCapitulo=6&numMateria=141&codMateria=2. Accessed on: 29 Jul. 2020.

STF. Plenary. *General Repercussion 258.* Judgment in Extraordinary Appeal No. 595.332 - PR. Reporting Justice Marco Aurélio. J. 31-08-2016. Available at: http://portal.stf.jus.br/processos/downloadPeca.asp?id=312054331&ext=.pd. Accessed on: 01 Sep. 2019.

STF. Plenary. *ADI 3.756.* Reporting Justice Ayres Britto, j. 21-6-2007, DJ de 19-10-2007. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=2388039. Access on: 26 jul. 2020.

stf. Plenary. *ADI 1307/DF.* Processo 0001628-68.1995.0.01.0000. Reporting Justice Francisco Rezek. v.u. J. 19-12-1995. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1619793. Access on: 29 jul. 2020.

STF. Plenary. *ADI 733-MG,* Reporting Sepúlveda Pertence, j: 17/06/1992, Full Court, Publication Date: DJ 30-06-1995 PP-18213 EMENT VOL-01791-02 PP-00238 . Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1537760. Access on: 29 Jul. 2020.

STF. Plenary. *ADI 1396-SC.* Processo 0000103-17.1996.0.01.0000. Rel. Min. Marco Aurélio. J. 08-06-1998. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1632220. Accessed July 29, 2020.

STF. Plenary. *ADI 1157-MC.* Reporting Justice Celso de Mello, j. 1-12-94, Plenary, DJ, 17-11-06. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=391350.Accessed on May 17, 2020.

STF, *ADI 1.407 MC*, Reporting Justice Celso de Mello, j. 7-3-1996, P, DJ de 24-11-2000. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1633066. Access on: 29 jul. 2020.

STF, *ADI 779 AgR,* Reporting Justice Celso de Mello, j. 8-10-1992, P, DJ de 11-3-1994. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1546488. Accessed on: 29 Jul. 2020.

STF. *ADI 1.507 MC-AgR,* Reporting Justice Carlos Velloso, j. 3-2-1997, P, DJ de 6-6-1997. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=1651775. Accessed on: 29 jul. 2020.

STF. *RE 733.433-PR.* Theme 607 of the General Repercussion. Reporting Justice Dias Toffoli. Legitimacy of the Public Defender to propose public civil action in defense of diffuse interests**.** Available at: http://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=4362356&numeroProcesso=733433&classeProcesso=RE&numeroTema=6. Accessed on: 27 July 2020.

VIANNA, Luiz Werneck; BURGOS, Marcelo Baumann; SALLES, Paula Martins. Seventeen years of judicialization of politics. In *Tempo Social, sociology journal of USP,* v. 19, n. 2. Nov. 2007.

ZAVASCKI, Teori Albino. *Collective Process: Collective Rights Protection and Collective Rights Protection.* 2005. 290 f. Thesis (Doctorate in Law) - Federal University of Rio Grande do Sul, Porto Alegre.

Received/*Recebido:* 07.06.2020.

Approved/*Aprovado:* 26.09.2020.

THE STATE OF EXCEPTION AND JUDICIAL REVIEW: THE ROLE OF CONSTITUTIONAL COURTS IN THE PROTECTION OF FUNDAMENTAL RIGHTS

THE STATE OF EXCEPTION AND THE JUDICIAL REVIEW: THE ROLE OF CONSTITUTIONAL COURTS IN THE PROTECTION OF FUNDAMENTAL RIGHTS

Deomar da Assenção Arouche Junior[1]
Delmo Mattos da Silva[2]
Roberto Carvalho Veloso[3]

ABSTRACT

The use of exceptional measures by governments has always been controversial due to its legitimacy. In view of this, this article aims to analyze this theme, adopting Giorgio Agamben's studies as a theoretical reference. Initially, we discuss the functions and characteristics of the new constitutionalism developed in the post-war period and the recognition of the normative power of the Constitution. After that, by means of the deductive method, starting from the main premises placed by the theorists studied, the situations of exception that occurred in the United States and in Colombia are analyzed, highlighting the justifications and execution measures. The choice for these countries occurred because they have experienced a complete cycle with the decree and execution of exceptional measures, up to the questioning before the respective constitutional courts about the constitutionality of these measures. In light of this, we analyze how the constitutional courts have acted in these cases, especially with respect to the constitutionality of the state of exception itself, as well as the constitutionality of the execution measures. Finally, the content of these decisions is analyzed, especially the treatment given to cases that resulted in restrictions to basic fundamental rights.

Keywords: State of exception; constitutional jurisdiction; control of constitutionality; fundamental rights.

1 Graduated in Law from Universidade Federal do Maranhão (2005). Specialization in Constitutional Law from Uniceuma (2008). Master's student at the Graduate Program in Law and Institutions of the Justice System of the Federal University of Maranhão (UFMA). Substitute Federal Judge. ORCID iD: https://orcid.org/0000-0002-8021-4038. E-mail: deomar_arouchejr@hotmail.com.

2 PhD in Philosophy from UFRJ. Collaborating Professor in the Graduate Program in Law and Institutions of the Justice System at UFMA. Researcher FAPEMA/CNPq. ORCID iD: https://orcid.org/0000-0002-9074-2192. E-mail: delmomattos@hotmail.com.

3 PhD in Law from the Federal University of Pernambuco (2008), Master in Law from the Federal University of Pernambuco (2002), Coordinator of the Master in Law and Institutions of the Justice System at UFMA, Federal Judge, Former President of Ajufe. ORCID iD: https://orcid.org/0000-0002-7477-6675. E-mail: velosorc@uol.com.br.

How to cite this article/Como citar esse artigo:
AROUCHE JÚNIOR, Deomar da Assenção; SILVA, Delmo Mattos da; VELOSO, Roberto Carvalho. O estado de exceção e a revisão judicial: a atuação das Cortes Constitucionais na proteção dos direitos fundamentais. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 127-144, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.8137.

RESUMO

The use of exceptional measures by governments has always been the subject of controversy due to its legitimacy. In view of this, this article aims to analyze this theme, using as a theoretical reference the studies of Giorgio Agamben. It discusses initially the functions and characteristics of the new constitutionalism developed in the post-war period and the recognition of the normative force of the Constitution. After that, using the deductive method, starting from the main premises made by the studied theorists, it is analyzed situations of exception that occurred in the United States and Colombia, with an emphasis on justifications and measures of execution. These countries were chosen because they experienced a complete cycle with the enactment and execution of exceptional measures, until questioning before the respective constitutional courts about the constitutionality of those measures. Therefore, it is analyzed how the Constitutional Courts acted in these cases, especially with regard to the constitutionality of the enactment of the state of exception as well as of the enforcement measures. Finally, it is analyzed the content of these decisions, especially the treatment given to cases that resulted in restrictions on basic fundamental rights.

Keywords: State of exception; constitutional jurisdiction; judicial review; fundamental rights.

1. INTRODUCTION

This article aims to analyze the main theoretical conceptions about the state of exception, as well as its application in real situations in recent history. To this end, it investigates the use of exceptional measures in the United States and Colombia, focusing on the analysis of decisions handed down by the constitutional courts of these countries in the exercise of constitutionality control. In this context, through the deductive method, we analyze the way in which the Judiciary of these countries has acted when faced with exceptional situations experienced in times of crisis in recent decades.

As a starting point, we discuss the new functions attributed to constitutional courts in the role of interpreting and applying constitutional rules by means of modern methods of constitutional interpretation. The performance of the courts was verified in light of their duty to ensure the maintenance of the democratic order based on the constitutional values that guarantee fundamental rights.

Next, using Giorgio Agamben's studies on the State of Exception as a theoretical reference, we discuss the main characteristics of the institute, as well as the problems related to the legitimacy of its use. At this point, the Italian author's criticism is emphasized, especially regarding the subjectivity in determining the reasons invoked for the decree of exceptional measures.

Among his many criticisms of the institute, Agamben recalls that exceptional measures usually consist in attributing exceptional powers to the ruler, which implies the weakening of democratic pillars. The author emphasizes that the measure results in the restriction of fundamental rights and the curtailment of the other powers. He also states that the justification for the adoption of such measures ends up not having any kind of control or verification, depending only on the will of the ruler.

The author justifies his assertions with several examples in which exceptional measures, which should be transitory, ended up becoming definitive, leading to the deterioration of the democratic rule of law. On the other hand, there is a current that understands the need to

apply restrictive exceptional measures as a form of protection for democratic institutions in unstable situations.

The choice to analyze the cases of Colombia and the United States occurred because they are democratic countries that have used exceptional measures, with severe restrictions on fundamental rights, under the allegation of facing threats to national security. Given that exceptional measures are still used and that, in some cases, they are even provided for in the constitutions, this article seeks to analyze how these courts faced issues related to the theme. In this scenario, we analyze the results of actions that questioned the constitutionality of enforcement measures arising from the exceptional situation at the time.

It was verified that, to a greater or lesser extent, both the Colombian and the American courts have considered some measures that restrict fundamental rights to be constitutional, while others have not. In general, it was possible to verify that, although both courts admit measures of this nature, they have clearly emphasized that no act of government practiced in an exceptional situation is immune from constitutionality control by the Judiciary.

Finally, this article briefly analyzes exception measures enacted in some countries because of the Coronavirus Disease 2019 (Covid-19) pandemic and its possible consequences for the democratic rule of law.

2. INTERPRETATION AND THE NORMATIVE FORCE OF THE CONSTITUTION

Traditionally, hermeneutics means theory or art of interpreting and understanding texts, whose main objective is to describe how the interpretative-comprehensive process takes place, still in its traditional sense. It also has a prescriptive dimension, to the extent that, through this descriptive process, it seeks to establish a more or less coherent set of rules and methods to correctly interpret and understand the most diverse legal texts (STRECK, 2014).

In this sense, according to Streck (2014, p. 345), the constitutional rule "becomes, in all its substantiality, the hermeneutic topos that will conform the interpretation of the rest of the legal system". However, the Constitution should not be understood as an entity dispersed in the legal system, nor can it be considered a substitute for the interpretative activity. The Constitution would be, thus, the materialization of the legal order of the social contract, directing the realization of the political and social order of a community. From this, one should be aware that the principles are deontological and govern the Constitution, the regime and the legal order. It would not be only the law, "but the law in all its extension, substantiality, fullness and scope" (STRECK, 2014, p. 345).

Until the beginning of the 20th century, more specifically until the outbreak of World War II, a culture based on the law passed by parliament as the main source prevailed, relegating to constitutions a merely programmatic role, which should inspire the legislature's actions. Thus, the constitutional rule was not recognized as having a normative force that could be invoked before the Judiciary. Fundamental rights, to have validity, should be protected by law, which

often led to the predominance of the arbitrariness of the majorities installed in parliament (SARMENTO, 2009).

This picture changed substantially after this period, because the perception that political majorities can perpetrate or complicate barbarism, as occurred with Nazism, led the new constitutions to create or strengthen constitutional jurisdiction, instituting powerful mechanisms for the protection of fundamental rights, including against the legislature (SARMENTO, 2009).

Thus, the reconstitutionalization of Europe over the second half of the 20th century redefined the place of the constitution and the influence of constitutional law on contemporary institutions. The main reference in the development of the new law is the Bonn Basic Law (German Constitution) of 1949 and the creation of the Federal Constitutional Court in 1951. From that moment on, an incessant scientific and doctrinal production about Constitutional Law began in countries of Roman-Germanic tradition. In Brazil, this process intensified with the approval of the 1988 Constitution, guaranteeing the consolidation of a Democratic State of Law with relative stability (BARROSO, 2005).

According to Hesse (1991), the legal Constitution is conditioned by historical reality and cannot be separated from the concrete reality of its time - and this has to be taken into account to satisfy its claim of efficacy. It itself becomes a normative force that influences and determines political and social reality. The limits of normative force can be seen when the factors of the present change.

> If the presuppositions of normative force find a correspondence in the Constitution, if the forces in a position to violate it show themselves willing to pay homage to it, if, even in difficult times, the Constitution manages to preserve its normative force, then it is a real, living force capable of protecting the life of the State against the unrestrained onslaught of arbitrary acts. It is not, therefore, in calm and happy times that the normative Constitution undergoes its test of strength. In truth, this test takes place in emergency situations, in times of need. (HESSE, 1991, p. 25).

Since it is a norm that creates the state, its institutions, and protects rights, the Constitution must have an apparatus to protect against any attempts to weaken it. In this case, the author highlights the fact that the normative force itself can be tested at times of exceptionality, when it is argued that it is necessary to relativize its commands for some reason. In such periods, the Constitution may be tested, and it is on these occasions that its strength should be asserted.

> To a certain extent, here resides the relative truth of the well-known thesis of Carl Schmitt, according to which the state of necessity configures an essential point for the characterization of the normative force of the Constitution. What is important, however, is not to verify, exactly during the state of necessity, the superiority of the facts over the secondary meaning of the normative element, but to verify, at this moment, the superiority of the norm over the factual circumstances. (HESSE, 1991, p. 25).

In the wake of the post-war period of strengthening of the Constitution, the so-called Neoconstitutionalism was consolidated, characterized mainly by the recognition of the normative force of principles, the rejection of formalism, the use of open methods of interpretation, the constitutionalization of law and the irradiation of fundamental rights norms to all branches (SARMENTO, 2009).

Another striking feature is the focus on the Judiciary, in which the judge is conceived as a guardian of the civilizing promises of the constitutional texts. Thus, members of the Judiciary would assume a leading role in the interpretation of constitutional rules, to the detriment of the other powers, a fact that ends up becoming controversial due to the limits of this interpretive activity and the possibility of exercising judicial activism (SARMENTO, 2009).

The origin of judicial activism dates back to the period of the great crisis of 1929, when the U.S. Supreme Court was forced to decide several cases involving the New Deal. From the 1950s on, the Supreme Court began to produce progressive jurisprudence on fundamental rights (BARROSO, 2012). After that, the U.S. Supreme Court, assumed a role as protector of fundamental rights, especially of minority groups, quantitatively or representatively, such as racial minorities.

Thus, the notion of judicial activism is linked to a broader participation of the judiciary in the realization of constitutional values and purposes, with a greater role in the space of the other powers. The activist posture manifests itself, for example, through the direct application of the Constitution to situations not expressly contemplated in its text and without manifestation of the legislature, declaration of unconstitutionality in situations where it is not ostensible and imposition of conducts or abstentions to the Public Power (BARROSO, 2012).

By protecting these minority interests, the Judiciary exercises its counter-majoritarian function. Thus, in certain situations, a certain group of individuals or even the entire community may be at the mercy of suffering restrictions on the enjoyment of its most basic rights, which often occurs under a cloak of legality.

3. THE STATE OF EXCEPTION

The state of exception is usually identified as an institute related to transitory moments of alteration of the institutional order established by a rule of law. It is usually associated with measures that allow the state to act in order to correct a threat or violation of the constitutional order.

François Saint-Bonnet alludes to two meanings of the word “exception”. The first, which he calls “classic”, would consist in the moment when legal rules foreseen for a period of “calm” are transgressed or suspended in order to face a certain danger. The second, on the other hand, whose great representative is Giorgio Agamben, would point to a profound modification of certain legal systems in the face of lasting dangers, such as terrorism. The latter, according to Saint-Bonnet, should not last, because the idea of a “permanent state of exception” would be a contradiction, as exceptions would become rules (VALIM, 2018).

In this context, in Constitutional Law, under the most varied labels, “state of urgency”, “state of emergency”, “state of siege”, “constitutional dictatorship” and “constitutional government of crisis”, the exception is understood as a bundle of prerogatives that the Executive Branch uses to face anomalous situations, such as a serious institutional crisis or calamities of great proportions. It is also noteworthy the definition under the philosophical prism in which the classic statement of Carl Schmitt is found, according to which “sovereign is the one who

MERITUM MAGAZINE • v.15 • n.4 • p. 127-144 • 2020

decides on the state of exception" (VALIM, 2018, p. 21). The sovereign would be the only one capable of making the last decision, which has for object the situation of exception.

Carl Schmitt, in turn, was one of the main theoreticians of the state of exception. His theory began to be developed in the works The Dictatorship and Political Theology. Showing fascination for the theme, the author even states that the exception is more interesting than the normal case, that the latter proves nothing and the former proves everything, which not only confirms the rule, but also the latter lives of exception (ALMEIDA; TORREÃO, 2019).

For Schmitt, the exception plays a central element, because he believes that only in the face of exceptionality one can glimpse who is the sovereign, since this is precisely who decides on the state or situation of exception. He defends a decision that comes from exceptionality, not from normativity, thus attacking the limit of the State's action given by the valid legal norm. One of his justifications was that no normative validity could do itself and that validity would be untenable when facing a situation of exception. In such situation, one can realize that the legal norm comes from a concrete normative order that would present itself in limit situations (ALVES; OLIVEIRA, 2012).

In this context, a widespread opinion is that the state of exception constitutes "a point of imbalance between public law and political fact" (AGAMBEN, 2004, p. 11). Another thought is that, if they are fruits of periods of political crisis, they should be understood in this field, and not in the legal one. The exceptional measures would find themselves in the paradoxical situation of legal measures that cannot be understood at the level of law, and the state of exception is presented as a legal form of that which cannot have a legal form (AGAMBEN, 2004).

Among the elements that make it difficult to define a state of exception is its close relationship with moments of institutional rupture, such as civil wars, insurrections and resistance. In this sense, it is worth explaining that, soon after taking power, Hitler promulgated, on February 28, a decree for the "protection of the people and the state", which suspended the articles of the Weimar Constitution regarding individual freedoms. The decree was never revoked, so that the entire Third Reich can be considered a state of exception, which lasted 12 years (AGAMBEN, 2004).

Modern Totalitarianism can be defined as the establishment, through the state of exception, of a legal civil war that allows the physical elimination not only of political opponents, but also of entire categories of citizens who seem unintegratable to the political system. Since then, the creation of a permanent state of emergency has become common practice in contemporary states, including the so-called democratic ones (AGAMBEN, 2004).

It is worth noting that there are several states of exception, that is, portions of power that lawfully or unlawfully escape the limits of the rule of law (BASILIEN-GAINCHE apud VALIM, 2018). Unlike what happens with a revolutionary movement, with the exception is not intended to openly establish a new constitutional order, it surreptitiously erodes the democratic rule of law. Although there are those who deny the legality of the exception, qualifying it as a merely political reality, everything indicates that it belongs to the law, emphasizing that the norm that determines it will never suspend itself (VALIM, 2018).

Regarding this issue, Agamben states that there is a division between those who seek to insert the state of exception within the legal system and those who consider it outside this system, as an essentially political phenomenon. In this regard, he states that

> Among the first, some - such as Santi Romano, Hauriou, Mortati - conceive the state of exception as an integral part of positive law, since the necessity that grounds it acts as an autonomous source of law; others - such as Hoerni, Ranelletti, Rossiter - understand it as a subjective right (natural or constitutional) of the State to its own conservation. The latter - among whom are Biscaretti, Balladore-Pallieri, Carré de Malberg - consider, on the contrary, the state of exception and the necessity that underlies it as factual elements that are substantially extra-legal, even though they may eventually have consequences in the field of law. (AGAMBEN, 2004, p. 38).

The author further questions:

> If what is proper of the state of exception is the suspension (total or partial) of the legal order, how can this suspension still be understood in the legal order? How can an anomie be inscribed in the legal order? And if, on the contrary, the state of exception is only a factual situation and, as such, alien or contrary to the law; how is it possible for the legal order to have a lacuna precisely as to a crucial situation? And what is the meaning of this gap? (AGAMBEN, 2004, p. 39).

After asking these questions, Agamben (2004) points out that the state of exception is neither outside nor inside the legal order, and the problem of its definition refers to a level or a gray zone in which inside and outside are not mutually exclusive, but indeterminate. The suspension of the norm does not mean its abolition, and the zone of anomie it establishes is not unrelated to the legal order.

In this context, there is an interesting debate about the foundation of the state of exception. One of the most cited currents sustains itself on the concept of necessity, resorting to the Latin adage necessitas legem non habet, which means "necessity has no law". According to Agamben (2004), this should be understood in two opposite senses: "necessity recognizes no law" and "necessity creates its own law.

The author concludes that understanding the structure and meaning of the state of exception presupposes an analysis of the legal concept of necessity. He understands that necessity is not a source of law, nor does it suspend it, it merely subtracts a particular case from its literal application. However, he states that the modern state of exception is, in fact, an attempt to include, in the legal order, the exception itself, creating a zone of indifference in which fact and law coincide.

Finally, Agamben (2004) understands that the theory of the state of necessity does not hold, because it concerns the very nature of necessity that some authors continue to think, more or less unconsciously, as an objective situation. In such a way, the concept of necessity would be totally subjective, relative to the objective that one wants to achieve. François Saint-Bonnet states that the issue of exception in public law is not only about discarding the applicable law as a result of certain circumstances, but also refers to the subtraction of normal relations between rulers and ruled (BERCOVICI, 2014).

Thus, most constitutionalists favor the constitutionalization of the exception, whose goal would be to rationalize the extraordinary protection of the state, incorporating it into the legal system. In this vein, the exceptional powers should be expressly provided for in the Constitution to enable limitation and control, including as a way to affirm democracy (BERCOVICI, 2014).

In this line, the state of exception would prove to be controllable, manageable, if executed in the manner provided in the constitutional and legal texts. Based on Godoy (2016, p. 301): “Its effective decree, however, leads the conceptual abstraction built on normality to an aggressive and hostile political and bureaucratic structure that enables the most monstrous barbarities”.

At the national level, the 1988 Federal Constitution provides for exceptional measures to defend the state and democratic institutions. The so-called constitutional crisis system has as its instruments the state of defense and the state of siege, aimed at maintaining or restoring order in times of abnormality. Therefore, crisis control is configured as a legal system formed by constitutional rules that establish and prescribe the necessary measures to solve political-institutional crises. Exceptionality would be the keynote in these cases, justifying the measures until the constitutional balance is, again, reached (FERNANDES, 2018).

MERITUM MAGAZINE • v.15 • n.4 • p. 127-144 • 2020

4. SITUATIONS OF EXCEPTION IN RECENT HISTORY AND JUDICIAL CONTROL

After the terrorist attacks of September 11, 2001, the United States government approved several normative acts with the intention of reducing fundamental guarantees in general, under the pretext of facing, with greater rigor, and preventing acts of terrorism. On November 13, 2001, it approved the *Military Order*, which authorized indefinite detention and prosecution before *Military Commissions* of non-citizens suspected of involvement in terrorist activities. Later, on September 26, 2001, the U.S. Senate passed the Patriot Act, which, among other things, allowed the *Attorney General to detain foreigners* suspected of terrorist activities that endanger the national security of the country (AGAMBEN, 2004).

Furthermore, within seven days, the alien was to be deported or charged with violation of immigration law or some other offense. In the event, the act radically nullified all legal status of the individual, thus producing a legally unnamable and unclassifiable being. Thus, the Taliban captured in Afghanistan did not enjoy the status of prisoners of war under the Geneva Convention, nor did they enjoy the status of those accused of common crimes under U.S. law (AGAMBEN, 2004):

> Neither prisoners nor accused, but only detainees, they are the object of a pure de facto domination, of an indeterminate detention not only in the temporal sense, but also as to their very nature, because totally outside the law and judicial control. The only possible comparison is with the legal situation of the Jews in the Nazi Lager: along with citizenship, they had lost all legal identity, but kept at least the identity of Jews. (AGAMBEN, 2004, p. 14).

At other times, there has been this claim to power by the executive branch, to deal with military or economic emergencies. Such was the case with the passage of the New Deal, in which there was a delegation to the president of unlimited power to regulate and control all aspects of the country’s economic life.

> It is in the perspective of this vindication of the president’s sovereign powers in an emergency situation that one must consider President Bush’s decision to refer to himself constantly, after September 11, 2001, as the Commander in

> chief of the army. If, as we have seen, such a title implies an immediate reference to the state of exception, Bush is seeking to produce a situation in which emergency becomes the rule and in which the very distinction between peace and war (and between foreign war and world civil war) becomes impossible. (AGAMBEM, 2004, p. 18).

Along these same lines, the Egyptian government, under former President Mohamed Morsi, published a constitutional declaration on November 22, 2012, that considered presidential decrees to be exempt from judicial review and authorized the president to implement the necessary actions to protect the country and the goals of the so-called Egyptian Revolution, which began after the deposition of Hosni Mubarak (MARTINS, 2015).

In another situation, on May 1, 1994, Decree No. 874 was approved by the government of Colombia, declaring a state of internal disturbance and determining the application of special legislation for crimes under the jurisdiction of regional courts, classified as terrorism, subversion, kidnapping, rebellion, drug trafficking, among others. An example of this special legislation was Decree No. 2271/1991, which provided for provisional release only for those over seventy years old and those who had already served pre-trial detention, for the time of the maximum penalty provided for the crime, with the intention of preventing the application of the more favorable legislation in these cases (MUÑOZ, 2002).

4.1 CONSTITUTIONAL JURISDICTION AS A MEANS OF CONTROLLING THE STATE OF EXCEPTION

Often, the constitutional system itself provides for a system of control by the Legislative and Judiciary Branches. This control should be exercised over the acts that lead to the suspension of constitutional guarantees, in order to ensure that they are pertinent to the validity of the exceptional situation. Along these lines, both in the United States and in Colombia, their respective Constitutional Courts have been called upon to exercise control over the constitutionality of the acts that implement such measures, adopted under the justification of the need for greater rigor and agility on the part of Executive Branch agencies.

In view of this, the Constitutional Court of Colombia, when asked to control the constitutionality of state of exception declarations, issued important decisions (some of which are analyzed below) to restrict the use of exceptional measures. Although it has not failed to recognize the discretion of the President of the Republic in deciding when and for how long to use the institute, the Court has recognized the possibility of full constitutionality control.

Thus, two declarations of exception were recognized as unconstitutional between 1994 and 1995. These decisions resulted in accusations of "judicial dictatorship" by the Court, for supposedly making it difficult for the government to control public order in the context of the confrontation with the Revolutionary Armed Forces of Colombia (FARC), a guerrilla group operating in that country (CAMPOS, 2016).

In these precedents, some of which are analyzed below, the Court has ensured that, although there is the faculty for the decree of exceptional measures in any of its modalities, such measures should observe the principle of proportionality and can never reduce the essential core of fundamental rights. Thus, it recognized the legitimacy of these mecha-

nisms when provided for in the Constitution itself and in international documents, but also stressed that judicial control should be unlimited and permanent (TOBÓN-TOBÓN; MENDIETA-GONZÁLEZ, 2017).

According to Muñoz (2002), former president of the Constitutional Court of Colombia, the Constitution of that country establishes three types of state of exception, namely, external war, internal commotion and emergency. The author stresses that the purpose of the constituent is to distinguish the scenarios of normality and abnormality, making it clear that the latter is subject to the rule of the constitutional rule.

On May 1, 1994, the Colombian government passed Decree No. 874, declaring a state of internal commotion, shortly after receiving a communication from the Attorney General's Office that several people accused of serious crimes were about to be released due to the expiration of the deadline for procedural instruction. The Attorney General's Office claimed that it would not be possible to consider the merits in such cases within the legal timeframe and that the delay could result in the release of 724 prisoners (MUÑOZ, 2002).

In practice, this decree would result in the maintenance of several preventive arrests without legal grounds, while the prisoners were awaiting trial. The Supreme Court held that the act was unconstitutional because it violated the right to liberty, the presumption of innocence, and the human being's capacity for self-determination, and that there could not be an objective presumption that the person under investigation, once released, would be a threat to public order (MUÑOZ, 2002).

In a judgment held under the reporting of the mentioned magistrate member of the Colombian Constitutional Court, it was stated that:

> The argument that the Government makes is absolutely dangerous, signals the Court and does not really demonstrate a risk of crisis in the declaration. It should also be noted that it violates the principle of presumption of innocence and also attacks the principles of a social state of law that relies on its own institutions. The Constitutional Court considers that in this case the mere fact that many people come out of prisons by lapse of time, due to a slowness in proceedings, there is no evident causal link with the endangering of state institutions, nor with the disturbance of public order (COLOMBIA, 1994, p. 1).

However, in another precedent, in *Sentence* No. C-556/92, the Court recognized the legitimacy of the declaration of a state of commotion, but controlled the exercise of this prerogative by verifying the presence of the formal requirements for such:

> Nevertheless, despite these caveats, the Constitutional Court declares the state of exception feasible, based on two reasons:
>
> a - The certification of the formal requirements, namely, the democratic principle and the prior approval by the senate;
>
> b - The adequacy of the powers given to the President of the Republic, namely, the non-existence of ordinary powers to prevent a crisis from occurring. (GONZÁLEZ, 2016, p. 148).

Sentence No. C-802/02 affirmed the legitimacy of the constitutionality control of acts as follows:

> In summary, the Political Charter confirms the competence of the Constitutional Court to control the formal and material constitutionality of both the legislative decrees declaring states of exception and the legislative decrees of execution. Such competence is further corroborated by the deliberations that took place in the National Constituent Assembly; by the model of constitutional law of exception chosen by the 1991 Constituent; by the regulation it made of the nature, limits, and system of control [...]; by the legal nature of the decree declaring a state of exception; and by the current conception of constitutional jurisdiction and its function (COLOMBIA, 2002, p. 1).

Furthermore, he understood that it would even be possible to suspend laws that were incompatible with the state of exception, but rights provided for in international treaties could not be suspended. In this sense:

> The Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights are the two international instruments that are considered to have been most flagrantly violated. Among the articles of the Inter-American Convention, article 8 stands out, stating the following: "Everyone arrested or detained shall be entitled to trial within a reasonable time or to release". In the same vein, the UN Human Rights Committee, in case No. 46 of 1979, held that: "The detention of an individual for more than 6 months before proceedings were initiated, and for more than two years before sentence was pronounced, would constitute excessive delays" (cited by the Constitutional Court of Colombia, Sentencia C-556 of 1992). (GONZÁLEZ, 2016, p. 147).

Even recognizing the constitutionality of the state of commotion, provided for by the constitutional order, the constitutional jurisdiction has acted to verify whether the exercise of this prerogative has been occurring regularly. Even so, it did not admit the suppression of fundamental rights and guarantees considered core to the democratic rule of law.

Along the same lines, also under the justification of facing an emergency situation, the U.S. government obtained the approval of the so-called *Patriot Act*, signed by President George W. Bush on October 26, 2001. Soon after the September 11 terrorist attacks, the law came into force under the argument of fighting terrorism, providing for a series of exceptional measures to be granted to government agencies in charge of acting in the fight against terror.

Critics of the Bush administration argued that this measure reflected a disregard for basic civil liberties. Supporters of the administration argued that it was an appropriate legislative response to the terrorist attacks. In short, the act greatly expanded investigative powers, especially broadening the possibilities for searching and acting on the Internet, authorizing clandestine personal searches, to take advantage of the new standards established by the *Foreign Intelligence Surveillance Act* (FISA) (GUIORA; JULIET, 2019).

This law, in its various chapters, provided for increased funding for military operations and increased the authority of the Executive Branch to seize the financial assets of foreign persons, countries, and entities suspected of participating in terrorist attacks. In doing so, it increased the authority of agencies charged with conducting surveillance of suspected terrorists, changed banking system regulations to combat money laundering, made it easier to request personal information from service companies, made it easier to detain suspected terrorists, and other measures (MORGAN, 2013).

The law also created a secret court with the function of legalizing, through court orders, the actions of the security agencies. This court even ordered the telecommunications com-

pany Verizon to hand over all its customers' telephone records to the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI) without being subject to any investigation. The court order also directed Verizon not to disclose the existence of the request and the court order itself (GREENWALD, 2013). Subsequently, the Supreme Court ruled for the constitutionality of this practice.

Moreover, this law allowed anyone in the world to be held in prison for an unlimited time, without a formal accusation, due process and trial. In this vein, illegal arrests and drone strikes were also "legalized" by secret courts, without any control, all under the justification of being in the war against terror (MELO, 2013).

Nevertheless, many actions of the U.S. government based on the Patriot Act have been challenged in court - some cases reaching the Supreme Court due to allegations of human rights violations, as in the case of Rasul v. Bush, in 2003. In this context, several individuals of different nationalities were captured in Afghanistan and Pakistan on suspicion of having ties to terrorist organizations. After family members of these prisoners filed Habeas Corpus petitions, the government claimed that the federal jurisdiction could not hear cases in which detainees of other nationalities were outside the U.S. territory (TAUBER; BANKS, 2019).

By six votes to three, the Supreme Court decided that, although Guantanamo Island is located in another country, the United States had full control of the naval base on Cuban territory, a situation that would be equivalent to detention on national soil. However, this decision did not result in the release of the individuals, as they were only guaranteed to submit the case to Federal Jurisdiction (UNITED STATES OF AMERICA, 2004a).

In another situation, also in the year 2004, the Supreme Court decided the case of Hamdi v. Rumsfeld, which was distinguished from the one mentioned above in that it involved a US citizen named Yaser Hamdi. Although born in Louisiana, he grew up outside the United States and was captured fighting alongside Taliban forces in Afghanistan. He was later taken to Guantanamo Bay prison when his citizenship was discovered, and was then transferred to a military prison. Initially, the prisoner was denied the right to communicate with a lawyer, which led him to argue a violation of due process of law under the fifth amendment of the US Constitution (TAUBER; BANKS, 2019).

Thus, he claimed that he was being prevented from challenging his arrest through an attorney. The American state, in turn, claimed the exclusive authority of the president to decide which prisoner would be considered an enemy combatant and that the principle of separation of powers would prevent the judiciary from interfering in this matter. The Supreme Court, by six votes to three, ruled that the president would not have exclusive authority to determine when a prisoner has the right to challenge his arrest through an advocate. *Justice* Sandra Day O'Connor stated that because Hamdi is a U.S. citizen, the government would be violating his Fifth Amendment right to due process of law, which would assure him the right to challenge his arrest (UNITED STATES OF AMERICA, 2004b).

However, in this case, there was no consensus among the justices as to the powers given to the president to detain enemy combatants. Two *Justices*, David Souter and Tuth Bader, disagreed on whether the *Authorization for Use of Military Force* (AUMF) gave such powers to the president. *Justice Souter*, in his *opinion*, pointed out that he disagreed with the others on this point. He emphasized that the government had not been able to show that the AUMF sup-

ported detention in the case at hand, and that Mr. Hamdi should be released immediately. In his view, the AUMF does not use the word detention and no interpretation of the law indicates that it is intended to give the president the authority to order detention of citizens as enemy combatants. He also argued that there would be another statute, the *Non-Detention* Act of 1971, which expressly prohibited the detention of US citizens except with the authorization of a law passed by Congress (EDELSON, 2017).

In the case of Hamdan v. Rumsfeld, judged in 2006, Salim Hamdan, who had been a driver for Osama bin Laden, was captured in Afghanistan and transferred to the Guantanamo prison, his case being under the protection of a military court, which declared him an enemy combatant. Prior to this declaration, Hamdan filed a *habeas corpus* petition before a federal court, which recognized the right to a hearing to verify the prisoner's *status* and possible submission to the rights provided for in the Geneva Convention. Such decision was reformed after appeal, under the argument that Congress had authorized the trial before the so-called Military Commissions and that the Geneva Convention would have no effect on US soil (TAUBER; BANKS, 2019).

The case was taken to the Supreme Court, which reformed the decision by five votes to three, prevailing the understanding that neither the Constitution nor any other law authorized the Military Commissions to act in this way and that the Geneva Convention should be observed in the case, since it produced effects within the national territory (UNITED STATES OF AMERICA, 2006).

After this case, Congress passed the Military Commission Act (MCA), which expressly removed from federal jurisdiction the competence to hear habeas corpus cases filed by Guantanamo prisoners. Thus, in the case Boumediene v. Bush, Lakhdar Boumediene, an Algerian citizen captured in Bosnia, suspected of planning attacks on an embassy, filed a writ of habeas corpus seeking to challenge his imprisonment. In light of this, the Supreme Court was again provoked to pronounce itself on the issue and, by five votes to four, reformed the initial decision (TAUBER; BANKS, 2019).

Thus, the understanding prevailed that the MCA could not authorize the president, by his own act, to designate prisoners as enemy combatants, or not. In addition, it reaffirmed that the guarantee of Habeas Corpus could not be suppressed despite legal provisions, because this would be contrary to the Constitution, which should be respected even in extraordinary situations (UNITED STATES OF AMERICA, 2008).

It is worth noting, in this last case, that the Justices who voted for the dismissal did so under the understanding that the guarantee of the Habeas Corpus would not extend to foreigners who support those considered enemies of the nation. In view of this, the performance of the Supreme Court was not exempt from criticism. In this sense, Guiora and Juliet (2019) state that successive governments have adopted measures that minimize individual rights. Meanwhile, Congress and the Supreme Court have failed to strengthen and rigorously apply checks and balances, failing to act in the field of combating terrorism and leaving it totally under the dominion of the Executive. The consequences of this hiatus are deleterious to fundamental rights, and it is questionable whether there is any benefit in restricting these rights.

MERITUM MAGAZINE • v.15 • n.4 • p. 127-144 • 2020

4.2 THE COVID-19 PANDEMIC AS A REASON TO DECLARE A STATE OF EXCEPTION

At the present time, the world is in a state of complete exceptionality due to a pandemic caused by Covid-19. The high number of people infected is shaking the health systems of many different countries to different extents. Some European countries, such as Italy and Spain, have been hardest hit by having their medical care capacity completely exhausted. In these countries, it has come to the point where choices have to be made between patients who should receive respirators because there are not enough of them to meet all the needs.

Faced with many scientific uncertainties about the efficacy of medicines, the form of contagion, over the months, international experience has shown that, for the moment, the only effective way to interrupt the chain of contagion would be social isolation, with the complete paralysis of almost all activities. Thus, what was seen, in some countries, was a resistance from part of the population to comply with isolation orders imposed by the authorities.

In this scenario of exceptionality, with the need to impose measures restricting the rights to freedom, some governments, it seems, have taken advantage of this to change their constitutional orders, under the justification that they need more powers to take measures to confront the pandemic.

One of the cases that gained prominence was Hungary, where the ultra-rightist government of Viktor Orbán managed on March 30, 2020, to pass a law that extends the state of alarm indefinitely, under the pretext of combating the new coronavirus. Holding a two-thirds majority in parliament, the executive gained extraordinary powers to rule by decree, without setting a time limit and without any control, including from parliament (BLANCO, 2020).

After international pressure mainly from European countries, on June 16, the parliament withdrew the special powers given to the prime minister. However, the new rule allows the chief executive to decree, without parliamentary consent, a state of public health emergency, which would allow a return to the previous situation (LEHOTAY, 2020). The case of Hungary demonstrates how a situation of exceptional character can be used to depart from the constitutional order and, therefore, democratic pillars such as the separation of powers and fundamental freedoms. One of the measures adopted was the punishment, with up to five years in prison, for those who publish false or distorted information that “obstructs” the effective protection of the population (BLANCO, 2020).

A similar measure was discussed and passed in Bulgaria, increasing the powers of Prime Minister Boyko Borisov. However, some articles were repealed by the parliament precisely because of the fear that the measure could hurt the freedom of speech in the country. One of the measures, similar to what happened in Hungary, provided for a prison sentence of up to three years for those who spread false news. President Rumen Radev vetoed this part of the law, claiming that it could cause more problems for the country, since it would restrict access to information. The Philippines, India, Poland, and Austria have also passed measures giving more powers to their respective chief executives to fight the pandemic (BRAUN, 2020).

Italy, the country most affected by Covid-19 so far, has passed a decree law for reasons of hygiene and public safety, imposing a series of restrictions, including: a ban on residents leaving the municipality, a ban on access to certain areas, the suspension of demonstrations

MERITUM MAGAZINE • v.15 • n.4 • p. 127-144 • 2020

and any form of assembly, the suspension of educational services for children and teenagers, and other restrictions.

In an article published on February 26, 2020, well before the outbreak of the contamination in Italy, Giorgio Agamben stated that such measures were irrational and totally immotivated, and that a state of exception was being provoked. However, subsequent events led the country to enter a total blockade, as this was the only way found to contain the wave of contagion. (AGAMBEN, 2020).

Already in early August, Parliament approved the extension of emergency powers to Prime Minister Giuseppe Conte until October 15. These powers allow the government to maintain restrictions and to respond promptly to new outbreaks with the restrictive measures it deems appropriate (HOROWITZ, 2020). So far, everything indicates that in the Italian case, the measures have indeed been adopted to last temporarily and only in order to contain the spread of the disease.

In Germany, the Federal Constitutional Court rejected applications against measures restricting the right of citizens of the Bavarian region to meet in general. The claim was that fundamental rights of freedom were being restricted too much and that there were no longer any grounds for doing so. The Court rejected the claim on the grounds that the restrictions were not unfounded and that they were pertinent to the goals of preserving public health (GERMANY, 2020).

MERITUM MAGAZINE • v.15 • n.4 • p. 127-144 • 2020

5. CONCLUSIONS

The Constitutional Courts have the important role of protecting and enforcing the constitutional rule, guaranteeing the validity of the democratic rule of law. Thus, the order of values that make up the constitutional system remains in force in any situation that escapes normality, regardless of its denomination. Even if the constitutional system itself brings a normatization for acting in moments of crisis, the values immanent to the constitutional order remain fully in force.

Even in a situation accepted by legal systems as an emergency, the Judiciary, at any of its levels, does not fail to act in an attempt to maintain control over the constitutionality of acts practiced during a state of exception. Even if the constitutional system foresees the prerogative of the Executive Branch, with the consent of the Legislative Branch, to act with exceptional powers, the judicial control function does not suffer any restriction as to the function of evaluating the constitutionality of the acts practiced.

In this way, as much as measures that may curtail certain fundamental guarantees are authorized, the Constitutional Courts and the common Jurisdiction must act to control such measures and, above all, to prevent the provisional situation from becoming definitive and degenerating the institution. In the precedents analyzed, both courts admit the use of exceptional measures that restrict fundamental rights, but always ratifying the possibility of verifying the constitutionality of the measures used.

Comparing the cases of the United States and Colombia, it was possible to verify a different degree of tolerance with regard to the restriction of fundamental guarantees. The U.S. Court adopted, in some cases, a more restrictive position, recognizing, for example, that the prisoners in Guantánamo had the right to be submitted to Federal Jurisdiction, but without immediately recognizing the illegality of the detentions.

Therefore, we conclude that judicial control can be more effectively exercised in constitutional systems that accept and regulate the situation of exceptionality. The legitimacy of the institute is recognized, in many places, as an important and even essential tool for dealing with emergency situations related to security and health, for example. However, not all constitutions foresee the regulation of the institute, which leads to a greater margin of discussion regarding the constitutionality of the execution measures, as occurs in the United States.

In cases where there is no regulation of state action in exceptional situations, democratic institutions may become more fragile, leaving citizens subject to the discretion of the Executive Branch in the exercise of its powers of criminal prosecution. The absence of a prior definition of the limits of state power leads to the violation of rights that may be irreversible, even after obtaining a judicial remedy.

Therefore, the full operation of the other powers, during the execution of exceptional measures within the dynamics of checks and balances, is essential to maintain vigilance and control over the actions taken under the auspices of the state of emergency or similar. In this sense, under no circumstances and to no degree should one allow a reduction in the judicial capacity to evaluate the acts practiced under a state of exception. Measures that deprive the Judiciary of the ability to syndicate any act are unconstitutional in any event, and should not be accepted under any circumstances.

REFERENCES

AGAMBEN, Giorgio. **State of exception**. Trad. Iraci D. Poleti. São Paulo: Boitempo, 2004.

AGAMBEN, Giorgio. The state of exception provoked by an unmotivated emergency. Trad. Luisa Rabolini. **IHU Magazine**, São Leopoldo, 27 Feb. 2020. Available at: http://www.ihu.unisinos.br/78-noticias/596584-o-estado-de-excecao-provocado-por-uma-emergencia-imotivada. Accessed on: 9 abr. 2020.

ALMEIDA, Eneá de Stutz e; TORREÃO, Marcelo Pires. The right in exception and the right in transition: exceptional grounds for a transitional justice. **Revista de Direito da Universidade de Brasília**, Brasília, v. 3, n. 1, p. 113-136, Dec. 2019. Available at: https://periodicos.unb.br/index.php/revistadedireitounb/article/view/26919. Accessed on: 20 Mar. 2020.

ALVES, Adamo Dias; OLIVEIRA, Marcelo Andrade Cattoni. Carl Schmitt: a theorist of exception under the state of exception. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, n. 105, p. 225-276, jul./dez. 2012. Available at: https://pos.direito.ufmg.br/rbep/index.php/rbep/article/view/P.0034-7191.2012v105p225. Accessed on: 12 mar. 2020.

BARROSO, Luís Roberto. Neoconstitucionalismo e constitucionalização do Direito (o triunfo tardio do direito constitucional no Brasil). **Revista de Direito Administrativo**, Rio de Janeiro, v. 240, p. 1-42, apr. /jun. 2005. Available at: http://bibliotecadigital.fgv.br/ojs/index. php/rda/article/view/43618. Accessed on: 14 abr. 2020.

BARROSO, Luís Roberto. Judicialization, judicial activism and democratic legitimacy. **(Syn)Thesis**, Rio de Janeiro, v. 5, n. 1, p. 23-32, 2012. Available at: https://www.e-publicacoes.uerj.br/index.php/synthesis/article/view/7433. Accessed on: 9 abr. 2020.

BERCOVICI, Gilberto. The expansion of the state of exception: from guaranteeing the Constitution to guaranteeing capitalism. **Boletim de Ciências Econômicas**, Coimbra, v. 57, tome 1, p. 737-754, 2014. Available at: https://digitalis-dsp.uc.pt/bitstream/10316.2/39819/1/A%20expansao%20do%20estado%20de%20excecao.pdf. Accessed on: 22 abr. 2020.

BLANCO, Silvia. By coronavirus, Hungary allows ultra-rightist Orbán to rule by decree indefinitely. **El País**, Madrid, 30 Mar. 2020. Available at: https://brasil.elpais.com/internacional/2020-03-30/lei-aprovada-na-hungria-permite-que-orban-amplie-indefinidamente-o-estado-de-alarme-devido-a-pandemia.html. Accessed on: 10 Apr. 2020.

BRAUN, Julia. Extreme right leaders expand power and fail in dealing with the epidemic. **Veja**, São Paulo, March 26, 2020. Available at: https://veja.abril.com.br/mundo/lideres-de-extrema-direita-ampliam-poder-e-erram-ao-lidar-com-epidemia/. Accessed on: 28 Mar. 2020.

CAMPOS, Carlos Alexandre de Azevedo. **Unconstitutional state of things**. Salvador: Juspodivm, 2016.

COLOMBIA. Constitutional Court. **Sentence no. C-300/94**. Bogotá: Constitutional Court, 1994. Available at: https://www.corteconstitucional.gov.co/Relatoria/1994/C-300-94.htm. Accessed on: 20 abr. 2020.

COLOMBIA. Constitutional Court. **Sentence no. C-802/02**. Bogotá: Constitutional Court, 2002. Available at: < https://www.corteconstitucional.gov.co/Relatoria/2002/C-802-02.htm>. Accessed on: 20 abr. 2020.

EDELSON, Chris. The hollowing out of Youngstown sheet: how congress and the courts can restore limits on presidential power. In: SPSA ANNUAL MEETING, 88, 2017, New Orleans. **Abstract**... New Orleans: SPSA, 2017. Available at: https://papers.ssrn.com/sol3/papers.cfm? abstract_id=2895076. Accessed on: 7 Jul. 2020.

FERNANDES, Bernardo Gonçalves. **Curso de Direito Constitucional**. 10. ed. Salvador: Juspodivm, 2018.

GERMANY. Federal Constitutional Court. Unsuccessful applications for preliminary injunctions in relation to the COVID-19 pandemic. **Press Release**, Karlsruhe, n. 23, Apr. 2020. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-023.html. Accessed on: 20 Apr. 2020.

GODOY, Arnaldo Sampaio de Moraes. The state of exception in the Brazilian constitutional experience. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, São Leopoldo, v. 8, n. 3, p. 286-302, sep./dez. 2016. Available at: http://revistas.unisinos.br/index. php/RECHTD/article/viewFile/rechtd.2016.83.03/5716. Accessed on: 10 Apr. 2020.

GONZÁLEZ, Clara María Mira. Los estados de excepción en Colombia y aplicación del principio de proporcionalidad: un análisis de seis casos representativos. **Opinión Jurídica**, Medellín, v. 15, n. 29, p. 141-163, jun. 2016. Available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S1692-25302016000100008&lng=en&nrm=isso. Accessed on: 14 abr. 2020.

GREENWALD, Glenn. NSA collecting phone records of millions of Verizon customers daily. **The Guardian**, London, 6 Jun. 2013. Available at: https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order. Accessed on: 14 Apr. 2020.

GUIORA, Amos; JOLIET, Chelsea. Counter-terrorism policies and challenges to human rights and civil liberties: a case study of the United States of America. In: SHOR, E.; HOADLEY, S. (eds.). **International human rights and counter-terrorism**. Singapore: Springer Nature, 2019. p. 293-322. Disponível em: https://link.springer.com/referenceworkentry/10.1007%2F978-981-10-4181-5_24#citeas. Accessed: 13 May 2020.

HESSE, Konrad. **The normative force of the Constitution**. Trad. Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris, 1991.

HOROWITZ, Jason. Cómo logró Italia contener la calamidad del coronavirus. **The New York Times**, New York, 6 Aug. 2020. Available at: https://www.nytimes.com/es/2020/08/05/espanol/mundo/italia-reapertura-coronavirus.html. Accessed on: 16 Aug 2020.

LEHOTAY, Orsolya. Hungary's Democracy Is Still Under Threat. **Foreignpolicy**, Washington, July 17, 2020. Available at: https://foreignpolicy.com/2020/07/17/hungary-democracy-still-under-threat-orban-state-public-health-emergency-decree/. Accessed on: 16 Aug 2020.

MARTINS, Lucas Moraes. State of exception: origin and topological structure. **Interthesis**, Florianópolis, v. 12, n. 1, p. 157-175, jan./jun. 2015. Available at: https://periodicos.ufsc.br/index.php/interthesis/article/view/1807-1384.2015v12n1p157. Accessed on: 15 mar. 2020.

MELO, João Ozório. Americans already accuse loss of constitutional guarantees. **Conjur**, São Paulo, 9 jun. 2013. Available at: https://www.conjur.com.br/2013-jun-09/americanos-sentem-perda-garantias-constitucionais-guerra-terror. Accessed on: 12 abr. 2020.

MORGAN, Andrew. The patriot act and civil liberties. **Jurist**, Pittsburgh, July 20, 2013. Available at: https://www.jurist.org/archives/feature/the-patriot-act-and-civil-liberties/. Accessed on: 15 Apr. 2020.

MUÑOZ, Eduardo Cifuentes. Los estados de excepción constitucional en Colombia. **Ius et Praxis**, Talca, v. 8, n. 1, p. 117-146, 2002. Available at: https://scielo.conicyt.cl/scielo.php? script=sci_arttext&pid=S0718-00122002000100009&lng=es&nrm=iso. Accessed on: 14 Apr. 2020.

SARMENTO, Daniel. **Neoconstitutionalism in Brazil**: risks and possibilities. 2009. Available at: https://www.passeidireto.com/arquivo/3526139/neoconstitucionalismo-no-brasil-riscos-e-possibilidades. Accessed on: 11 mar. 2020.

STRECK, Lenio. **A hermenêutica jurídica e(m) crise**: uma exploração hermenêutica da construção do Direito. 11. ed. Porto Alegre: Livraria do Advogado, 2014.

TAUBER, Steven; BANKS, Christopher. Civil rights and liberties with national security: the role of the federal judiciary. In: SHOR, E.; HOADLEY, S. (eds.). **International human rights and counter-terrorism**. Singapore: Springer Nature, 2019. p. 451-471. Disponível em: https://link.springer.com/referenceworkentry/10.1007/978-981-10-4181-5_24. Accessed on: 16 Jun. 2020.

TOBÓN-TOBÓN, Mary Lu; MENDIETA-GONZÁLEZ, David. Los estados de excepción en el régimen constitucional colombiano. **Opinión Jurídica**, Medellín, v. 16, n. 31, p. 67-88, Sept. 2017. Available at: https://revistas.udem.edu.co/index.php/opinion/article/view/2170/1868. Accessed on: 20 abr. 2020.

UNITED STATES OF AMERICA. Supreme Court. Hamdi v. Rumsfeld. In: UNITED STATES OF AMERICA. Supreme Court. **United States Reports: United States Reports**: cases adjudged in the Supreme Court at October Term, 2003. Washington, DC: Supreme Court, 2004a. 542 v. p. 507-599. Available at: https://www.supremecourt.gov/opinions/boundvolumes/542bv.pdf. Accessed on: 5 May 2020.

UNITED STATES OF AMERICA. Supreme Court. Rasul v. Bush. In: UNITED STATES OF AMERICA. Supreme Court. **United States Reports**: cases adjudicated in the Supreme Court at October term, 2003. Washington, DC: Supreme Court, 2004b. 542 v. p. 466-506. Available at: https://www.supremecourt.gov/opinions/boundvolumes/542bv.pdf. Accessed on: 5 May 2020.

UNITED STATES OF AMERICA. Supreme Court. Hamdan v. Rumsfeld. In: UNITED STATES OF AMERICA. Supreme Court. **United States Reports**: cases adjudicated in the Supreme Court at October term, 2005. Washington, DC: Supreme Court, 2006. 548 v. p. 557- 734. Available at: https://www.supremecourt.gov/opinions/boundvolumes/548bv.pdf. Accessed April 15, 2020.

UNITED STATES OF AMERICA. Supreme Court. Boumediene v. Bush. In: UNITED STATES OF AMERICA. Supreme Court. **United States Reports**: cases adjudicated in the Supreme Court at October term, 2007. Washington, DC: Supreme Court, 2008. 553 v. p. 723-850. Available at: https://www.supremecourt.gov/opinions/boundvolumes/553bv.pdf. Accessed April 10, 2020.

VALIM, Rafael. **State of exception**: the legal form of neoliberalism. São Paulo: Current Account, 2018.

Received/*Recebido:* 23.07.2020.

Approved/*Aprovado:* 26.09.2020.

THE JUDICIALIZATION OF POLICY AS A PHENOMENON OF NEOCONSTITUTIONALISM AND THE LIMITS OF REPRESENTATIVE DEMOCRACY

A JUDICIALIZAÇÃO DA POLÍTICA COMO FENÔMENO DO NEOCONSTITUCIONALISMO E OS LIMITES DA DEMOCRACIA REPRESENTATIVA

Camila Leonardo Nandi de Albuquerque[1]
Sandro Luiz Bazzanella[2]

ABSTRACT

This article has as its theme the imbricated relationship between the judicialization of politics and democracy and its general objective is to analyze, in the light of Brazilian law, how political decisions migrated to the judicial sphere, intensifying the process of judicialization of politics in Brazil after the redemocratization. The hypothesis suggested is that in the context of neoconstitutionalism, there was an amplification of the subjective interpretation of the constitutional charters, which culminated in the expansion of the decision-making power of the legal field in relation to the other powers, thus corroborating the rise of the phenomenon of political judicialization. Furthermore, the crisis of representativeness of political powers adds to the phenomenon of judicialization, which led to the protagonism of the judiciary from the phenomenon of judicialization. The research used the deductive method, which starts from a generalization for a particularized question, and as a research technique the bibliography, which is developed from primary and secondary sources, that is, from the Federal Constitution and sparse norms and from literature available regarding the issue. It was found that the judicialization of politics is a worldwide phenomenon, of which judicial activism is one of its consequences. If, on the one hand, urgent political issues are getting a faster response from the Judiciary, on the other hand it must be pointed out that these decisions have a democratic deficit.

Keywords: Neoconstitutionalism; Judicial activism; Judicialization of politics; Representative democracy.

1 Mestre em Desenvolvimento Regional pela Universidade do Contestado. Mestranda no Programa de Pós-Graduação em Direito da Universidade do Extremo Sul Catarinense (Unesc), com taxa Prosuc/CNPq. Especialista em Direito Empresarial. Graduada em Direito pela Unisul. Vinculada ao grupo de pesquisas Pensamento Jurídico Crítico Latino-americano – Unesc. ORCID iD: https://orcid.org/0000-0003-3466-6209. E-mail: camilanandi_@hotmail.com.

2 Graduado em Filosofia pela Faculdade de Filosofia, Ciências e Letras Dom Bosco, Santa Rosa (RS); Mestre em Educação e Cultura pela UDESC; Doutorado Interdisciplinar em Ciências Humanas UFSC. Professor do Programa de Mestrado em Desenvolvimento Regional da Universidade do Contestado. ORCID iD: http://orcid.org/0000-0002-9430-8684. E-mail: sandroluizbazzanella@gmail.com.

How to cite this article/Como citar esse artigo:
ALBUQUERQUE, Camila Leonardo Nandi de; BAZZANELLA, Sandro Luiz. A judicialização da política como fenômeno do neoconstitucionalismo e os limites da democracia representativa. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 145-164, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.8175.

RESUMO

O presente artigo tem como tema a imbricada relação entre judicialização da política e democracia e tem como objetivo geral analisar, à luz do direito brasileiro, de que maneira as decisões políticas migraram para o âmbito judicial intensificando o processo de judicialização da política no Brasil após a redemocratização. A hipótese aventada é a de que no âmbito do neoconstitucionalismo, houve uma amplificação da interpretação subjetiva das cartas constitucionais, o que culminou na expansão do poder de decisão do campo jurídico frente aos demais poderes, corroborando assim para a ascensão do fenômeno da judicialização política. Ainda, acresce como causa explicativa ao fenômeno da judicialização a crise de representatividade dos poderes políticos o que acarretou o protagonismo do poder judiciário a partir do fenômeno da judicialização. A pesquisa utilizou o método dedutivo, que parte de uma generalização para uma questão particularizada, e como técnica de pesquisa a bibliográfica, que se desenvolve a partir de fontes primárias e secundárias, ou seja, a partir da Constituição Federal e normas esparsas e da literatura disponível atinente à questão. Constatou-se que a judicialização da política é um fenômeno mundial, do qual o ativismo judicial é um de seus desdobramentos. Se por um lado questões políticas urgentes estão tendo uma resposta mais célere por parte do Poder Judiciário, por outro há que se pontuar que essas decisões possuem um déficit democrático.

Palavras-chave: *Neoconstitucionalismo; Ativismo judicial; Judicialização da política; Democracia representativa.*

1. INITIAL CONSIDERATIONS

The central object of this article is to analyze the factors related to the judicialization of politics and judicial activism, after the redemocratization of institutions and Brazilian society with the removal of the military from power in 1984, which contributed and contribute to the worsening of the crisis of representative democracy, the rule of law, or also called the welfare state under the aegis of the state of exception. The study is justified by the importance of knowing the nuances present in the intertwined relationship between the judicialization of politics and representative democracy.

In this sense, a dialog is established with Giorgio Agamben's theory of the state of exception to verify whether this crisis, resulting from the superposition of one State power over the others, could be related to the beginning of a permanent state of exception, in which the exception becomes the rule.

The context of judicialization of politics expressing aspects of a state of exception finds in the Brazilian context specificities circumscribed in the scope of its representative democracy, as well as its institutions and, above all, in relation to the demands, if not impositions of the financial capital in relation to the contractual guarantees by the Brazilian State, so that the phenomenon of the decision contrary to the constitution, materialized in activist decisions, had an outflow through its legal, political and economic configuration.

In the legal context, what has been defined as neoconstitutionalism has been characterized by the possibility of integrating subjective elements into the interpretation of constitutional charters, so as to give the Supreme Court, the ultimate interpreter of the Constitution, greater decision-making autonomy. This conjuncture, conceived from the possibility of enforcing rights and public policies not made possible by the other branches of government through judicial decisions, had as a secondary result the prominence of this branch of government in relation to the others.

As to the political aspect, the limits of the representativeness of the legislative branch in relation to the demands of Brazilian society and, by extension, its substantial lack of credibility in relation to the citizens, as well as even its strategic evasiveness, inherent to the political game, in legislating on issues considered controversial, have contributed to the judiciary's being called upon to resolve political issues that should be instrumentalized by law.

The hypothesis of the present article is that democracy is disconnected, if not disqualified and, as a logical consequence, delegitimized from its representative condition. Reduced in its institutional condition, it presents itself as a mere technique of government in an emergency context, of political crisis, which allows the sovereign power to act in a state of exception under the argument of defense of democracy. This context would reflect the neoconstitutionalism phenomenon, which has promoted the amplification of subjective interpretation in constitutions, increasing the decision-making power of the legal field in relation to the other powers, thus corroborating the rise of the political judicialization phenomenon. Added to this factor is the crisis of representativeness of the political powers, which has led to the leading role of the judiciary through the judicialization phenomenon.

Under these assumptions, the political issue unfolds in the delicate question of representativeness. This remarkable feature of the modern State, guided by efficiency and effectiveness in the management of natural and human resources, individuals and populations (biopolitics) has as a result the emptying of politics, resulting in the limitation, if not in the stampede of citizens from the public agora and the isolation of individuals restricted to the demands of full production and consumption whose ultimate goal is mere survival.

For the discussion of the theme proposed here, the article is structured as follows: The first topic seeks to understand the phenomenon of neoconstitutionalism and its unfolding in Brazilian law. The second topic presents some considerations about representative democracy and its limits, in order to substantiate arguments so that, in the third topic, we can discuss the relationship between representative democracy and the expansion of the judiciary's role in the Brazilian political scenario. The present research used the deductive method, which starts from a generalization for a particularized question, and the bibliographical research technique, which is developed from primary and secondary sources, that is, from the Federal Constitution, and sparse norms and the available literature related to the issue under analysis.

2. NEOCONSTITUTIONALISM: BRIEF CONSIDERATIONS ON ITS EFFECTS ON BRAZILIAN CONSTITUTIONAL LAW

The term 'neoconstitutionalism' incorporates in itself a plethora of authors and theoretical stances that cannot always be lumped together in the same sense" (STRECK, 2013, p. 12). That is why one should have reservations with the nomenclature[3] -. Neoconstitutional-

3 "North American political science, for example, calls new constitutionalism the redemocratization processes that have taken place in several countries of the so-called peripheral modernity in the last decades. Among these countries are Brazil, Argentina, Colombia, Ecuador, Bolivia, Eastern European countries, South Africa, and others. In the case of legal theory, it is possible to list a number of authors, mainly Spanish and Italian, who seek to frame the intellectual production on law since the second post-war period as neoconstitutionalism, to refer to a model of law that no longer professes the same perspectives on the foundation of law, on its interpretation and its application, as they were thought in the context of the first constitutionalism and the positivism prevailing until then. Thus, jusophilosophers like Ronald Dworkin and Robert Alexy (among others) would represent, in its best light, the great theoretical turn operated by neoconstitutionalism" (STRECK, 2013, p. 12).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 145-164 • 2020

ism[4] to some extent can be read in parallel with post-positivism and, therefore, they can be grouped, despite their differences, in the same category with respect to some of their common characteristics, namely those related to the postulate of the normativity of principles. And it is on this common point that our reflection will focus.

Neoconstitutionalism is approached in legal doctrine in different ways. It is the nomenclature given to a new movement in constitutional law composed of thoughts that coincide at one moment and diverge at another. That is why Carbonell (2003), when dealing with the theme, does it in a plural way: "neoconstitutionalism(s)". For the jurist:

> [...] cuando se habla de neoconstitucionalismo, ya sea en singular o en plural, se está haciendo referencia a dos cuetiones que deben estudiarse por separado. Por una parte [...], a una serie de fenómenos evolutivos que han tenido evidentes impactos en lo que se há llamado el paradigma del Estado constitucional. Por otro lado, com el término <neoconstitucionalismo>; se hace referencia también a una determinada teoría del Derecho que há propugnado em el pasado reciente por esos cambios y/o que da cuenta de ellos normalmente em términos bastante positivos o incluso elogioso (SÁNCHEZ, 2003, p. 8-9).

This plural characteristic permeates the whole dynamics of neoconstitutionalism, since there is no consensus about this movement. The historical framework of the new constitutional law in continental Europe was the post-war constitutionalism, especially in Germany and Italy. In this sense, the place of the Constitution was redefined. The approximation of the ideas of constitutionalism and democracy gave rise to a new form of political organization, which goes by different names: democratic state of law, constitutional state of law, or even democratic constitutional state.

The new constitutional law has as its philosophical framework the post-positivism, which has in its central debate the confluence of the two currents of thought that offer opposite paradigms for Law, namely, the jusnaturalism and positivism (BARROSO, 2005). In this sense, Sarmento argues:

> Until World War II, an essentially legicentric legal culture prevailed on the old continent, which treated the law enacted by parliament as the main source - almost the exclusive source - of law, and did not attribute normative force to constitutions. These were basically seen as political programs that should inspire the legislator's actions, but that could not be invoked before the Judiciary, in defense of rights. Fundamental rights were valid only insofar as they were protected by laws, and did not, in general, involve guarantees against the discretion or disregard of the political majorities installed in the parliaments. In fact, for most of the time, parliamentary majorities did not even represent all the people, since universal suffrage was only achieved in the course of the 20th century. (SARMENTO, 2009, p. 113-146).

In other words, the centrality of the constitutions came as a response to the atrocities committed in the context of World War II. For this reason, the return of values and ethics was perfected in the positivization of fundamental principles and rights in the constitutions in the second postwar period, and the Constitution came to be perceived as the representation of a universal moral ideal that supports the legal system (POZZOLO, 2010). In other words, "instead of a theory of the sources of law focused on the code and formal law," within the context of

4 The term was widely spread through the work organized by the Mexican jurist Miguel Carbonell called Neoconstitutionalism(s).

the European constitutions of the 2nd postwar period, "the centrality of the Constitution in the legal system, the ubiquity of its influence on the legal order, and the creative role of jurisprudence are emphasized" (SARMENTO, 2009, n.p.).

Such condition was outlined from the fact that values and political options started to be inserted in the Constitutions by means of principles that gradually gained recognition of their normative character. In this sense, there was an opening for the introduction of constitutional principles and the limits between morality and Law became imprecise. From this perspective, neoconstitutionalism confronts the positivist reading of law.

In this context, creativity in judicial interpretation is encouraged to the extent that a significant portion of the most relevant norms of these constitutions are marked by semantic openness and indeterminacy, since they are formed by principles and not rules. For this reason, their direct application by the Judiciary has led to the "adoption of new hermeneutic techniques and styles, beside the traditional subsumption" (SARMENTO, 2009, n.p.).

> The need to resolve tensions between conflicting constitutional principles - frequent in compromising constitutions, marked by richness and axiological pluralism - gave way to the development of the weighting technique, and made frequent recourse to the proportionality principle in the judicial sphere. And the search for legitimacy for these decisions, in the framework of plural and complex societies, has driven the development of several theories of legal argumentation, which incorporated elements to Law that classical positivism used to disregard, such as considerations of moral nature, or related to the empirical field underlying the rules (SARMENTO, 2009, n.p.).

Within this new order, the Judiciary gains space, because "with increasing frequency, controversial and relevant issues for society have been decided by judges, and especially by constitutional courts" (SARMENTO, 2009, n.p.).

This is why, as Sarmento argues, under the neoconstitutionalism paradigm, "the classic reading of the separation of powers principle, which imposed rigid limits on the Judiciary's actions, gives way to other views more favorable to judicial activism in defense of constitutional values" (SARMENTO, 2009, n.p.).

In Brazil, the landmark of neoconstitutionalism was the 1988 Constitution and the redemocratization process it helped to lead. According to Barroso, the 1988 Constitution "was able to successfully promote the transition of the Brazilian State from an authoritarian, intolerant, and sometimes violent regime to a democratic State of law" (BARROSO, 2005, p. 3). Under its aegis, Brazilian constitutional law went from relative insignificance to apogee in less than a generation (BARROSO, 2005). The justification for this political ascension is explained by Barroso as follows:

> The methods of acting and argumentation of judicial bodies are, as is known, juridical, but the nature of their function is undeniably political. [...]. Notwithstanding the fact that it exercises a political power, the Judiciary has characteristics different from those of the other Branches. It is that its members are not invested by elective criteria or by majority processes. And it is good that this should be so. Most countries in the world reserve a portion of power to be exercised by public agents selected on the basis of merit and specific knowledge. Ideally preserved from political passions, the judge must decide with impartiality, based on the Constitution and the laws (BARROSO, 2005, p. 37).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 145-164 • 2020

For Barroso (2005), despite being a counter-majoritarian power, the political power of judges and courts still has the characteristic of representativeness, since it is exercised on behalf of the people and, in this condition, needs to be accountable to society. It was based on these prerogatives that, since the re-democratization, Brazilian judges have felt more comfortable to judge in a way unrelated to the normative system, using for this expedient the basis of their decisions in principles.

According to Dimoulis (2009) this strengthening of the judiciary may lead to abuses or imbalances. According to the author "these theories allow the Supreme Court to unduly appropriate powers that the Constitution has recognized to the Federal Senate, the legislatures of various federal entities and the courts that perform diffuse control" and, for this reason, these theoretical options translate into an "attempt to monopolize the control of constitutionality, succumbing to the ambition that the U.S. doctrine criticizes as judicial exclusivism" (DIMOULIS, 2009, p.10).

In a similar vein, Sarmento (2009) points out that the judicialist slant is anti-democratic, since "judges, unlike parliamentarians and chief executives, are not elected and are not directly accountable to the people" (SARMENTO, 2009, n.p.).

> This democratic critique is based on the idea that in a democracy it is essential that the most important political decisions are taken by the people themselves or by their elected representatives, and not by wise men or technocrats in robes. It is true that most contemporary theorists of democracy recognize that it is not exhausted in the respect of the majoritarian principle, but presupposes the observance of the rules of the democratic game, which include the guarantee of basic rights, aiming at the citizen's equal participation in the public sphere, as well as some protection to minorities. However, we have here a question of dosage, because if the imposition of some limits to the decision of majorities can be justified in the name of democracy, the exaggeration tends to prove antidemocratic, by restricting too much the possibility of the people to govern themselves (SARMENTO, 2009, n.p.).

For Sarmento, the central issue does not reside in the mere division of powers over time, but in the recognition that, "given the vagueness and openness of many of the most important constitutional rules, those who interpret them also participate in their creation process" and, therefore, judges would have a "kind of permanent constituent power" (SARMENTO, 2009, n.p.). This feature led, according to Sarmento, to the rejection of constitutional jurisdiction, or at least of judicial activism in its exercise, "from the French revolutionaries of the 18th century, through Carl Schmitt, in the Weimar Republic", since this power would allow molding the Constitution according to their political and value preferences, to the detriment of those of the elected legislature (SARMENTO, 2009, n.p.).

Still on neoconstitutionalism, the author criticizes the preference for principles and weighting over rules and subsumption.

> If, until not so long ago, principles were not treated as authentic norms here - only those who could invoke a clear and precise legal rule in favor of their claim had good law - with the arrival of post-positivism and neoconstitutionalism, in a few years we have gone from water to wine. Today, an intellectual environment has been installed in Brazil that applauds and values decisions based on principles, and does not appreciate those based on legal rules, which are bureaucratic or positivist - and positivism today in the country is almost

> a dirty word. In this context, law operators are encouraged to always invoke very vague principles in their decisions, even when it is unnecessary, due to the existence of a clear and valid rule governing the hypothesis (SARMENTO, 2009, n.p.).

Under such assumptions, the problem would reside in the fact that, for a functional and stable legal system, consistent with the values of a Democratic State of Law, it is necessary to apply both rules and principles. According to Sarmento (2009), rules are indispensable because, among other reasons, they generate greater legal security and predictability for their addressees; they reduce the risk of error in their application; they involve lower costs in their application process, and do not imply, to the same extent as principles, a transfer of decision-making power from the Legislative branch, which is elected, to the Judiciary, which is not[5].

Finally, Sarmento asserts the fact that the exacerbated constitutionalization of constitutional law can generate a pan-constitutionalization of Law, that is, in the face of the arbitrary constitutionalization of Law, the legislator's freedom is undermined (SARMENTO, 2009). As Sarmento explains:

> One of the characteristics of neoconstitutionalism is the defense of the constitutionalization of Law. It is argued that the irradiation of constitutional norms throughout the entire legal system contributes to bring it closer to the emancipatory values contained in contemporary constitutions. The Constitution is no longer seen as a simple normarum norm - whose main purpose is to discipline the process of producing other norms. It is now seen as the embodiment of the higher values of the political community, which should fertilize the entire legal system. (SARMENTO, 2009, n.p.)

This conjuncture would give room for the interpreter to, in addition to directly applying the constitutional dictates to social relations, reread all the institutes and rules of law in the light of the Constitution, providing them with the meaning that is most in line with the Charter's axiology (SARMENTO, 2009). It is precisely in the unfolding of this point that Sarmento raises the case of extreme theses on this process, "which end up cutting too much the legislator's space of freedom, to the detriment of democracy". However, the author exposes that at least in Brazil some constitutionalization of Law is positive and even welcome, for giving it the humanitarian values of the Constitution. That is why, for Sarmento, the crux of the matter concerns excesses, since "the excess of constitutionalization of Law is, therefore, anti-democratic" (SARMENTO, 2009, n.p.).

Still with regard to the issues under analysis, one could not fail to mention the approaches and criticisms of jurist Streck (2014), for whom the term "neoconstitutionalism" conforms, since its origin, a theoretical ambiguity, or even misunderstandings. For this jurist, the import of the term and some of its proposals had strategic importance for Brazil and Latin America as a whole, to the extent that they entered the "new constitutional world" late. In this sense, neoconstitutionalism meant to go beyond a constitutionalism with liberal characteristics "[...] which, in Brazil, was always a simulacrum in years interspersed by authoritarian regimes -

5 It is important to emphasize that with regard to this aspect, Sarmento makes a caveat: "I do not intend to argue that we should go back to the time when principles were not applied by Brazilian judges. Principles are also essential in the legal system, because they give more plasticity to the Law - which is essential in a hyper-complex society such as ours - and allow a greater opening of the legal argumentation to Moral and to the underlying empirical world. I think the time has come for a return of the pendulum in Brazilian Law, which, without discarding the importance of principles and weighting, also takes rules and subsumption seriously" (SARMENTO, 2009, n.p.).

towards a compromising constitutionalism that would enable [...] the effectuation of a democratic regime" (STRECK, 2014, n.p.).

However, according to Streck (2014), given the specificities of Brazilian law, neoconstitutionalism ended up causing conditions that contributed to the corruption of the constitutional text itself. Therefore, facing the adoption of voluntarist postures made possible by this new design in Brazil, he started to use the term with reservations, in parentheses or in quotes, since the author understands the term neoconstitutionalism as the compromise constitutionalism of the second post-war period, this untied of activism or discretionary practices. Therefore, the author started to designate the post-World War II constitutionalism as Contemporary Constitutionalism.

This is because, under the banner of neoconstitutionalism, as well as the moralization of law, one defends "[...] at the same time, a constitutional right of effectiveness, a right haunted by the weighting of values, an ad hoc concretization of the Constitution and a so-called constitutionalization of the order" (STRECK, 2014, n.p.). This is all because, according to Streck, it was believed that the jurisdiction was responsible for incorporating the supposed true values, i.e., those defining a fair law, elevating the jurisdiction.

It is a paradoxical question that arises in the light of the theory of law: in order for it not to be undermined by politics, economics and morality, it is necessary for the law to have autonomy, which is a condition of its possibility. On the other hand, in the face of increasingly analytical constitutional texts, and greater openness to constitutional jurisdiction (which leads to greater control of constitutionality), the legislature's space for freedom decreases, which may "represent a narrowing of democracy, a central issue of the democratic rule of law itself" (STRECK, 2010, p. 163).

As Streck (2010, p. 164) argues, "autonomy of law cannot imply indeterminability of this same democratically constructed law", because this would leave democracy exposed to a constant risk, since the replacement of autonomy by political pragmatism in its various aspects has been putting the law in a permanent state of exception, which, for Streck, means the very decline of the Empire of Law.

> [...] the law of the Democratic State of Law is under constant threat. This is because, on the one hand, it runs the risk of losing its autonomy (hard won) due to the attacks of external predators (from politics, from the corrective discourse arising from morality and from the economic analysis of law) and, on the other, it becomes increasingly fragile in its internal bases, in view of the discretionary/arbitrary nature of judicial decisions and the consequent decisionism that inexorably emerges from this (STRECK, 2010, p. 164).

This discussion is the core of the present text, and through it we can list some of the contradictions of liberal democracy. These contradictions and impasses will be addressed in the following topic.

3. CONSIDERATIONS ABOUT REPRESENTATIVE DEMOCRACY

It is necessary, preliminarily, to make some comments on political representation, since one of the most convincing criticisms of the judicialization of politics concerns this very question, in such a way as to suggest even a "juristocracy"[6]. The aim of this topic is to demonstrate, in general terms, the polysemy that permeates the concept of democracy and to provide theoretical and conceptual subsidies to reflect on the relationship between the judicialization of politics and democracy.

In the definition of democracy the terms *people and power* are inserted. Therefore, the people will always play a fundamental role when it comes to democracy[7].

The concept of democracy has been changing throughout history. For Santos and Avritzer (2002), in fact, the 20th century was a century of intense disputes regarding the issue of democracy. According to the authors, at the end of each of the world wars and during the cold war period the debate about the desirability of democracy became central, and was resolved in its favor as a form of government. However, the proposal that became hegemonic at the end of the two world wars led to "[...] the restriction of expanded forms of participation and sovereignty in favor of a consensus around an electoral procedure for the formation of governments" (SANTOS; AVRITZER, 2002, p. 39-40).

After World War II a specific debate around democracy gained strength, this time about its structural conditions, and therefore the debate also orbited the compatibility or not between democracy and capitalism (SANTOS; AVRITZER, 2002). This tension was resolved in favor of democracy, which tended to place limits on property that implied distributive gains for disadvantaged social sectors.

However, from the 1980s on, with the dismantling of the welfare state and the cutting of social policies, the discussion about the structural meaning of democracy was reopened, especially about developing countries, or countries of the South (SANTOS; AVRITZER, 2002). In this context, Joseph Schumpeter argued that the problem of democracy building stems from the problems in building democracy in Europe in the interwar period. This answer founded what Santos and Avritzer (2002) define as the hegemonic conception of democracy, which has as some of its assumptions the positive valuation of political apathy, the concentration of the democratic debate on the issue of electoral designs of democracies, the treatment of pluralism as a form of party incorporation and dispute among elites, among other aspects.

6 Termo oriundo do artigo "Rumo à Juristocracia": The origins and consequences of the new constitutionalism", de Ran Hirschl, publicado em 2004.

7 The idea of democracy originated in ancient Greece. It was there that the idea of democracy developed most profoundly. The outstanding characteristic of this period, that is, what distinguishes the coexistence of men in the polis from all other forms of coexistence is, according to Hannah Arendt, something well known to the Greeks: freedom (ARENDT, 2012). However, this does not mean that the political thing or even politics would be a necessary condition to enable men to be free (ARENDT, 2012). This is because being-free and living-in-a-polis were, according to Arendt, the same thing in a certain sense, because to live in a polis, man should be free, that is, not be subordinated as a slave to the coercion of another nor as a worker to the necessity of the daily breadwinner (ARENDT, 2012). That is, politics in the Greek world orbits around freedom, understood negatively as the not-being-dominated and not-dominating, and also positively as a space that can only be produced by many, in which each one moves among equals (ARENDT, 2012). It is worth noting that, according to Ferreira (2020), the Athenians considered themselves free because they were equal before the law, of which they felt they were the authors, and only obeyed it. However, it was only the citizens who enjoyed these prerogatives and had political rights, and this characterized a small portion of the population of Athens (FERREIRA, 2020).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 145-164 • 2020

All these elements can be pointed out as constituents of a hegemonic conception of democracy that cannot deal with its problems, giving rise to the paradoxical situation that the extension of democracy has brought with it an enormous degradation of democratic practices (SANTOS; AVRITZER, 2002). It is for this reason that Santos and Avritzer (2002) state that the hegemonic form of democracy, which is elitist representative democracy, proposes to extend to the rest of the world the model of liberal-representative democracy in force in societies of the northern hemisphere, ignoring the experiences, as well as the discussions arising from the countries of the South.

It is notorious that the meanings suggested above as a conception for the word democracy have in common the notion that democracy is a fertile ground for its own dismantling. Democracy demands constant vigilance, for it can easily lead to the establishment of a state of exception, as historical facts such as totalitarianism, which emerged in the bosom of liberal democracies, prove. With this argument in mind, it is important to verify the role of the judiciary in representative Brazilian democracy.

As the Italian philosopher Giorgio Agamben (2007) points out, there is an intimate solidarity between democracy and totalitarianism. At first, it should be emphasized that by pointing out the complicity between democracy and totalitarianism, Agamben does not intend to devalue the achievements and difficulties of democracy. The philosopher's intention is to try to demonstrate how democracy, at a moment when it seemed to be at its peak, proved incapable of saving from an unprecedented ruin that *zoé*[8] for which it had put all its efforts (AGAMBEN, 2007).

Democracy is a political regime that has as its premise that all power emanates from the people and is exercised by them, either directly or indirectly, and is a barrier that tries to keep oppression of all kinds at bay. Its ideals and principles are based on freedom and equality. As Agamben points out, modern Western politics should be read based on what Foucault called biopolitics. This is because, for the philosopher, the theories about politics have in their core the idea of calculation and manipulation of life, that is, a technique of administration and management of bare life[9]. It is from this perspective that Giorgio Agamben reflects on the idea of democracy:

> We use this concept as if it were the same thing in fifth century Athens and in contemporary democracies. As if it is everywhere and always clear what it is about. Democracy is an uncertain idea because it means, first of all, the constitution of a political body, but it also simply means the technology of administration - what we have today. Today, democracy is a technique of power - one among others. I don't want to say that democracy is bad. **But let us make this distinction between real democracy as the constitution of the body politic and democracy as a mere technique of administration** that relies on opinion polls, elections, manipulation of public opinion, management of

8 The Greeks defined life from two terms: *zoé* and *bíos*. This separation is because the Greeks did not have a single definition to express the concept of life. *Bios* indicated the form or manner of living proper to an individual or a group. *Zoé* referred to the simple fact of living common to all living beings (AGAMBEN, 2007). That is, *zoé* refers to unqualified life, mere biological existence, and, for this reason, "simple natural life is, however, excluded, in the classical world, from the polis proper and remains firmly confined, as mere reproductive life, to the sphere of the *oîkos*" (AGAMBEN, 2007, p. 10), the house. In turn, *bios* concerns ethical life, political life, the qualified form of life and, therefore, is constituted in the sphere of the polis, the city-community.

9 The concept of bare life in the Agambenian sense, refers to human life in its merely biological apprehension, so that the insecurity resulting from this situation is the obscure threat of death that transforms living into mere survival"[...] which would be equivalent to exterminable, in the sense that the life of homo sacer could be eventually exterminated by anyone, without committing a violation" (AGAMBEN, 2007, p. 195).

> the mass media, etc. The second version, the one that rulers call democracy, does not resemble at all the one that existed in the fifth century B.C. If that is what democracy is, I simply do not care (emphasis added) (AGAMBEN, 2014, n.p.).

The Italian philosopher points out an intimate complicity between democracy and totalitarianism insofar as both have in common the exercise of political power through a biopolitics. This is because democracy in its contemporary form, according to Agamben, is merely a technique of governmental administration, which is affirmed through narratives of endless crises. This crisis is nothing more than "[...] the normal way in which the capitalism of our time functions" (AGAMBEN, 2014, n.p.). In this sense, crisis is, for contemporary democracy, necessary and even desired, since it constitutes a technique of government.

The arguments that "justify" this non-application of the norm are, as a rule, related to emergency measures brought about by exceptional situations. In this way, the crisis is fertile ground for the exercise of sovereign power that establishes the exception. In other words, it is as if the perilous situation demanded a decision outside the law for the preservation of order, the order in which the perilous situation has been established. The cyclical and increasingly intense crises of the financialized economy give rise to a state of emergency that justifies exceptional measures, a state of exception[10].

It is precisely a matter of "[...] letting the events take place in order to later orient them in the most opportune direction. It is in this sense that today everything can be governed, managed and normalized" (AGAMBEN, 2014, n.p.). It is from this situation that the primacy of economics and law over politics stems, for "where everything is normalized and everything is governable, the space of politics tends to disappear" (AGAMBEN, 2014, n.p.).

This logic is based on the assumption that the State of exception coexists within contemporary Western democracies as a biopolitical pertinence, which tends to treat large contingents of the population as "bare life". About the concept of state of exception,

> If what is proper of the state of exception is the suspension (total or partial) of the legal order, how can this suspension still be understood in the legal order? How can an anomie be inscribed in the legal order? And if, on the contrary, the state of exception is only a factual situation and, as such, foreign and contrary to the law; how is it possible for the legal order to have a lacuna precisely as to a crucial situation? And what is the meaning of this gap? (AGAMBEN, 2004, p. 39).

Agamben points out that the legal system within the democracies of the 20th century is not founded on a legal suspension of the law, but simply on anomie. In his conception, the state of exception is inserted in a zone of indifference, in which inside and outside are not excluded, but are indeterminate. Therefore, the suspension of the norm does not mean its abolition, as well as "[...] the zone of anomie established by it is not (or, at least, does not pretend to be) devoid of relation to the legal order." (AGAMBEN, 2004, p. 39).

10 What Giorgio Agamben defines as permanent state of exception stems from the practice of contemporary states of voluntarily creating a permanent state of emergency that justifies exceptional measures, even in the face of the dictates of constitutional democracy. This phenomenon is presented as "[...] the dominant governing paradigm in contemporary politics" (AGAMBEN, 2004, p. 12-13).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 145-164 • 2020

The politicization of life and, consequently, the exception transformed into a technique of government give rise to the emergence of a structure designated by Agamben as field[11], which is characterized as a space of manifestation of anomie in which human life is deprived of the right, thrown out of the legal order that was constituted and legitimized from the promise of the protection of life, "[...] the structure in which the state of exception, on whose possible decision the sovereign power is founded, is stably realized" (AGAMBEN, 2015, p. 43). Therefore, whoever occupies the sovereign's seat institutes the exception through the suspension of the norm as a way to preserve a certain order that preserves the interests that confer sustainability to the sovereign power. This is, therefore, the intertwining between the concept of democracy in Agamben and the discussion about the judicialization of politics and judicial activism.

4. THE DUSK OF POLITICAL POWERS AND THE DAWN OF THE JUDICIARY

The expansion of the spheres of composition of representative democracy, especially with regard to the social and institutional democratic assumptions of the post-war period, reached the end of the military regime (1964 to 1984) and the national political opening of the 1988 Constituent Assembly and were presented as a legal expression in the Constitutional Charter itself.

However, when we take a closer look, from the mid-1990s on, in the context of the implementation of the demands of the neoliberal prescription in the governments of Fernando Henrique Cardoso (FHC) and, especially after the 2008 crisis and, the deepening of the assumptions of the financialized economy, we realize that the Brazilian representative democracy faced difficulties, as well as being weakened by several factors, among them the disarticulation of social movements that are incorporated by the State's institutionality and are no longer movements; the emptying of political debate inside the political parties, attenuating what is defined as party ideology, which has transformed the parties into mere electoral associations; more and more the National Congress to be composed of benches linked to the defense of private groups' interests. Still in this direction, we can add to this scenario, the fact that the Executive Branch uses, if not governs from the use of provisional measures (MP's), beyond what is stated by the Brazilian Constitution itself, that is, without the presence of the requirements of relevance and urgency of the matter addressed[12]. In this way, political agendas that should be debated with broad sectors of organized civil society, with social movements, are decided by provisional measures, by decree laws, with the legislative branch being responsible for the

11 The Nazists concentration camps are the brutal expression of the anomic logic of the camp with full state of exception inside which naked life is produced, as well as "[...] as much the Bari stadium, in which, in 1991, the Italian police provisionally crammed the Albanian illegal immigrant before returning him to his country, as the winter velodrome in which the Vichy authorities collected Jews before handing them over to the Germans; as much the refugee camp on the border with Spain, [...] as the zones d'attente in the French international airports, in which foreigners requesting refugee status were kept. In all these cases, an apparently anodyne place [...] delimits, in reality, a space in which the normal order is, in fact, suspended and in which whether or not atrocities are committed does not depend on the law, but only on the civility and ethical sense of the police who act provisionally as sovereign [...] (AGAMBEN, 2015, p. 45).

12 Art. 62 - In cases of relevance and urgency, the President of the Republic may adopt provisional measures, with the force of law, and must immediately submit them to the National Congress, which, being in recess, will be extraordinarily summoned to meet within five days (BRASIL, 1988).

approval of such measures and impositions. These factors contribute to the emptying of the legislative power. And it is in this political gap that the Judiciary is called upon to act. All these aspects, as well as other situations and variables that can be listed in this context unequivocally demonstrate the emptying of representative democracy within Brazilian society.

Under such assumptions, according to jurist Campos (2014) we are experiencing the constitutional and infra-constitutional moments of greatest formal opportunities for the judicialization of politics and judicial activism in the history of the Supreme Court. However, it should be noted at the outset that there is a huge legal debate about the concepts of judicialization of politics and judicial activism and their effects.

For the present analysis, we adopt the perspective of judicialization of politics as a broad phenomenon in which there is a transfer of power from the Legislative to the Courts and other legal institutions. Judicial activism, in turn, can be considered a stricter phenomenon that corresponds to the "[...] expansive, not necessarily illegitimate, exercise of political-normative powers by judges and courts vis-à-vis other political actors (CAMPOS, 2014, p. 164). In a similar sense, the jurist Ramos (2015, p. 119) claims that judicial activism refers to "[...] the crossing of demarcation lines of the jurisdictional function, to the detriment, mainly, of the legislative function, but also the administrative function and even the government function.

The judicialization of politics, demarcated by a constitutional arrangement that elevated the Judiciary to the position of the core of politics, has as a consequence the performance of a political role that relates to the exercise of sovereign power.

After the 1988 Constitution the Brazilian legal system went through a process of juridicization that impacted the functioning of the State and of Brazilian society. This process has elevated the judiciary to the heart of the political debate.

The neoconstitutional context, discussed above, has led to a rearrangement in the constitutional model, to the extent that it has made possible the irradiation of the constitutional rule to governmental policy. Thus, the Judiciary has taken on a role in the realization of constitutional rights not fulfilled by the other branches of government. Added to this factor is the social complexification and its consequent increase in litigation, which ends up in the Judiciary. This perspective is described in the work "Judicialization of politics and social relations", by Luiz Werneck Vianna, published in 1999.

According to jurist Vieira (2008), the expansion of the authority of the Supreme Court and the courts in general is a global phenomenon, about which there is a vast literature that seeks to understand this phenomenon of the advancement of law over politics and the consequent expansion of the sphere of authority of the courts to the detriment of parliaments.

According to Vieira (2008), the process of expansion of the courts' authority around the world has become even more pronounced in Brazil, because the ambition of the 1988 Constitution and the gradual concentration of the Supreme Court's jurisdictional powers led to an imbalance in the system of separation of powers in Brazil.

> The Supreme Court, which after 1988 had already accumulated the functions of constitutional court, apex judicial body and specialized forum, in the context of a normatively ambitious Constitution, had its political role further reinforced by the amendments no. 3/1993, and no.45 /2005, as well as by the

> laws no.9.868/99 and no.9.882/99, becoming a unique institution in comparative terms, either with its own history, either with the history of existing courts in other democracies, even the most prominent (VIEIRA, 2008, p. 444).

This conjuncture was denominated by Vieira (2008) as Supremocracy. This terminology has two meanings: the first concerns the authority of the supreme court in relation to the other instances of the judiciary. Created in 1891, the Supreme Federal Court has always had difficulties in imposing its decisions, taken in the diffuse control of constitutionality, on the lower courts. This is due to the inexistence of a doctrine such as the common law *stare decisis*, which would bind the other members of the Judiciary to the decisions of the STF. This made the Court weakened. However, in 2005, with the adoption of the binding precedent, there was a concentration of powers within the Supreme Court. Thus, it aimed to remedy its inability to frame judges and courts resistant to its decisions. From this point of view, Oscar Vilhena Vieira (2008) points out that the term "supremocracy" refers, in the first place, to the authority acquired by the Supreme Court to rule the judiciary in Brazil.

In a second sense, the jurist indicates that the term supremocracy refers to the expansion of the supreme's authority to the detriment of the other powers. With the 1988 constitution the Supreme Court moved to the center of the Brazilian political arrangement, so that, in view of the enormous task of guarding such an extensive constitution, its institutional position has been gradually occupied in a substantive way. Thus, the increase of instruments given to constitutional jurisdiction has made the Supreme Court not only exercise a kind of moderating power, but also become responsible for "[...] issuing the last word on countless issues of a substantive nature, sometimes validating and legitimating a decision by representative bodies, other times substituting majority choices" (VIEIRA, 2008, p. 446).

The Brazilian case is unique because of its scale and nature. Scale because of the number of issues that, in Brazil, have a constitutional nature and that, therefore, are recognized by the doctrine as susceptible to judicialization; and nature, because there is no obstacle for the Supreme Federal Court to appreciate acts of the reforming constituent power (VIEIRA, 2008, p. 446).

In this direction, it is essential to note that the Supreme Federal Court not only exercises, in the current historical period, a political function, but also exercises, even if subsidiarily, the function of "rule-making". That is, it accumulates the exercise of authority, inherent to any constitutional interpreter, with the exercise of power reserved for representative bodies (VIEIRA, 2008).

This strengthening and expansion of the courts' authority can be read, as for example in Hirschl (2009), as a consequence of the global expansion of the market system, so that the courts would constitute, in the eyes of investors, a more reliable means to ensure legal certainty, stability and predictability than democratic legislators, since the latter would be pressed by "populist" demands and, therefore, not very efficient, in light of an economic perspective (VIEIRA, 2008). In this sense, the Israeli jurist notes "[...] the increasing use of courts and judicial means to face important moral dilemmas, public policy issues and political controversies" (HIRSCHL, 2009, p. 140).

Another current argues that the expansion of the protagonism of the judiciary is a consequence of the retraction of the representative system as well as of its deficiency in fulfilling the promises of equality and justice, arising from the democratic ideal and inserted in contemporary constitutions (VIEIRA, 2008). This perspective, exposed in the work "The

Judge and Democracy", by Antonie Garapon (1999), qualifies the judiciary as the guardian of democratic ideals, giving rise to a paradoxical situation, since by seeking to fill the gaps in the representative system, the judiciary has contributed to the expansion of the crisis of authority of democracy.

Still in this direction, the displacement of authority of the representative system to the judiciary is, for many constitutionalists, a consequence of rigid constitutions that have systems of constitutionality control, because this phenomenon becomes more acute when in the perspective of ambitious constitutions in detriment of liberal ones, and in this context the judiciary acts as guardian of the constitution.

> Unlike liberal constitutions, which established few rights and favored the design of political institutions aimed at allowing each generation to make its own substantive choices, through the law and public policies, many contemporary constitutions are suspicious of the legislature, opting to decide everything and leaving to the legislative and executive branches only the function of implementing the constituent will, while the judiciary is given the ultimate role of guardian of the constitution (VIEIRA, 2008, p. 443).

In a similar vein, jurist Roberto Barroso defines the phenomenon of Judicialization as the situation in which relevant issues from a political, social or moral point of view are being decided, in a final character, by the Judiciary, so that there is a "transfer of power to judicial institutions", to the detriment of the Legislative and Executive branches (BARROSO, 2016).

For this jurist, this expansion of jurisdiction operates a drastic change in the way of thinking and practicing law in the Roman-Germanic world, but even in countries that traditionally followed the English model it is possible to verify this phenomenon (BARROSO, 2016). As causes, Barroso (2016) lists the recognition of the importance of a strong and independent judiciary, as an essential element for modern democracies, which led to a vertiginous institutional rise of judges and courts, as well as a certain disillusionment with majority politics, due to the crisis of representativeness and functionality of parliaments in general. Also pointed out by the jurist as a cause is the fact that, many times, political actors prefer to elect the Judiciary as the decisive instance of issues in relation to which there is reasonable moral disagreement in society, in order to avoid their own weariness in the deliberation of issues that divide opinions, such as: homosexual unions, termination of pregnancy or demarcation of indigenous lands (BARROSO, 2016).

For this jurist, the phenomenon has assumed such proportions in Brazil due to the comprehensive and analytical constitutionalization, since to constitutionalize is, in the final analysis, to remove a topic from the political debate and bring it to the universe of judicially enforceable claims, as well as due to the system of constitutionality control in force in the country, which provides ample access to the Supreme Court via direct actions (BARROSO, 2016). The consequence of this is that "almost all issues of political, social, or moral relevance have been discussed or are already before the courts, especially before the Supreme Court" (BARROSO, 2016, p. 386). As an example of this statement, Barroso mentions a number of political issues that have already been judicialized:

> (i) creation of the National Council of Justice in the Reform of the Judiciary (ADI 3.367-DF); (iii) embryonic stem cell research (ADI 3. 510-DF); (iv) freedom of speech and racism (HC 82.424-RS - Ellwanger case); (v) interruption of pregnancy of anencephalic fetuses (ADPF 54/DF); (vi) restriction on the use

MERITUM LAW JOURNAL • v.15 • n.4 • p. 145-164 • 2020

> of handcuffs (HC 91. 952-SP and Súmula Vinculante n. 11); (vii) demarcation of the Raposa Serra do Sol Indian reservation (Pet 3.388-RR); (viii) legitimacy of affirmative action and social and racial quotas (ADI 3.330); (ix) prohibition of nepotism (ADC 12-DF and Súmula 13); (x) non-receipt of the Press Law (ADPF 130-DF). The list could go on indefinitely, with the identification of cases of great visibility and repercussion, such as the extradition of the Italian militant Cesare Battisti (Ext 1.085-Italy and MS 27.875-DF), the question of the importation of used tires (ADPF 101-DF) or the prohibition of the use of asbestos (ADI 3.937-SP). It is worth mentioning the holding of several public hearings before the STF to discuss the issue of judicialization of health benefits, notably the provision of medicines and treatments outside the lists and protocols of the Single Health System (SUS) (BARROSO, 2016, p. 386).

However, for Vieira (2008), the hyper-constitutionalization of contemporary life does not occur because of democracy, but because of distrust of it. According to the author, the institutional option for expanding the scope of constitutions and strengthening the role of the judiciary as guardian of constitutional commitments contributes to the weakening of the representative system.

Still, the jurist Cappelletti (1993) in his work "Legislative Judges? (1993) hypothesizes as a hypothesis for the case the decline in confidence in parliaments, as well as the fact that the "third power" cannot simply ignore the profound transformations of the real world, so that judicial control of the constitutional legitimacy of laws is one aspect of this responsibility. And a characteristic of these new responsibilities "[...] was the unprecedented growth of administrative justice, that is to say (more precisely), of the judicial control of the activity of the exercise and its derivatives" (CAPPELLETTI, 1993, p. 46).

For Tate (1995), the judicialization of politics is the expansion of the field of action of the Courts or judges to the detriment of politicians and/or administrators, as well as the dissemination of judicial decision methods outside the judicial field itself. For the American sociologist and jurist Ferejohn (2012, p. 63), judicialization of politics is "a profound transfer of power from the legislature to courts and other legal institutions around the world.

The discussion about the democratic character within this institutional arrangement is intense. The protagonism of the Judiciary induces, in a way, a construction of Law by judicial means and not guided by legal criteria (TASSINARI, 2012). According to jurist Tassinari (2012), one should not deny the democratic conception that includes the counter-majoritarian premise, in which the performance of courts and tribunals acts in the protection of constitutionally guaranteed rights in the face of the existence of eventual majorities. However, even in the face of this situation, it was not expected that the permanent appeal to jurisdiction and political apathy would be experienced so intensely in the political context (TASSINARI, 2012).

On the other hand, the judicialization of politics has given effectiveness to fundamental rights, with the possibility of giving content to human rights. The jurists Estefânia Maria De Queiroz Barboza and Katya Kozicki (2012) argue that, despite the criticism leveled at the political actions of the Brazilian judiciary in violation of the principle of separation of powers, the transfer of decision making from the parliament to the judiciary is due to the phenomenon of the judicialization of politics. Furthermore, the lawyers claim that the 1988 Federal Constitution gave a new role to the Brazilian judiciary, which now plays an important role in the realization of fundamental rights. Thus, the principle of separation of powers should be analyzed

MERITUM LAW JOURNAL • v.15 • n.4 • p. 145-164 • 2020

based on the Constitution, "[...] with the idea of reciprocal controls between the powers and no longer the idea of rigid separation between them" (BARBOSA, KOZICKI, 2012, p. 80). Still, he argues that the Constitution is presented as a political document, so that "[...] it is up to the judiciary to take some political options, which, however, should be based on principles chosen by the people themselves at the constituent moment" (BARBOSA, KOZICKI, 2012, p. 80).

It is worth pointing out that, according to the lawyers, it is difficult to find a single cause to justify the judicialization of politics and that "[...] many of the political issues that are transferred to the courts are transferred by political parties or interest groups and, therefore, this cannot be seen as a legal phenomenon or as a phenomenon of usurpation of functions of one power over the other, but as a political phenomenon" (BARBOSA, KOZICKI, 2012, p. 65). The authors find that the judiciary has been used as another political arena, in which political minorities in the scope of parliamentary deliberative discussion have the possibility of having their rights safeguarded.

Still, Andrei Koerner (2013) argues that after 2003 there was a major renewal in the Supreme Court, so that external incentives found internal renewal to facilitate a new jurisprudential orientation. Thus, this new court "[...] with judges with another training and conception about the role of constitutional justice and the interpretation of the Constitution, acted in a convergent manner with the government on issues concerning the greater effectiveness of rights and the promotion of social policies" (KOERNER, 2013, n.p.). Therefore, one can promote the effectiveness of the Constitution, through the realization of principles of the 1988 Constitution not realized by omission of the legislature, conforming a new jurisprudential regime (KOERNER, 2013).

In a similar vein, the jurist Anderson Teixeira argues that beyond the debate about the conceptual definition of judicial activism, it should be recognized that "[...] it is an increasingly necessary constitutional pathology - provided that it is in its positive aspect - for the protection of the individual against omissions or excesses of the State" (TEIXEIRA, 2012, p. 52). The jurist inquires about the possible scenario that would result if the judiciary decided to abandon an activist posture and began to omit itself before the offenses to fundamental rights that are often perpetrated by the state itself (TEIXEIRA, 2012)

What can be seen is that in the face of this transfer of power to the judiciary, or even the expansion of judicial power, there are many criticisms. If for some the expansion of powers helps in the implementation of public policies and the realization of social rights, for others this configuration points to a democratic bias.

The arguments presented so far have not considered the economic logic[13] and its impact on political power and, specifically, on the judiciary. Justice, democracy and neoliberalism are axes that complement each other in the search for answers to the perennial crisis. At the extreme, the

13 What is crystal clear is that the current economic model enables decisions to be made that are contrary to democratic desires. When dealing with the current economic model, whether it is here called neoliberal (related to authors such as Friedrich Hayek, Milton Friedman, F. Knight, Ludwig Von Mises, in short, those who were part of the Mont Pèlerin society), or even the model called post-neoliberal, known for its more "progressive", (this model related to the thought of authors such as Emir Sader, Atilio Borón, Carlos Fiqueroa Ibarra), what is clear is that the judicialization of politics and, consequently, judicial activism, are spectra of a political process that does not aim to build an equitable society (or a substantive equality, according to Istvàn Mészáros), but a merely "more equitable" society, which in practice means a non-equitable society (MÉSZÁROS, 2015). In the current neoliberal democracy, popular participation is limited to the choices between the nuances of neoliberalism, because it is a democracy whose aim is not the common good, but the market and its freedom of exploitation. However, the market does not aim at the symmetry of opportunities and the common good, but precisely at asymmetry, so that it can abuse more and more those excluded from this logic, the dispossessed. The judicialization of politics, which could be a shortcut for the

question hangs over whether the crisis of representation has led to an invasion of powers by the judiciary, or whether the invasion by the judiciary has led to a crisis of representation.

5. FINAL CONSIDERATIONS

The national institutional rearrangement can be read as a reorganization in function of international interests in the guarantee of contracts, the interests of the financialized economy, unlimited circulation and security, the limits of the State in guaranteeing fundamental rights, among others. However, what we can see is that the judicialization of social relations, through the innovations that have provided the Supreme Court with a new institutional role, has also implied the judicialization of politics. In other words, there was a transfer of power that belongs to the legislative branch, equipped with political representation, to a power with no representative covering, which is the judiciary.

If, on the one hand, urgent political questions are being answered more quickly by the Judiciary, on the other hand, it must be pointed out that these decisions have a democratic deficit. That is, if for some the expansion of powers helps in the implementation of public policies and the realization of social rights, for others this configuration points to a totalitarian bias, since there has been a transfer of power that belongs to the Legislative Branch, endowed with political representation, to a power with no representative covering, which is the Judiciary Branch.

In face of this conjuncture, the crisis of the democratic State and the Rule of Law was analyzed, since, in face of this structure, the intimate relation between democracy and totalitarianism in Giorgio Agamben's concept appears in the weakening of the democratic logic that, in this sense, will tend to totalitarianism.

To this end, the present article has pointed to decisionism, that is, the phenomenon of decisions contrary to the constitution materialized in activist decisions, as a private exercise of arbitrary power, because it removes from the public debate central issues related to the democratic political game. In the legal context, what was defined as neoconstitutionalism had as a characteristic the possibility of integrating elements endowed with subjectivity to the interpretation of constitutional letters, in order to enable the Supreme Court, the ultimate interpreter of the Constitution, greater autonomy of decision. This conjuncture, conceived from the possibility of enforcing rights and public policies not made possible by the other branches of government through judicial decisions, had as a secondary result the prominence of this branch of government in relation to the others.

As to the political aspect, the detachment of the legislative power from Brazilian society, its deficiency in relation to representativeness, and by extension its substantial lack of credibility on the part of citizens, as well as even the strategic dodging of the political game so as not to put issues considered controversial on the agenda, have contributed to the judiciary being called upon to make the rights set forth in the 1988 Federal Constitution viable. This transfer of political action to the judiciary distances the population from the democratic debate, so

realization of public policies aimed at the common good, becomes an increasingly central element in the dismissal of the norm in favor of the market.

that the laws, plural and applicable to all, are replaced by decisions that are valid for one or a few. Therefore, the social aspect of democracy loses space to a private, individualized and segmented space.

Furthermore, economic changes have led to legal changes. And within this logic, constitutionalism is seen as an obstacle to the dismantling of the welfare state. Therefore, the judicialization of politics comes to circumvent social rights to be in line with what is demanded by the international market. It happens that the market demands and the population's demands hardly coincide.

REFERENCES

AGAMBEN, G. **Homo Sacer**: sovereign power and bare life I. Belo Horizonte: UFMG, 2007.

AGAMBEN, G. **Estado de exceção**: Homo Sacer, II, I. São Paulo: BoiTempo Editorial, 2004.

AGAMBEN, G. Democracy is an ambiguous concept. **Boitempo Blog**, 2014. Available at: https://blogdaboitempo.com.br/2014/07/04/agamben-a-democracia-e-um-conceito-ambiguo/. Accessed on: 10 Jul. 2020.

AGAMBEN, G. **Means without end**: notes on politics. Belo Horizonte: Autêntica Editora, 2015. 136 p.

ARENDT, H. **What is Politics?** Rio de Janeiro: Bertrand Brasil, 2012.

BARBOZA, Estefânia Maria de Queiroz; KOZICKI, Katya. Judicialization of politics and judicial control of public policies. **GV Law Journal**, v. 8, n. 1, p. 059-085, 2012.

BARROSO, L. R. Neoconstitucionalismo e constitucionalização do Direito: O triunfo tardio do direito constitucional no Brasil. **Administrative Law Journal**, Rio de Janeiro, v. 240, n. 1, p. 1-42, abr., 2005. Available at: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/43618. Accessed on: 10 jul. 2020.

BARROSO, L. R. **Brazilian's law judicial review**. São Paulo: Saraiva, 2016.

BRAZIL, Federal Senate. **Constitution of the federative republic of Brazil**. Brasília: Federal Senate, Graphic Center, 1988.

CARBONELL, M. Nuevos tiempos para elconstitucionalismo. In: CARBONELL, M. (Org.). **Neoconstitutionalism(s)**. Madrid: Editorial Trotta, 2003.

CAMPOS, C. A. de A. **Dimensions of judicial activism of the Supreme Court**. Rio de Janeiro: Forense, 2014.

CAPPELLETTI, M. **Judges legislators?** Porto Alegre: Safe, 1993.

DIMOULIS, D. Neoconstitutionalism and legal moralism. In: SARMENTO, D. **Contemporary Philosophy and Constitutional Theory**. Rio de Janeiro: Lumen Juris, 2009.

FEREJOHN, J. Judicializing Politics, Politicizing Law. In: MOREIRA, L. (Org.). **Judicialization of Politics**. 1. ed. São Paulo: 22 Editorial, 2012. p. 63-97.

FERREIRA, José Ribeiro. Athens, a democracy? **Journal of the School of Arts-Languages and Literatures**, v. 6, 2020.

GARAPON, A. The judge and democracy. **The guardian of promises**. Rio de Janeiro: Revan, 1999.

HIRSCHL, R. The new constitutionalism and the judicialization of pure politics in the world. **Administrative Law Journal**, Rio de Janeiro, v. 251, p. 139-178, may, 2009. Available at: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/7533/6027. Accessed on: 05 Oct. 2020.

HIRSCHL, R. The political origins of the new constitutionalism. **Indiana Journal of Global Legal Studies**, v. 11, n. 1, p. 71-108, 2004.

KOERNER, Andrei. Judicial Activism: constitutional jurisprudence and politics in the post-88 STF. **New studies CEBRAP**, n. 96, p. 69-85, 2013.

MÉSZÁROS, István. **The mountain we must conquer**: reflections on the State. São Paulo: Boitempo, 2015.

POZZOLO, S. Neoconstitutionalism as the last challenge to legal positivism: The neoconstitutionalist reconstruction of the theory of law its incompatibilities with legal positivism and the description of a new model. In. DUARTE, E. O. R.; POZZOLO, S. **Neoconstitutionalism and Legal Positivism**. The faces of legal theory in times of moral interpretation of the Constitution. São Paulo: Landy, 2010.

RAMOS, E. da S. **Judicial activism**: dogmatic parameters. São Paulo: Saraiva, 2015.

SÁNCHEZ, M. C. (Org.). **Neoconstitutionalism(s)**. Spain: Trotta, 2003.

SANTOS, B. de S.; AVRITZER, L. Para ampliar o cânone democrático. In: SANTOS, B. de S.; AVRITZER, L. **Democratizing democracy**: the paths of participatory democracy. Rio de Janeiro: Civilização Brasileira, 2002. p. 39-82.

SARMENTO, D. A. de M. O Neoconstitucionalismo no Brasil: Riscos e possibilidades. In: SARMENTO, D. A. de M. (Org.). **Philosophy and Contemporary Constitutional Theory**. Rio de Janeiro: Lumen Juris, 2009.

STRECK, Lênio. Constitutionalism in Brazil and the need for the insurgence of the new: how neoconstitutionalism does not overcome positivism**. Journal of CEJUR/TJSC**: Jurisdictional Rendering, Florianópolis, v. 1, n. 1, p. 11 - 28, dec., 2013. Available 241 at: https://revistadocejur.tjsc.jus.br/cejur/article/view/23. Accessed on: 03 Aug. 2020.

STRECK, Lênio. Is applying the "letter of the law" a positivist attitude? **NEJ Magazine**, Itajaí, v. 15, n. 1, p.158-173, jan., 2010. Available at: https://siaiap32.univali.br/seer/index.php/nej/article/view/2308/1623. Accessed on: 10 jul. 2020.

STRECK, Lenio. **Here is why I abandoned "neoconstitutionalism". Legal Counsel Magazine**, Mar. 2014. Available at: https://www.conjur.com.br/2014-mar-13/senso-incomum-eis-porque-abandonei-neoconstitucionalismo. Accessed on: 10 jul. 2020.

TASSINARI, C. **Judicial activism**: an analysis of judicial action in the Brazilian and North American experiences. 2012. 141 f. Dissertation (Master's Degree) - Postgraduate Program in Law in the Area of Legal Sciences, University of Vale do Rio dos Sinos, São Leopoldo, 2012. Available at: http://www.repositorio.jesuita.org.br/bitstream/handle/UNISINOS/3522/ativismo_judi cial.pdf?sequence=1&isAllowed=y. Accessed on: 05 Oct. 2020.

TATE, C. N. Why the expansion of judicial power? In: TATE, C. N.; VALLINDER, T. (Ed.). **The Global Expansion of Judicial Power**. New York: New York University Press, 1995. p. 27-37.

TEIXEIRA, Anderson Vichinkeski. Judicial activism: on the limits between legal rationality and political decision. **GV Law Journal**, v. 8, n. 1, p. 037-057, 2012.

VIANNA, Luiz Werneck. **The judicialization of politics and social relations in Brazil**. 1. ed. Rio de Janeiro: Revan, 1999.

VIEIRA, O. V. Supremocracia. F**GV Law Journal**, São Paulo, v. 4, n. 2, p.441- 464, jul., 2008. Available at: http://www.scielo.br/pdf/rdgv/v4n2/a05v4n2.pdf. Accessed on: 10 sep. 2020.

Received/*Recebido:* 03.08.2020.

Approved/*Aprovado:* 12.10.2020.

WEALTH TAX AND COMBAT AND ERADICATION OF POVERTY FUND: TAX COMPETENCE, UNCONSTITUTIONAL OMISSION AND VIOLATION OF FUNDAMENTAL RIGHTS

IMPOSTO SOBRE GRANDES FORTUNAS E FUNDO DE COMBATE E ERRADICAÇÃO DA POBREZA: COMPETÊNCIA TRIBUTÁRIA, OMISSÃO INCONSTITUCIONAL E VIOLAÇÃO DE DIREITOS FUNDAMENTAIS

Julia Pires Peixoto dos Santos[1]
Mario Di Stefano Filho[2]
Vinícius Gomes Casalino[3]

ABSTRACT

The present article deals with the Wealth Tax, which, although established in article 153, subparagraph VII, of the 1988 Federal Constitution, has not yet been implemented, lacking regulation by complementary law. In this regard, the paper has as its objective to promote a critical analysis about the non-institution of the Wealth Tax in face of the Brazilian inequality scenario. Thus, from a broad examination of the content and binding nature of the constitutionally defined objectives, among them the eradication of poverty and the reduction of inequalities (article 3, subparagraph III, Federal Constitution), and the role of tax legislative activity in its concretization, the

1 Graduating in Law at the Pontifical Catholic University of Campinas. Scholarship holder in the Scientific Initiation program at PUC-Campinas, with the theme "Public Policies and Tax Policies", in the FAPIC / Rectory modality, under the guidance of professor-researcher Dr. Vinícius Gomes Casalino. ORCID iD: https://orcid.org/0000-0001-7506-2378. E-mail: juliapirespeixoto@gmail.com.

2 Master's student in the Graduate Law Program (PPGD) at the Pontifical Catholic University of Campinas, CAPES / PROSUC fellow with exclusive dedication, linked to the Human Rights and Public Policies research line. Post-graduate in Tax Law from the Pontifical Catholic University of Campinas and post-graduate in Public Law from FACAB. Bachelor of Laws from the Pontifical Catholic University of Campinas. ORCID iD: https://orcid.org/0000-0002-2429-8345. E-mail: mariodsfilho.adv@gmail.com.

3 Full professor (category A1) at the Faculty of Law of the Pontifical Catholic University of Campinas (PUCCAMP) on a full-time and exclusive dedication basis. Master's advisor, is linked to the Human Rights and Public Policies research line of the Master's Program in Human Rights and Social Development. Post-Doctor by the Department of Economics, Faculty of Economics, Administration and Accounting, University of São Paulo (FEA-USP). Doctor and Master by the Department of Philosophy and General Theory of Law at the Faculty of Law of the University of São Paulo (Largo São Francisco-USP), an institution by which he obtained a bachelor's degree in law. Post-doctorate in progress by the History Department of the Faculty of Philosophy, Letters and Human Sciences of the University of São Paulo (FFLCH-USP). ORCID iD: https://orcid.org/0000-0003-0003-3315. E-mail: vinicius.casalino@puc-campinas.edu.br.

How to cite this article/Como citar esse artigo:
SANTOS, Julia Pires Peixoto dos; STEFANO FILHO, Mario Di; CASALINO, Vinícius Gomes. Wealth Tax and fund to combat and eradicate poverty: tax jurisdiction, unconstitutional omission and violation of fundamental rights. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 165-186, 2020. DOI: https://doi.org/10.46560/meritum.v15i4.8153.

study seeks to answer the following research problem: insofar as it expressly links the revenues from the collection of the Wealth Tax to the financing of the Combat and Eradication of Poverty Fund, a typical instrument for implementing public policies aimed at the promotion of fundamental social rights, wouldn't the Constitution be explicitly determining the exercise of tax competence?. In this sense, the hypothesis is raised that the federal legislator incurs in an unconstitutional omission by not editing the infraconstitucional regulatory rule, given its indispensability for the adequate financing of the fund, crucial to achieve the fundamental objectives of the Republic. To the examination of what proposed, the hypothetical-deductive method was chosen, with data analysis and interpretation from national and foreign sources, together with a bibliographic search of qualified articles on the subject and relevant legislative instruments. It is concluded, there for, the need to revisit the faculty paradigm as an attribute of tax competence, defended almost unanimously by the doctrine of public law, and, thus, ascertain as to whether the non-exercise of legislative tax activity by the taxing entity violates express constitutional commandment, seeking, if so, to comprehend what legal consequences can be drawn from it.

Keywords: Wealth Tax; Combat and Eradication of Poverty Fund; Fundamental social rights; Tax competence; Unconstitutionality by omission.

RESUMO

O presente artigo trata do Imposto sobre Grandes Fortunas (IGF), o qual, apesar de previsto no artigo 153, inciso VII, da Constituição Federal de 1988, ainda não foi implementado, carecendo de regulamentação por lei complementar. Nessa linha, o trabalho tem como objetivo promover uma análise crítica acerca da não instituição do IGF frente ao cenário de desigualdade brasileiro. Assim, a partir de um exame amplo do conteúdo e da natureza vinculante dos objetivos constitucionalmente definidos, dentre eles a erradicação da pobreza e a redução das desigualdades (artigo 3°, inciso III, CF), e do papel da atividade legislativa tributária na sua concretização, o estudo procura responder ao seguinte problema de pesquisa: na medida em que a Constituição vincula expressamente as receitas oriundas da arrecadação do IGF ao financiamento do Fundo de Combate e Erradicação da Pobreza, instrumento típico de implementação de políticas públicas voltadas à promoção de direitos fundamentais sociais, a Constituição não estaria determinando explicitamente o exercício da competência tributária? Nesse sentido, levanta-se a hipótese de que o legislador federal incorre em omissão inconstitucional ao não editar a norma infraconstitucional regulamentadora, dada a sua indispensabilidade para o adequado custeio do fundo, crucial para atingir os objetivos fundamentais da República. Para exame do proposto, optou-se pelo método hipotético-dedutivo, com análise e interpretação de dados, nacionais e estrangeiros, juntamente com pesquisa bibliográfica de artigos qualificados sobre o assunto e instrumentos legislativos pertinentes. Conclui-se, por conseguinte, pela necessidade de se revisitar o paradigma da facultatividade como atributo da competência tributária, defendido de forma quase unânime pela doutrina de direito público, e, assim, averiguar se o não exercício da atividade tributária legislativa pelo ente tributante viola mandamento constitucional expresso, buscando, em caso afirmativo, compreender que consequências jurídicas podem ser daí extraídas.

Palavras-chave: *Imposto sobre Grandes Fortunas; Fundo de Combate e Erradicação da Pobreza; Direitos fundamentais sociais; Competência tributária; Inconstitucionalidade por omissão.*

1. INTRODUCTION

It is known that in article 3, subparagraph III, of the Federal Constitution of 1988, enshrines as the fundamental objective of the Republic the Eradication of Poverty and the reduction of social inequalities (BRAZIL, 1998). It is one of the most expensive purposes for Brazilian society, in view of the multidimensional poverty and the phenomenon of concentration of wealth, which permeate of history the Country.

Given this context, it is important to analyze the Wealth Tax (IGF), as a constitutionally linked tax to finance, with all its collection, the Fund for Combating and Eradicating Poverty, under the terms of article 80, subparagraph III, of the ADCT (BRAZIL, 1988). With the primary purpose of subsidizing public policies aimed at the promotion of basic social fundamental rights, such as health and education, this fund has a clear vocation to the realization of the current constitutional purposes.

Occurs that, despite appearing in article 153, subparagraph VII, of the Federal Constitution (BRAZIL, 1988), the Wealth Tax, more than 30 years after its promulgation, has not yet been implemented, given the inertness of the federal legislature in the edition the necessary complementary regulatory law.

Accordingly, the fund remains in a situation of evident underfunding, being partially committed, hence, all the supplementary programs for which it was responsible to support.

Thus, the purpose of this article is to analyze whether the federal legislator incurs an unconstitutional omission by not instituting the tax and, consequently, allocating resources constitutionally linked to the Fund's financing.

To this end, we opted for the hypothetical-deductive method, using bibliographic research of relevant scientific works and articles, as well as legislative instruments that revolve around the experience with the assessment of wealth and guidelines of the Fund for Combating and Eradicating Poverty, in addition to constitutional rules that define and legitimize the State's prerogative.

In order to understand the roots of the proposed reflection, in chapter 01 the content and binding nature of the function and objectives of the Constitution are investigated, as well as the role of the State relates to them. Based on this, we search to expose the necessary relationship between the tax legislation activity and the effectiveness of the constitutional program.

In chapter 02, a brief analysis of the figure of the Wealth Tax and the Fund for Combating and Eradicating Poverty carried out, investigating both the importance of each institute isolated and the indispensability of the bond between both.

In turn, chapter 03 seeks, in short, to demonstrate the unconstitutional omission in the position of the law enforcement body by not instituting the IGF. To this end, it analyzes the (in) compatibility of the option as an intrinsic attribute to the tax competence, frequently used as a device to mask the non-institution of the impost.

Thereby, it is possible to conclude that, either because of its exceptional redistributive potential, or because of the social destination of its revenues, the imposition of this tax has full capacity to act positively on the Brazilian reality. Being essential for the triumph of its protective dimension, and being expressly linked to the financing of specific expenses, the Constitution prohibits the entity from having (in the sense of deciding discretionally) its competence to institute the IGF, which is why it is urgent to regulate it by complementary law, in charge of the federal legislator.

Finally, it is worth saying that, having been reinserted in the focus of attention of the Brazilian population with the outbreak of the coronavirus pandemic in 2020, which exposed the social and economic inequalities in our country, the discussion about the need to implement the Wealth Tax it is, more than ever, essential

2. THE ERADICATION OF POVERTY AND INEQUALITIES AS A CONSTITUTIONAL PROJECT BINDING TAX LEGISLATIVE ACTIVITY

As a legal document endowed with formal and material supremacy, the 1988 Constitution reveals itself not only as a vector for the interpretation of the whole legal order, but also as a regulatory framework that shapes economic, political and social reality. More than erecting the State in a merely abstract and theoretical way, therefore, acting as a mere instrument of government, this model of Constitution, of a leading nature, seeks to assert itself as an action program committed to the effective transformation of society through law. (CANOTILHO, 2001, p. 6).

In this sense, Hesse (1991, p. 14-15, 24) maintains that the legal constitution is determined by social reality, at the same time that it is determinant in relation to it. It is to say that, in fact, the pretension of effectiveness the legal norm presupposes the consideration of the historical conditions of its realization, insofar as the situation regulated by it intends to be realized in such reality. However, it is not limited to being just an expression of these conditions, considering that, thanks to its normative element, it becomes an active force, managing to give form and change to the current economic, political and social situation.

In fact, a simple reading of the Constitution is enough to realize that the constituent, when defining the spectrum of values and political options that guide all constitutional and legal orders, in fact, considered the reality in which it was inserted, that is, a society historically marked by poverty, immense economic and social disparities and the extreme concentration of income and wealth at the top of the social pyramid. After all, a country that excludes a large contingent of its population from access to the minimum conditions necessary for a dignified life.

Moreover, the current Brazilian scenario is not even more encouraging when compared to that faced by the constituent in the elaboration of the current Constitutional Charter. Confirming the trend of the last decades, the country's economic growth has not been accompanied by satisfactory results in the reduction of the income and wealth inequality indices, having been verified, at the beginning of 2017, more than 16 million people living below the poverty line, according to a report published by the NGO Oxfam Brazil (2017, p. 21). Furthermore, the same report also warned of the extraordinary concentration of wealth in the country, with the richest 1% of the Brazilian population concentrating 48% of all national wealth, while the richest 10% were left with the impressive percentage of 74% (OXFAM BRAZIL, 2017, p. 30).

Demonstrated, nowadays, the existence of a markedly unequal society has been demonstrated, on which the 1988 Constitution commits itself to act to improve the economic and political-social structures that contribute to the perpetuation of the backwardness and deprivation resulting from insufficient income, link all State activity to the pursuit of this objective.

This perspective is especially clear with article 3 of the Federal Constitution, which, as Bello, Bercovici and Lima (2019, p. 1771-1772) points out, incorporates a program of economic and social transformations as legal ends to be necessarily accomplished by the Brazilian State. Among these purposes, it is worth mentioning, the purpose of this article, the establishment of the construction of a free, righteous, solidary society and the eradication of

poverty and marginalization and the reduction of social inequalities and as basic objectives of the Federative Republic of Brazil, the latter unfolding, including, in several other constitutional provisions (eg, arts. 23, X; 43; 165, § 7 °; 170, CF).

Eros Roberto Grau conveys the same idea when remembering:

> The statement of the principle expresses, for one aspect, the explicit recognition of marks that characterize the national reality: poverty, marginalization, and inequalities, social and regional. Here is an uncontested framework of underdevelopment, which, however, is intended to be reversed. [...] It will be said that the Constitution, there, nothing else postulates, in its character of Constitution, leader, but breaking the development process in which, we are immersed and, in whose midst, poverty, marginalization, and social inequalities and regional, act in a cumulative circular causation regime - they are causes and effects of themselves (GRAU, 2010, p. 220).

Given this context, the idea that the constitutional program aimed at combating poverty and marginalization in the country would be just rhetoric of the constituent is broken, devoid, therefore, of any legal binding, although it has been considered in the past 32 years old. As the original constituent outlines goals to be pursued and incorporates them as relevant legal norms, the development of specific dogmatics capable of making them effective is essential (BARCELLOS, 2005, p. 86). Hence, the State is required to act actively, all public powers, without exception, linked to undertaking, within the sphere of their competencies, concrete initiatives towards the materialization of the constitutional plan that aims to overcome the intergenerational cycle of inequalities and miseries existing in the country.

Along these lines, one of the main tools available to governments to carry out this task is public policies. Without intending to enter, within the scope of this article, in the complex discussion about the (in) existence of a unique legal concept of the term "public policy", the definition proposed by Maria Paula Dallari Bucci (2019, p. 816), which is: "It is coordinated and wide-scale government action, dealing with complex problems, a service of a specified strategy, all of which conform to rules and legal processes".

Two considerations can be made from this formulation. In the first place, public policies are considered as a suitable means for the realization of the entire wide range of objectives selected by the Constitution, which, of course, presupposes the realization of rights far beyond those only considered fundamental, despite the undeniable prioritizing them. However, for the study proposed in this work, attention will be focused on its role in the implementation of fundamental rights, especially social rights, representatives of the second generation.

This is justified by the fact that such rights have a fundamental role in the objective of poverty elimination. Thus, given, in the case of a multidimensional problem, to have an efficient combat policy, State's intervention is essential, through broad social programs that contemplate and enable the raising of the standard of living of the poorest social strata, either by direct transfer of resources (eg, assistance scholarship programs, such as Bolsa Família and the Child Labor Eradication Program) or by offering good universal public services for food, housing, health and education to be distributed equally in the society (eg, Fund for Combat and Poverty Eradication, which combines income transfer with the supplement of social protection actions).

Another consideration to be made is the fact that the implementation of public policies constitutes a process that develops through a sequence of distinct and related steps, ranging from the identification of problems that require State's intervention, with the definition of action strategies and budgetary deliberations, until the effective provision of the essential service, and all decisions taken in the meantime only enjoy material legitimation insofar as they are in agreement and seek to meet the constitutionally established purposes.

In the light of that scenario, and considering the decision-making process in the public policy cycle, the formulation of a tax policy is particularly relevant, that is, the complex of policy and law decisions that involve how tax collection will take place, with due regard for constitutional limits. Accordingly, the tax policy can vary between changing a certain rate, or even imposing a tax.

Because of this, to face the expenses inherent to maintaining the structure of social policies for transferring income and providing essential public goods and services to the citizens, the State depends on financial resources, which, within a capitalist economic model such as that for our country, they are collected, as a rule, by the compulsory transfer of wealth from private individuals through the imposition of taxes (RIBEIRO; NUNES; ALMEIDA, 2018, p. 129).

In this regard, Hugo Thamir Rodrigues and Marguid Schmidt assert:

> Taxation is presented as an indispensable foundation for the State to develop its typical activities. Thus, State's actions, regardless of their nature, depend on the delivery, by citizens, directly or indirectly, of resources that enable the existence of services and works aimed at all members of society, regardless of how much each one participates in the total collection. Such surrender is justified by the need of man to provide material conditions to that (the State) that should allow them to live in a free and fair society, that allows everyone to live with dignity (RODRIGUES; SCHMIDT, 2016, p. 156).

However, the collection of government revenues by the State certainly has as an inexorable assumption the exercise of tax legislative activity. This because the institution of taxes by the Legislative Branch must precede any collection act, even because the public administration cannot act outside its scope of competence, intending to demand a tax not instituted by the relevant legislative body.

For this reason, including that, when dealing with tax jurisdiction, understood precisely as such a prerogative of the lawful body for the creation, by law, of the taxes reserved to it by the constitutional text, Geraldo Ataliba (1998, p. 60) defines it as a "primary activity, in the sense that, without it, there can be no tax action (taxation), which, as said, is an indispensable instrument for meeting public needs".

In this context, it is possible to identify in the realization of fundamental rights a relationship of direct dependence concerning taxation: without the institution of taxes by the legislator, with the subsequent collection of their revenues by the public administrator - especially those arising from taxes -, and therefore, without the financing of governmental actions, there is no feasible way for the Public Authority to adequately fulfill the guarantee function that the constitutional text imposed on it, which ends up making it impossible, therefore, to satisfy the social objectives protected therein (RIBEIRO; NUNES; ALMEIDA, 2018, p. 129).

It is inferred, therefore, that the legislator, alongside the public administrator, has a fundamental role in the achievement of the constitutionally defined social objectives since every state measure has its beginning in the exercise of the tax activity that is incumbent upon it.

It is perhaps what can be synthesized with the placement of Juan F. González Bertomeu, present in the prologue of the work *El costo de los derechos: Por qué la libertad depende de los impuestos, de Stephen Holmes e Cass Sustein* (2011, p. 14)*: "Dime cuántos impuestos te cobran (y cómo se gastan) y te diré qué derechos tienes*". For the author, taking into account that safeguarding any and all rights involves spending public funds, it is not enough to look only at the Constitution to know what rights are guaranteed to a community, but especially at how the resources are intended to ensure compliance (HOLMES; SUSTEIN, 2011, p. 14), since there is no point in providing for a right without the existence of a state apparatus capable of making it effective, since they lack sufficient financial funding instruments.

Finally, the governing character and the draft of the 1988 Constitution subject us to the idea that the State has duties towards a transformation of the social and economic status quo, subordinating all its actions to the achievement of the objectives that it considers most dear to the community, especially those that aim for a more just and solidary society, with the elimination of poverty and inequalities. As a reflection of this purpose, the guarantee of fundamental rights is the confirmation of a legal duty, the fulfillment of which depends primarily on the full exercise of state tax activity, which covers not only the effective collection by the Public Administration but, above all, the very institution of the tax by the Legislative Branch, to whom the tax competence was attributed.

With these considerations in mind, an analysis is made, in the next topic, of the Wealth Tax Institute, whose importance lies precisely in its special vocation for the fulfillment of the main objectives stipulated in article 3rd of the Federal Constitution, maximum due to the link of its revenues to the structuring of the Fund for Combating and Eradicating Poverty, but which, inexplicably, more than 30 years after the promulgation of the Constitutional Charter, has not yet been instituted, being currently the only hypothesis of non-exercise of tax jurisdiction concerning to taxes named within the Brazilian legal system.

3. CONSIDERATIONS ON THE WEALTH TAX AND ITS CONTRIBUTION TO THE BRAZILIAN REALITY: BINDING TO THE FUND TO FIGHT AND POVERTY ERADICATION

Inspired by the French experience of wealth tax in the 1980s, with the title Impôt sur les Grandes Fortunes, the wealth tax was introduced in Brazil as an achievement of the 1987-88 National Constituent Assembly, which, after heated debates, succeeded success in including it within the tax list of tributes within the competence of the Union, more specifically in subparagraph VII, article 153 of the Federal Constitution (BRAZIL, 1998).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 165-186 • 2020

Contrary to what happened in the French tax system, however, the wealth tax prepared by the national constituent never left the paper, since the effectiveness of the norm that institutes it depends, since 1988, on regulation by complementary law, being, therefore, the only occasion for the non-exercise of the Union's fiscal jurisdiction.

Over the years, there have been several attempts to regulate the tax, and several complementary bills have been taken for consideration by the National Congress, many of which have not even been analyzed until today. Even so, efforts in the search for an IGF regulatory norm did not cease, among which PLS n ° 315/2015, of Senator Paulo Paim's initiative, and PLP n ° 183/2019, under the authorship of doing Senator Plínio Valério, both of whom are in the Senate's Economic Affairs Committee. Also noteworthy is PLP No. 50/2020, by senator Eliziane Gama, as one of the projects recently presented in response to the economic crisis caused by the outbreak of the coronavirus pandemic in 2020, which rekindled the discussion about the need to create the Wealth Tax as a source of financing social protection needs.

The important thing to note in all of these proposals is that, despite varying in certain aspects (v.g., exemption limit, percentage of the rate of incidence, taxable event, etc.), they all share the same justification for the institution of the tax, that is, the fight against the vicissitudes of the alarming situation of inequality and extreme poverty in the country, which, even, was already devastating long before any pandemic crisis, but which, obviously, in the face of this, tends to worsen even more.

The Wealth Tax is fully intended to intervene positively in this reality. This is mainly since, by focusing specifically on the great fortunes[4], the institution of this exoneration would only burden the holders of the most expressive wealth, which, in itself, would already be a beneficial differential for the tax framework, marked by regressivity.

The Brazilian tax system was structured shortly before the rise of the neoliberal agenda in the country, which, seeking to break with the social order paradigms of the *Welfare State* in its most advanced modalities (SCHMIDT, 2018, p. 121), obstructed an agenda of fiscal progressivity. Thus, a logic of capital accumulation at any cost was awakened, thus leaving aside the social issue as a priority, giving space for the overlapping of capital to gradually form an impotent State concerning the implementation of developmental and social protection policies (RODRIGUES; SCHMIDT, 2016, p. 169), which were restricted to their financial and budgetary surpluses (SIQUEIRA; PETRIS, 2017, p. 190).

Despite the "alleged financial neutrality advocated by liberals" (RODRIGUES; SCHMIDT, 2016, p. 5-6), from the 1970s, a marked reduction in tax rates on inheritances, donations, and financial assets can be observed and non-financial in general, and, on the other hand, the structuring of a taxation system in which indirect taxes represent more than half of the total revenue collection (OLIVEIRA; BIASOTO JÚNIOR, 2015, p. 5).

Of course, there is nothing illegal about this system format, but inserted within a constitutionally State conditioned to a serious fight against poverty and inequality, and in a country that has excessively high levels of concentration - even when compared with other developing

4 There is no definition by the original constituent of what is a great fortune, it is up to the infra-constitutional legislator to define the term, and, therefore, to define the range of taxation when the complementary regulatory law is enacted. In any case, it is indisputable that the expression "great fortunes" greatly restricts the field of taxation.

countries and the United States[5] -, it proves to be at least problematic since the majority of taxes take as a reference, not the taxpayer income, but consumption, therefore not differentiating the different levels of purchasing power, which ends up causing the most socially fragile social strata to pay proportionally more taxes than the most privileged (OLIVEIRA; BIASOTO JÚNIOR, 2015, p. 12).

In this sense, the aforementioned study by Oxfam Brazil carried out in 2017, found that the 10% with the lowest income in Brazil spend 32% of this in taxes, 28% of which are indirect. Conversely, the richest 10% spend only 21% of their income on taxes, with only 10% of it earmarked for the payment of indirect taxes (OXFAM BRAZIL, 2017, p. 48). The discrepancy is startled, all the more when considering that, in 2018, taxation on consumption represented 44% of the country's revenue (BRAZIL, 2020, p. 18).

Therefore, it is undeniable that such a model of taxation, in force until today, favors the feedback of the concentration phenomenon and poverty, since, at the same time that it establishes obstacles for the rise of the less favored social segments, it makes it possible for holders of great wealth to use their tax burdens to relieve their economic and social status.

In the face of such a scenario, the importance of the Wealth Tax is highlighted, since the exaction would not only relieve the burden of taxation on consumption and service, which, as seen, mainly penalizes the less favored population, also, because it is a progressive tax, it would be able to carry out, especially, the principle of contributory capacity. This principle is part of the principle of material isonomy, and the relationship between them is illustrated by Claudiane Aquino Roesel and Maria Flávia de Freitas Ferreira as follows:

> The principles of isonomy and contributory capacity are related insofar as they observe the economic capacity of each taxpayer and treat them equally, respecting the individuality of each individual in bearing the burden of the tax burden (ROESEL; FERREIRA, 2017, p 201).

Notwithstanding, the IGF goes further, since it carries yet another attribute that makes it stand out among the intervention mechanisms articulated according to the fight against poverty and the redistribution of income. It refers, here, to the particularity that the revenues from its collection are destined to the implementation of the public policy specifically aimed at promoting essential services to the neediest, to grant them the basic conditions necessary to overcome poverty.

Such linkage, undeniably, does not constitute a mere option. It is, in fact, a requirement of the Federal Constitution itself, insofar as this, except for the postulate of not affecting the tax species (art. 167, IV, CF), expressly links the proceeds of the IGF collection to the financing of the so-called for Combating and Eradicating Poverty Fund, as per art. 80, subparagraph III, of the Transitional Constitutional Provisions Act (BRAZIL, 1988). Otherwise, let's see.

The Fund for Combating and Eradicating Poverty (FCEP) was inaugurated by Constitutional Amendment N° 31, of 2000, to provide all Brazilians with access to decent levels of sub-

5 These are the results of research carried out by Marc Morgan Milá, who, under the supervision of the prestigious French economist Thomas Piketty, found that the country has been showing a steady evolution of inequality, and the few changes observed since the 1970s do not appear clearly. as a reason to celebrate any "success story" in the country in combating economic and social disparities (MILÁ, 2015, p. 18, 93).

sistence. Such was his contribution that, originally established to remain in effect until 2010, Congress decided to extend its term indefinitely, by approving Constitutional Amendment 67, 2010. On that occasion, Senator Antônio Carlos Magalhães Junior declared that this decision was based on the fact that the fund was shown to be essential for the issue of overcoming the vexing social indicators of the country to be placed at the center of the Brazilian political debate (GUERREIRO, 2020).

As a fund of an accounting nature, its function is to collect, move and control budgetary revenue and its distribution to serve a specific purpose (SALVADOR; TEIXEIRA, 2014, p. 17), that is, to subsidize supplementary actions of nutrition, housing, education, health, reinforcement of family income and other social interest programs aimed at improving the quality of life, following the provisions of art. 79 of the ADCT. It is seen that it is of its nature, to contribute to the constitutional purpose of eliminating poverty, ensuring means of financing to guarantee the social rights and duties recognized by the 1988 Constitution, and dispensing them in the form of financial incentives and public services. basic principles for the dignified development of citizens.

The main way in which a public fundraises the necessary resources for its structuring and performance of functions is, as well as all public policy, by raising funds from citizens with sufficient financial capacity to contribute without jeopardizing their livelihood, the that occurs through the institution of taxes, contributions, and fees (SALVADOR; TEIXEIRA, 2014, p. 17). In the specific case of the Fund for Combating and Eradicating Poverty, its main means of financing, as has been said, is the Wealth Tax, being integrated by the totality of its revenues, which is why it even fits perfectly within the typology of Theodore L. Lowi, to the category of retributive public policies, because of its undeniable inter-sectoral repercussion, with the need to offer services to a broad social group, the most socially fragile, impacting the sphere of interests of the other group of individuals equally broad, the privileged (LOWI, 1964, p. 691).

Furthermore, despite the prominence given to the Wealth Tax, it was not forgotten that other sources of funding for the fund had been foreseen. Thus, in addition to the IGF, finances the Combat and Eradication Poverty Fund- the CPFM, a provisional contribution already extinguished, and the additional 5% of the Tax on Industrialized Products levied on superfluous products, without prejudice to any donations and budget allocations, in addition to other revenues to be defined in the Fund's regulations, according to art. 80 of the ADCT (BRAZIL, 1988).

However, the fact is that the absence of the IGF significantly reduces the strength of its financing. This is due to the significant potential collection of the tax, especially when it is considered that it has as its very reason the periodic collection of large amounts.

To elucidate this idea, studies by economist Amir Khair (2008, apud ELOI; LOPES, 2016, p. 121) concluded that, based on a rate of 1%, it could have been collected by the IGF exaction about R $ 18.5 billion in 1999 and R $ 22.3 billion in 2000, which corresponds to 1.73% and 1.89% of GDP at the time, respectively. More recently, some entities, such as the National Association of Tax Auditors of the Federal Revenue Service in Brazil (Anfip) and the National Federation of State and District Tax Authorities (Fenafisco), presented a manifest through which, among other measures to face the crisis caused by the pandemic, proposed the creation of the IGF permanently, estimating that, with progressive rates of up to 3% and levying on net assets more than R $ 20 million, which would reach only 0.1% of the taxpayers, - it would achieve an impressive potential, of approximately R $ 40 billion per year (SENADO FEDERAL, 2020).

Also, as an example of a successful concrete experience, mention can be made of data from France, where it came to represent 1.5% of the federal government's revenues in 2010, the collection by taxing the wealth tax inspired the creation of the Brazilian tax in the exam (CARVALHO JÚNIOR, 2011, p. 34). In the same vein, the wealth tax in Argentina has also been successful, with an uninterrupted growth in the collection of the so-called Impuesto Sobre Los Bienes Personales (ARGENTINA, 2020)[6] between the years 2014 and 2017.

There is no doubt, therefore, that, when creating the Fund for Combating and Eradicating Poverty, the constituent counted on the institution of the Wealth Tax to give it the necessary contribution, not least because spending on a poverty eradication project is far from being derisive a country that is considered to be one of the worst in the world in terms of income inequality and in which, a few years ago, it was confirmed that more than 16 million people were living in conditions of poverty (OXFAM BRAZIL, 2017, p. 12).

Furthermore, it is imperative to emphasize that, as seen in the first chapter of this article, the Brazilian Constitution is not neutral, insofar as it considers and proposes to transform the reality in which it is introduced. Thus, in a society that has 2.5% of the richest families in the world - for data from 2000 (CARVALHO JÚNIOR, 2011, p. 36) - and, at the same time, with precarious and poor educational institutions and health establishments. thousands of individuals battling hunger and lack of adequate housing, it would be unreasonable to argue that its founding law would have determined the taxation of surplus wealth as a mere accessory to fund public policy aimed at eradicating poverty and inequality.

Indeed, the Fund for Combating and Eradicating Poverty depends primarily on the IGF to structure itself, and its absence certainly causes a situation of underfunding capable of jeopardizing the quality and real effectiveness of the constitutional program for the eradication of poverty and social inequalities, which is so expensive. to our Constitution. As Ilton Garcia da Costa, Henrique Ribeiro Cardoso and José Leite dos Santos Neto (2018, p. 516) point out in this same sense, "*the lack of taxation not only violates the Ability-to-Pay Taxation principle, but also fails to raise a large mass of resources that would be extremely useful for the financing of public policies*".

It is concluded, therefore, that the Wealth Tax is indispensable in the fight against poverty and inequalities in the country, not only because of its ability to comply with the principle of equality and contributory capacity but, in particular, it is a decisive financial instrument for the functioning of the Fund for the Combat and Eradication of Poverty, so that its failure to do so inevitably results in the deficient provision of the aforementioned public policy, thus frustrating the fulfillment of the fundamental objectives of the Republic as established by the constituent.

In the following item, we seek to analyze the current scenario, to examine a possible unconstitutional omission by the federal legislator when failing to institute the Wealth Tax, rethinking itself, in the light of the projective directives of the Constitution and of its decision to link the revenues of the referred tax to the specific expense, the consistency of having the option as an intrinsic attribute of the tax jurisdiction.

6 Despite a decrease in tax revenue in 2018 compared to the years cited, the report found, in the first nine months of 2019, the return of its growth (ARGENTINA, 2020, p. 21, 38).

4. THE NON-REGULATION OF THE IGF AS A POSSIBLE UNCONSTITUTIONAL OMISSION: A REASSESSMENT OF THE FACULTATIVITY AS AN ATTRIBUTE OF THE TAX COMPETENCE

MERITUM LAW JOURNAL • v.15 • n.4 • p. 165-186 • 2020

According to a study carried out by Oxfam, Brazilian's support for government action to combat inequalities increased in 2019, in comparison with the same survey conducted by the organization in 2017. In the year in question, 77% of respondents totally or partially agreed with the affirmation that the federal government should increase taxes on very wealthy people to guarantee better education, health, and more housing for those in need, while in 2017, that number was 71%, which reveals a noticeable growth in this position, especially among those with an income above 5 minimum wages - generally more resistant to taxation, with the percentage having evolved from 56% to 76% (OXFAM BRAZIL, 2019, p. 27-28).

Given this scenario, it appears that the Wealth Tax would be perfectly suited to the desires of the Brazilian population, especially for the allocation of its revenues to the promotion, among other basic fundamental rights, of housing, health, and education to the needy, which, for 94% of respondents in the survey mentioned (adding the total and partial concordances), it must be the fiscal destination par excellence of all taxes (OXFAM BRAZIL, 2019, p. 29).

Precisely in the opposite direction, however, it is observed that the Legislative Branch is somewhat reluctant about the wealth tax. Regarding the bills presented regarding the implementation of the IGF, the resistance raised is punctual. There is an argument that the wealth tax could cause the evasion of capital abroad, in addition to discouraging savings, the acquisition of assets, and investments in the national territory (CARVALHO JÚNIOR, 2011, p. 10).

They also justify the defense in the sense of non-taxation due to the difficulties and high costs in the administration and inspection of the referred tax, due to its low collection potential, due to the multiple taxations generated by it, and, especially, due to the abandonment of wealth tax by several countries that adopted it (ELOI; LOPES, 2016, p. 115-116), such as, for example, Austria, Denmark, and Finland (CARVALHO JÚNIOR, 2011, p. 15). They are also supported by studies that demonstrate that countries that tax capital have not seen a significant fall in social inequality, as in the case of Germany and Sweden (BUFFON; ANSELMINI, 2017, p. 4)

.It turns out that the inconsistency of such arguments has long been evident, or, at least, that the obstacles pointed out would not be compelling, were it not for the lack of political will of the parliamentarians. As for evasion, there are authors, such as Ristea and Trandafir (2010, apud CARVALHO JÚNIOR, 2011, p. 15), who point out as one of the main reasons why European countries abandoned the wealth tax from the decade of 1990 the fact that the tax causes the capital transfer to countries with less tax burden. As an example, they cite the Dutch experience, in which the extinction of the tax resulted from the verification of its harmful effect on the economic activity of the country since it would be causing the exit of the productive capital and discouraging the entry of foreign investors (RISTEA; TRANDAFIR, 2010, p. 304).

However, it cannot be forgotten that, currently, the mechanisms of crossing and traceability of registrations, data, and tax information have evolved more and more (ELOI; LOPES, 2016, p. 121). In the Brazilian context, there is also the possibility of comparing the income tax

declaration with that of the IGF, to detect any discrepancies that indicate possible evasive conduct (ELOI; LOPES, 2016, p. 122). Besides, Brazil is a signatory to the Common Communication Standard (CRS), drafted by the Organization for Cooperation and Development (OECD), which aims to communicate about financial accounts on a global scale. Thus, the Federal Revenue Service, one of the best-structured bodies in the country, would have tools to combat the possible tax evasion that the implementation of the IGF may cause.

Another factor to be considered is that the reduced number of potential IGF taxpayers would imply greater inspection effectiveness since the tax authorities would not need to create a system that covers most of the Brazilian population, but the smallest part of it (ELOI; LOPES, 2016, p. 121). Regarding the pluritributable argument, there is no conflict with the existing taxes, since the calculation basis is the total value of the goods, in a universal aspect (CAPELEIRO; SILVA, 2019, p. 1440). In any case, for those who understand differently, some of the IGF institution's projects foresee the possibility of compensation, to guarantee the principle of *non bis in idem*.

The potential collection of the IGF in Brazil is, still, extremely significant, according to the aforementioned study by Amir Khair (ELOI; LOPES, 2016, p. 121). Research shows that, in certain countries, a low tax collection was found, as in Spain, where it represented only 0.5% of government revenues in 2002, having been extinguished in 2008 (CARVALHO JÚNIOR, 2011, p. 16). However, it must be considered that, in that country, there was no great structure for evaluating real estate and financial assets, as well as a device that limited the joint entry with the Income Tax to a maximum of 60% of the income of the resident taxpayer. in the country, in addition to other deductions, factors that directly impacted the collection (CARVALHO JÚNIOR, 2011, p. 16).

Also, many of the nations that extinguished the wealth tax, such as Austria, Finland, and Denmark, did so because of their inequality at significantly lower levels, since they have historically used significant taxation on wealth and transference (inheritance and donations), which does not happen in Brazil (CARVALHO JÚNIOR, 2011, p. 36). Regarding the studies that reveal in certain countries, such as Germany and Sweden, the failure to achieve the desired result of decreasing inequality, it is argued that this situation was because these countries exempt many assets and evaluate them by values cadastral and not at market values (BUFFON; ANSELMINI, 2017, p. 8).

The decrease in investments should also not be a problem, since recent studies released by the Federal Revenue found that, in the year 2017, a total of 28 OECD countries had a higher tax burden on income, profit and capital gain than that of Brazil. These countries include France, Germany, the United States, the United Kingdom, and New Zealand (BRAZIL, 2020, p. 7), and all have held, invariably, in the last three years (2018-2020), position equally superior in the ranking of most reliable countries for foreign direct investment, according to an indicator formulated by the North American company AT Kearney (LAUDICINA; PETERSON, 2020, p. 5).

Given these considerations, it is consistent with the conclusion of João Pedro Schmidt (2018, p. 124), according to which the real motivation behind the non-institution of the IGF lies, in the fact that the possible taxpayers, titleholders of great fortunes, have a great influ-

ence on public policies whose theme is income[7]. Thus, in Brazil, there is a manifest interest on the part of the political body in maintaining the tax status quo, either to prevent them from being called upon to dispose of part of their wealth, or to favor the interests of the country's elitist class, especially for submit to their generous contributions to the financing of political and election campaigns.

Thus, the political decision-making process ends up representing the will of the favored minority social segment to the detriment of the common interest of the Brazilian population, clinging to outdated criticisms to delay, in favor of its ambition, the regulation of a tax (ELOI; LOPES, 2016, p. 118) that could bring benefits to the whole society.

The finding of such political distortion, however, overlaps against the option as an attribute of the exercise of tax jurisdiction. Taken as a fundamental paradigm of Brazilian advertising doctrine, this element makes the creation of a tax to be seen as nothing more than a discretionary political decision by the taxing entity, allowing the legislator, therefore, to choose whether or not to institute a constitutionally provided tax, according to its judgment of opportunity and convenience.

André Luiz Borges Netto (1999, p. 79-80), endorsing this idea, affirms that politician is free to use or not to use the rules of competence provided for in the Federal Constitution, so that their performance is always optional, taking into account the principles of the separation of powers and the discretion of the legislator. Roque Antonio Carazza (2013, p. 766-767) goes further, stating that, to make a strictly political decision, such as creating, not creating, or partially creating the tax, the legal person under domestic public law does not is subject to no external control.

So, it appears that it is a timely conception so that political preferences prevail over the constitutional bases in force. In this light, the legislator can use his discretion and subjective arguments as a subterfuge to mask his particular interest in the non-taxation of the wealth of the ruling class, without, at the outset, being able to rate his conduct as contrary to the right.

It is clear that, within this perspective, the lowest risk of leaving decisions so dear to society at the mercy of party-political games already appears like a reasonably sufficient foundation to consider the revision of this dogma of tax legislative activity. However, what we seek to demonstrate in this study is that, even when the legislator's option is based on legitimate grounds, the idea of facultativeness as a feature of tax competence is not compatible with the dictates of the Constitution.

In the words of João Almeida de Barros Lima Filho, the constitutional attribution of tax jurisdiction: "as it could not be otherwise, it can only be understood in the light of a teleological and systematic interpretation, requiring knowledge not only of State's prerogatives but also of responsibilities because of which such prerogatives were instituted" (2003, p. 116). This is undoubtedly due to the directive character adopted by the current Constitution, which, as seen, presupposes the irradiation of its objectives and purposes on all state actions, including financial ones.

7 Along these lines, cf. COAST; CARDOSO; SANTOS NETO, 2018, p. 516: "The reasons seem to be obvious: this is not only an economic matter over the risk of capital flight, but it is also a political choice since among the 513 congressmen elected to the 2014-2018 legislature, almost half of them are millionaire, an increasing ratio in each legislature".

Here, reference is made to what was exposed in the first chapter of the present work. Thus, from 1988 onwards, the state function started to be linked to the performance with total direction to the efforts to achieve constitutional designs (LUCENA, 2017, p. 189). The listing of fundamental objectives, in art. 3 of the Magna Carta, demonstrates the constitutional engagement in search of transformative material results, such as the elimination of poverty and marginalization and the reduction of inequalities. And, even when not linked to positive social benefits, but especially when they are, these goals demand from the state entity a duty to act, and not to abstain, handling all the instrumental powers at their disposal to ensure their proper reach.

Faced with this scenario, it appears that the Constitution removes the exercise of tax competence from the legislator's discretion, since to the extent that any State's action requires the expenditure of budgetary resources by the government, it could not give up its role. main instrument for supplying public coffers.

Without taxation, the State would not be able to bear the expenses inherent to the realization of its public policies and would thus end up withholding any possibility of adequately fulfilling the immensity of tasks to which it was concerned, rendering constitutional guarantees empty in this sense.

In this way, there is no way to think that the Constitution would assign a range of duties to the Constituted Powers, but would leave it up to them to undertake or not to undertake the main measure for their fulfillment. This conception calls into question the very normative force of the constitutional text, as it would be admitted that the inertia of State agents could hinder the effectiveness of its most valuable statements. Starting from this same idea, it is worth remembering yet another lesson from João Almeida de Barros Lima Filho:

> To understand the institution of taxes as a mere faculty, would, in a way, also qualify all other attributions of the State as a faculty, since these depend on the implementation of that one, which simply destroys one of the fundamentals of the Rule of Law, whatever it may be, that the State has duties to citizens, allowing them to demand from the State the satisfaction of their subjective rights (LIMA FILHO, 2003, p. 115).

If therefore, it is peaceful to understand that the State is bound to fulfill the social objectives constitutionally enshrined, there must be no other understanding than that federal entities have to legislate, in the sense of implementing taxes listed.

This becomes even more clear when discussing the non-imposition of the Wealth Tax, given that the failure to exercise tax jurisdiction, in this case, has a direct impact on the functioning of the Fund for Combating and Eradicating Poverty. This is because, as already evidenced, the absence of the destination of the resources of the execution ends up in a significant decrease in the financing of the public policy in question and, once the fund is compromised, the supplementary actions of nutrition, housing, health and others for which he was responsible for subsidizing.

It turns out that, following the same reasoning previously adopted, for which it is not possible to dissociate the reflection about the mandatory or not in the institution of taxes from the analysis of the fundamentals of the State function, it is evident that the Federal Constitution does not authorize the State to assume a role neutral in the fight against economic and social inequalities (DIFINI; JOBIM, 2019, p. 284). Thus, since it ceases to act positively towards the

MERITUM LAW JOURNAL • v.15 • n.4 • p. 165-186 • 2020

guarantee of basic social services, disregarding the tax exemption necessary for carrying out public policies capable of carrying them out, the legislator is surely violating the constitutional legal order. Hence, there is talk of unconstitutionality due to the omission of the law enforcement agency.

It is certain, therefore, that the institution of the IGF cannot be understood as a mere option of the politician, since this decision was previously made by the original constituent (LIMA FILHO, 2003, p. 90). Such determination, even, was expressed in the constitutional text. Now, by linking the proceeds of the tax collection to the cost of the Fund for Combating and Eradicating Poverty, what is extracted is, in fact, an explicit order of the Constitution for the legislator to exercise legislative tax activity, given its indispensability for that, the State can fulfill its other duties of promoting fundamental rights, mentioned categorically, including, in art. 79 of the ADCT, the founding article of the fund.

Thus, the lack of its implementation, employing a complementary law, constitutes an affront to the express constitutional mandate - which, incidentally, can be extracted not only from the systemic analysis of the entire Constitution but also from specific positive norms, among which the art. 145 of the Constitution, which expresses the State's power-duty[8] in the institution of taxes in general, and art. 80, III, of the ADCT, which determines the need to allocate the IGF's revenues to the Fund for Combating and Eradicating Poverty. Maurício Barros (2013, p. 123-124) summarizes this issue in the following text:

> For all these reasons, it is not appropriate to consider tax jurisdiction as something optional, since it depends on the implementation of fundamental rights, including individual social rights (minimum existential). This assertion confirms the fundamental objectives of the Republic listed in art. 3rd of CF / 88, which imposes an implicit constitutional duty for the State to exhaust its sources of revenue, under the primacy of fiscal justice and the contributory capacity of citizens. Because of this, the Federal Union's omissive stance when it ceases to exercise the tax jurisdiction set out in art. 153, subparagraph VII, of CF / 88, which attributes the competence to institute the wealth tax (IGF), using a complementary law. This assertion does not stem from any logical stance by the author, but as a result of everything demonstrated in this topic, with the aggravating factor that the IGF, as determined by art. 80 of the ADCT (inserted by the Constitutional Amendment 31/2000), must have the proceeds of its collection allocated to the Fund for Combating and Eradicating Poverty, a fund destined to finance public policies inherent to the protection of the existential minimum [...] (BARROS, 2013, p. 123-124).

Thus, there is an unconstitutional omission by the federative entities, which, as José Afonso da Silva asserts, remains characterized "in cases where the legislative or administrative acts required to make constitutional rules fully applicable" (2014, p 49). On the same subject, Paulo Eduardo Garrido Modesto points out that unconstitutionality by default is constituted in situations in which it is no longer reasonable "the inertness or the appeal to the political discretion of the omitted Power, that is, when it is no longer possible to accept an excuse for editing of a regulatory norm or execution of a missing measure based on the judgment of opportunity and convenience" (2011, p. 1209), this being exactly the case of the absence of wealth tax.

8 C f. LIMA FILHO, 2003, p. 110: "the verb power when addressed to State's entities, does not mean the faculty attributed to them, but duties under which the powers were conferred on them. Thus, legislative tax competence is a power and a duty for the autonomous entities of the State ".

Given this scenario, there is a need to claim the implementation of the Wealth Tax, which is already taking longer to be more solidly placed on the agenda of legal debates. There is a gap in the Brazilian tax system that must be remedied, at the risk of any chance of ever being adequately achieved the purposes that the Constitution proposes to accomplish.

On the part of parliamentarians, it is finally necessary to proceed with the various bill requires that propose to regulate the IGF. Proposals such as Senator Plínio Valério's PLP N°/. 183/2019, if approved, would be of great value for the long-awaited transformation in the portrait of the country's social and economic inequalities. That specific project is mentioned because it is currently considered one of the most feasible, due to the recent progress in its progress in the Federal Senate, given that the need for financial reinforcement caused by the pandemic has rekindled the discussion about the taxation of wealth (NATIONAL HEALTH COUNCIL, 2020).

The emphasis given is also justified by the fact that, under the terms of the presented initiative, it was estimated that R$ 70 to 80 billion reais would be collected per year with the tax levy, of which 50% would be allocated to the National Health Fund, 25%, to the Worker Support Fund, and 25%, to the Fund for Combating and Eradicating Poverty (NATIONAL HEALTH COUNCIL, 2020). Thus, although it does not respect the total linking of revenues to the latter, as determined by the Constitution, it is an advantageous proposal, since, in any case, it destines the proceeds of the tax collection entirely to funds intended to subsidize socially relevant public policies. However, the Constitutional Court is primarily responsible for the persistence of the omission by the law enforcement agency to promote the defense of constitutional normative commands, including the determination of the duty to exercise tax jurisdiction. At this point, it is worth mentioning that the 1988 Constitution represented a framework of protection against opportunistic infra-constitutional movements, insofar as it provides several techniques for controlling legislative activity. Using them, the Judiciary has the power to make up for any deficits in the performance of the law enforcement body that is putting at risk the very observance of the axiological horizon of the constitutional order (CALIENDO, 2013, p. 209).

Thus, in the face of noncompliance with the explicit constitutional mandate to create the Wealth Tax, the issue can and should be brought to the analysis of the Supreme Federal Court, through direct actions of unconstitutionality by default. Along these lines, the recent initiative of the Socialism and Freedom Party (PSOL) stands out, which, in 2019, through ADO N° 55, postulated that the STF declare the failure of the National Congress to institute the IGF. It is worth noting the following excerpt from the initial application, in which the adequacy of this type of legal remedy is justified because of the non-observance of the State's power-duty to exercise its tax jurisdiction:

> According to the fundamental principle of the Republican Rule of Law, political power must be exercised for the realization, not of private interests, but the common good of the people (res publica). It follows that all competence of public bodies, instead of simple faculty or subjective law, undoubtedly represents a power-duty. When the Constitution of the Republic provides that the Legislative are "Powers of the Union, independent and harmonious with each other" (art. 2), it reinforces the principle that has just been remembered, because when the State's bodies constitutionally endowed with exclusive competence cease to exercise these powers-duties, the fundamental princi-

MERITUM LAW JOURNAL • v.15 • n.4 • p. 165-186 • 2020

> ple of the rule of law is severely undermined. The specific judicial guarantee against this serious State's dysfunction is the action of unconstitutionality for omission [...]. (BRAZIL, 2019)

Finally, and what is most valuable, it is up to the Brazilian population itself to claim the fundamental rights that belong to it, having already seen progress in this direction, as, as reported at the beginning of this chapter, Oxfam studies demonstrated an evolution in the awareness of society about the need for a revision of the regressive character of the current tax system, in addition to the increase in government investments in social matters (OXFAM BRAZIL, 2019).

In recent months, the economic and social crisis caused by the coronavirus pandemic has increasingly highlighted and exacerbated the country's situations of social and economic inequality. It is clear that the risk of contamination and the paralysis of the activities resulting from it attack without distinction, but most of the infected individuals will be precisely the one who does not have resources to escape agglomerations, receiving wages at home and providing the pantry with online purchases, while the immense mass of unemployed is composed mainly of the poorest paid labor (NEVES, 2020).

It is now, therefore, more than ever, that the Wealth Tax, with all its vast potential for redistribution and curbing the ills of poverty, must come to the fore as an instrument in favor of Brazilian society, ultimately competing with the taxing entity. institute it, fulfilling its constitutional duty regarding the exercise of tax legislative activity.

5. CONCLUSIONS

The Federal Constitution of 1988, due to its leading character, was conceived with an undeniable transformative purpose. Thus, more than a merely symbolic document, the constitutional text effectively aims to intervene in the factual reality in which it is inserted, altering it and shaping it in the molds of what it considers necessary for its prosperity.

Brazil has one of the highest rates of misery and concentration of income around the world, a scenario that is gradually worsened by the taxation model adopted by its tax system, since, to the extent that the amounts collected are mostly composed of taxes on consumption tends to record those economically less favored social segments more harshly. This situation is the reason why one of the fundamental objectives of the Constitution is, precisely, the transformation in the portrait of inequality and poverty existing in the country.

Given this context, the Magna Carta links the State's action, in all its extension, to the satisfaction of the ends it pursues. Thus, there is the conformation of a normative duty, which, unobserved, results in an unconstitutional omission, capable of being challenged through its legal actions and popular claims.

It so happens that the State, for its maintenance and for carrying out its activities, depends on the expenditure of public revenues. Especially concerning the promotion of fundamental social rights, essential for the fulfillment of the constitutional objective of eradicating poverty, it is essential that adequate funding be obtained for public policies capable of carrying them out.

Thus, since taxation is the main collection instrument for public coffers, it is not immune to constitutional guidelines. If the Constitution orders the positive performance of all the Constituted Powers, it is certain that it also determines that taxes are implemented, since without them, there is no collection and, without collection, there are no factual means for the Public Administration to comply with its other duties.

The Wealth Tax, in this sense, is one of the collection taxes directly dependent on public policies promoting fundamental social rights, insofar as there is an explicit constitutional provision for linking the entirety of its revenues to the Fund for Combating and Eradicating Poverty, that is responsible for subsidizing supplementary actions for housing, education, health, nutrition, among other programs of distinct social interest.

Ultimately, there is no room for the legislator to opt for the non-institution of the IGF, because, under the logic presented, the Constitution does not allow the State's omission to frustrate the achievement of the fundamental objectives of the Republic. Thus, despite being treated as dogma by the Brazilian advertising doctrine, the concept of facultatively as an inherent attribute in the exercise of tax competence does not subsist.

Therefore, it appears that, by allocating the proceeds from the collection of the Wealth Tax to the Fund for Combating and Eradicating Poverty, the constitutional text requires that it be implemented. Failing to comply with this commandment, there is flagrant unconstitutionality in the stance of the federal legislator, who is already slow in approving the complementary law necessary to make the tax feasible.

Evidence of illegality in the position of the law enforcement agency, it is crucial to start demanding a response from the State regarding such an omission, pressing it to proceed with the complementary bills in process and, in case it remains in contempt of express constitutional imposition, handling direct actions of unconstitutionality before the Federal Supreme Court so that due control is exercised under the action of the Legislative Power. According to, this research contributes to the IGF theme, by investigating its institution not as a mere political choice, but as a constitutional duty. Thus, it is evident the need to question certain dogmas of Brazilian advertising doctrine, which cannot be reproduced to the detriment of the dictates of the Constitution itself.

Furthermore, the analysis of the Wealth Tax as a fair and legally necessary tax is especially relevant in the current Brazilian scenario. Faced with the widespread social and economic crisis due to the pandemic resulting from Covid-19, the country has become a fertile ground for discussion about the implementation of new tax measures capable of curbing the growing trends of poverty and inequality in the country.

Under, the present study had some limitations that deserve to be highlighted. Firstly, there are not many countries with the same level of underdevelopment that adopt, or have adopted at any time, such a tax model for a more similar comparison parameter. Also, although the unconstitutional omission of the non-institution of the IGF was discussed in this paper, it is worth mentioning that the aforementioned Direct Action of Unconstitutionality by Omission (ADO) n ° 55 of the Federal District, proposed by the Socialism and Freedom Party (PSOL), in October 2019, has not yet been judged.

In addition, research on the subject of the link between the Wealth Tax and the Poverty Combat and Eradication Fund is still relatively scarce. Thus, future investigations must be conducted in this direction, to discuss possibilities to help those who are socially fragile.

BIBLIOGRAPHIC REFERENCES

ARGENTINA. Ministerio de Hacienda. **Subsecretaria de Politica Tributaria Informe sobre la recaudación tributaria III trimestre de 2019**. Buenos Aires. Disponível em: https://www.argentina.gob.ar/sites/default/files/it_iii_2019.pdf. Acesso em: 13 jul. 2020.

ATALIBA, Geraldo. **Hipótese de incidência tributária**. 5. ed. São Paulo: Malheiros, 1998.

BARCELLOS, Ana Paula de. Neoconstitucionalismo, direitos fundamentais e controle das políticas públicas. **Revista de Direito Administrativo**, Rio de Janeiro, v. 240, p. 83-103, abr./jun. 2005. Disponível em: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/43620/44697. Acesso em: 20 jun. 2020.

BARROS, Maurício. **A efetivação dos direitos sociais por medidas fiscais e financeiras** – instrumentos para a superação do subdesenvolvimento. 2013. Tese (Doutorado em Direito Econômico, Financeiro e Tributário) – Faculdade de Direito, USP, São Paulo, 2013. Disponível em: https://www.teses.usp.br/teses/disponiveis/2/2133/tde-02122016-093313/publico/TESE_Mauricio_Barros.pdf. Acesso em: 18 jul. 2020.

BELLO, Enzo; BERCOVICI, Gilberto; LIMA, Martonio Mont'Alverne Barreto. O Fim das Ilusões Constitucionais de 1988?. **Revista Direito e Práxis**, Rio de Janeiro, v. 10, n. 3, p. 1769-1811, set. 2019. Disponível em: https://www.scielo.br/pdf/rdp/v10n3/2179-8966-rdp-10-03-1769.pdf. Acesso em: 20 jun. 2020.

BORGES NETTO, André Luiz. **Competências legislativas dos Estados-membros**. 1. ed. São Paulo: Revista dos Tribunais, 1999.

BRASIL. (Constituição 1988). **Constituição da República Federativa do Brasil de 1988**. Brasília, DF: Presidência da República. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 08 jul. 2020.

BRASIL. Receita Federal. **Carga Tributária no Brasil – 2018 (Análise por Tributos e Base de Incidência)**. Brasília, mar. 2020. Disponível em: https://receita.economia.gov.br/dados/receitadata/estudos-e-tributarios-e-aduaneiros/estudos-e-estatisticas/carga-tributaria-no-brasil/ctb-2018-publicacao-v5.pdf. Acesso em: 28 set. 2020.

BRASIL. Supremo Tribunal Federal. **Ação direta de inconstitucionalidade nº 55/DF**. Requerente: Partido Socialismo e Liberdade (P-SOL). Intimado: Congresso Nacional. Relator: Min. Marco Aurélio. Brasília, 2 de outubro de 2019. Disponível em: http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5786819. Acesso em: 23 jul. 2020.

BUCCI, Maria Paula Dallari. Método e aplicações de abordagem direito e políticas públicas (DPP). **Revista Estudos Institucionais**, Rio de Janeiro, v. 5, n. 3, p. 791-832, set./dez. 2019. Disponível em: https://estudosinstitucionais.com/REI/article/view/430/447. Acesso em: 26 jul. 2020.

BUFFON, Marciano; ANSELMINI, Priscila. O imposto mundial sobre o capital: da sua relevância sócio-jurídica para a redução da desigualdade de renda e patrimônio, a partir de Piketty. **RDIET**, Brasília, v. 12, n. 1, p. 1-26, jan./jun. 2017. Disponível em: https://portalrevistas.ucb.br/index.php/RDIET/article/view/8186. Acesso em: 28 set. 2020.

CALIENDO, Paulo. Neoconstitucionalismo e Direito Tributário. **Revista da AJURIS**, Rio Grande do Sul, v. 40, n. 129, p. 199-223, mar. 2013. Disponível em: http://ajuris.kinghost.net/OJS2/index.php/REVAJURIS/article/view/313/248. Acesso em: 20 jun. 2020.

CANOTILHO, José Joaquim Gomes. **Constituição Dirigente e Vinculação do Legislador**: contributo para a Compreensão das Normas Constitucionais Programáticas. 2. ed. Coimbra: Coimbra, 2001.

CARVALHO JÚNIOR, Pedro Humberto Bruno de. As discussões sobre a regulamentação do Imposto Sobre Grandes Fortunas: a situação no Brasil e a experiência internacional. **Nota Técnica do IPEA,** Rio de Janeiro, p. 1-50, out. 2011. Disponível em: http://repositorio.ipea.gov.br/handle/11058/5755. Acesso em: 10 jun. 2020.

CAPELEIRO, Pedro Igor Evangelista de O.; SILVA, Carlos Sério Gurgel da. Imposto sobre Grandes Fortunas: da sua regulamentação ao necessário contrafluxo da carga tributária indiretamente aplicada sobre o consumo. **Revista Jurídica Luso-Brasileira**, Lisboa, ano 5, n. 5, p. 1415-1461, 2019. Disponível em: https://www.cidp.pt/revistas/rjlb/2019/5/2019_05_1415_1461.pdf. Acesso em: 01 out. 2020.

COSTA, Ilton Garcia da; CARDOSO, Henrique Ribeiro; SANTOS NETO, José Leite dos. Can Tax Justice Rearrange An Unfair System? The Brazilian Case. **Revista Jurídica**, Curitiba, v. 2, n. 51, p. 502-523, 2018. Disponível em: http://revista.unicuritiba.edu.br/index.php/RevJur/article/viewFile/3084/371371618. Acesso em: 08 jul. 2020.

DIFINI, Luiz Felipe Silveira; JOBIM, Eduardo de Sampaio Leite. Estado fiscal, tributação e os critérios de justiça no direito tributário. **Revista da Faculdade de Direito da UFRGS**, Porto Alegre, n. 41, p. 278-304, dez. 2019. Disponível em: https://seer.ufrgs.br/revfacdir/article/view/95205. Acesso em: 12 jul. 2020.

ELOI, Pilar de Souza e Paula; LOPES, Yara Almeida. A não regulamentação do IGF e os entraves que o rodeiam: Um estudo sobre o porquê da não normatização dessa espécie tributária. **Em tempo**, Marília, v. 15, p. 107-129, 2016. Disponível em: http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_informativo/bibli_inf_2006/Em-Tempo_v.15.06.pdf. Acesso em: 20 maio 2020.

GRAU, Eros Roberto. **A ordem econômica na Constituição de 1988**. 14. ed. São Paulo: Malheiros, 2010.

GUERREIRO, Gabriela. Senado aprova prorrogação da vigência do Fundo de Combate e Erradicação da Pobreza. **Folha de São Paulo**, São Paulo, 7 de julho de 2020. Disponível em: https://www1.folha.uol.com.br/poder/763570-senado-aprova-prorrogacao-da-vigencia-do-fundo-de-combate-e-erradicacao-da-pobreza.shtml. Acesso em: 05 jul. 2020.

HESSE, Honrad. **A força normativa da Constituição**. Tradução: Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris, 1991.

HOLMES, Stephen; SUSTEIN, Cass. **El costo de los derechos**: Por qué la libertad depende de los impuestos. Tradução: Stella Mastrangelo. 1. ed. Buenos Aires: Siglo Veintiuno, 2011.

LAUDICINA, Paul; PETERSON, Erik. **The 2020 Kearney Foreign Direct Investment Confidence Index**. 16 de junho de 2020. Disponível em: https://www.kearney.com/documents/20152/17744880/The+2020+Kearney+Foreign+Direct+Investment+Confidence+Index.pdf/18e45f29-867f-2cad-1899-8294b94e89d5?t=1592240888756. Acesso em: 01 out. 2020.

LIMA FILHO, João Almeida de Barro. **A distribuição da competência legislativa tributária no Brasil: a obrigatoriedade do seu exercício**. 2003. Dissertação (Mestrado em Direito) – UFPE, Recife, 2003. Disponível em: https://repositorio.ufpe.br/bitstream/123456789/4354/1/arquivo5499_1.pdf. Acesso em: 05 jul. 2020.

LOWI, Theodore J. American Business, Public Policy, Case-Studies and Political Theory. **World Politics**, Cambridge, v. 16, n. 4, p. 677-715, jul. 1964. Disponível em: https://www.cambridge.org/core/journals/world-politics/article/american-business-public-policy-case-studies-and-political-ory/6621C1B577BB52D00AFBD70F82B94C2D. Acesso em: 08 jul. 2020.

LUCENA, Pedro Flávio Cardoso. Competência tributária e facultatividade: conceitos jurídicos logicamente incompatíveis. **Revista de Direito Tributário Contemporâneo**, São Paulo, v. 9, p. 187-206, nov./dez. 2017.

MODESTO, Paulo Eduardo Garrido. Inconstitucionalidade por omissão: categoria jurídica e ação constitucional específica. **Doutrinas Essenciais de Direito Constitucional**, [*s. l.*], v. 5, p. 1203-1230, maio 2011.

MILÁ, Marc Morgan. **Income Concentration in a Context of Late Development: An Investigation of Top Incomes in Brazil using Tax Records***, 1993-2013.* 2015. Dissertação (Mestrado em Políticas Públicas e Desenvolvimento) – Paris School of Economics, Paris, 2015. Disponível em: http://piketty.pse.ens.fr/files/MorganMila2015.pdf. Acesso em: 03 jul. 2020.

NEVES, Ernesto. A pandemia expõe e agrava as desigualdades sociais no planeta. **Veja**, Rio de Janeiro, n. 2689, ano 53, n. 23, 29 maio 2020. Disponível em: https://veja.abril.com.br/mundo/a-pandemia-expoe-e-agrava-as-desigualdades-sociais-no-planeta/. Acesso em: 20 jul. 2020.

OLIVEIRA, Fabrício Augusto de; BIASOTO JÚNIOR, Geraldo. A reforma tributária: removendo entraves para o crescimento, a inclusão social e o fortalecimento da federação. **Revista Política Social e Desenvolvimento**, [*s. l.*], ano 3, nov. 2015. Disponível em: http://plataformapoliticasocial.com.br/wp-content/uploads/2015/11/revista-pps-25_5-11.pdf. Acesso em: 03 jul. 2020.

OXFAM BRASIL. **Relatório "A distância que nos une: um retrato das desigualdades brasileiras"**, set. 2017. Disponível em: https://www.oxfam.org.br/um-retrato-das-desigualdades-brasileiras/a-distancia-que-nos-une/. Acesso em: 23 jun. 2020.

OXFAM BRASIL. **Relatório "Nós e as Desigualdades**", jun. 2019. Disponível em: https://www.oxfam.org.br/um-retrato-das-desigualdades-brasileiras/pesquisa-nos-e-as-desigualdades/pesquisa-nos-e-as-desigualdades-2019/?_ga=2.49432036.330511726.1595133669-697185239.1595133669. Acesso em: 14 jul. 2020.

RIBEIRO, Maria de Fátima; NUNES, Geilson; ALMEIDA, Patrícia Silva de. O desenvolvimento dos direitos fundamentais através da tributação: políticas públicas como fomento do bem-estar social. **Meritum***,* Belo Horizonte, v. 13, n. 1, p. 128-146, jan./jun. 2018.

Disponível em: http://www.fumec.br/revistas/meritum/article/view/5827. Acesso em: 26 jul. 2020.

RISTEA, Luminita; TRANDAFIR, Adina. Wealth Tax Within Europe in the Context of a Possible Implementation in Romania: the existing Wealth Tax and its decline in Europe. **Annals of the University of Petrosani Economics**, Bucareste, v. 10, n 2, p. 299-306, 2010. Disponível em: https://core.ac.uk/download/pdf/25851962.pdf. Acesso em: 29 set. 2020.

RODRIGUES, Hugo Thamir; SCHMIDT, Marguid. A concretização do princípio da dignidade da pessoa humana como legitimizadora da tributação no Estado Democrático de Direito: solidariedade e neoliberalismo. **Revista Jurídica**, Curitiba, v. 4, n. 45, p. 154-179, 2016. Disponível em: http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/1786/1174. Acesso em: 07 jul. 2020.

ROESEL, Claudiane Aquino; FERREIRA, Maria Flávia de Freitas. A tributação como instrumento de justiça social. **Meritum**, Belo Horizonte, v. 12, n. 1, p. 196-210, jan./jun. 2017. Disponível em: http://www.fumec.br/revistas/meritum/article/view/5216/pdf. Acesso em: 24 jul. 2020.

SALVADOR, Evilasio; TEIXEIRA, Sandra Oliveira. Orçamento e políticas sociais: metodologia de análise na perspectiva crítica. **Revista de Políticas Públicas**, São Luís, v. 18, n. 1, p. 15-32, jan./jul. 2014. Disponível em: http://www.periodicoseletronicos.ufma.br/index.php/rppublica/article/view/2681/700. Acesso em: 06 jul. 2020.

SCHMIDT, João Pedro. Para estudar políticas públicas: aspectos conceituais, metodológicos e abordagens teóricas. **Revista do Direito**, Santa Cruz do Sul, v. 3, n. 53, p. 119-149, set./dez. 2018. Disponível em: https://online.unisc.br/seer/index.php/direito/article/view/12688. Acesso em: 26 jul. 2020.

SENADO debate quatro propostas de imposto sobre grandes fortunas. **Senado Notícias**, Brasília, 27 mar. 2020. Disponível em: https://www12.senado.leg.br/noticias/materias/2020/03/27/senado-debate-quatro-propostas-de-imposto-sobre-grandes-fortunas. Acesso em: 08 jul. 2020.

SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 37. ed. São Paulo: Malheiros, 2014.

SIQUEIRA, Dirceu Pereira; PETRIS, Maria Eduarda Pires. Reserva do possível e os direitos sociais: da previsão normativa a concretização. **Revista Jurídica**, Curitiba, v. 1, n. 46, p. 188-203, 2017. Disponível em: http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/2045. Acesso em: 26 jul. 2020.

Received/*Recebido:* 27.07.2020.

Approved/*Aprovado:* 25.10.2020.

BETWEEN DWORKIN'S LIBERALISM AND LUIGI FERRAJOLI'S GARANTISM - THEORETICAL APPROXIMATIONS AND DIVERGENCES

ENTRE O LIBERALISMO DE DWORKIN E O GARANTISMO DE LUIGI FERRAJOLI – APROXIMAÇÕES E DIVERGÊNCIAS TEÓRICAS

Italo Farias Braga[1]
Natércia Sampaio Siqueira[2]

MERITUM MAGAZINE • v.15 • n.4 • p. 187-201 • 2020

ABSTRACT

The present review proposes compare two different ways of understanding the law, in order to point out their approximations and dissimilarities and with this, better debug the discretion of the legal practice. In order to do so, it was invested in the comparative analysis between Dworkin's theory and Ferrajoli's, both because they are very attractive to contemporary law, and because they imply different forms of conception of law with a supposed inheritance of positivism and jusnaturalism. For this, through a bibliographical research, the Dworkin theory was expose, at a first moment, to later address the one of Ferrajoli. In a third moment, the comparative analysis between the two is carried out and it concludes by the practical approximation of one and the other, because in both the dialogue between law and morality is possible. Nevertheless, from the different discourse on the relation between law and morality, there are different possibilities for the right and the moral in each of them.

Keywords: Liberalism. Luigi Ferrajoli. Ronaldo Dworkin. Right and moral. Comparative analysis.

1 Doctoral student in Constitutional Law at the University of Fortaleza. Master of Laws from the University of Fortaleza. Researcher at the Laboratory of Criminal Sciences at the University of Fortaleza. Professor at the University Center Farias and Uninassau University Center. Lawyer. ORCID iD: https://orcid.org/0000-0002-7351-8498. E-mail: italofbraga@gmail.com.

2 Doctor in Law from the University of Fortaleza. Full Professor of the Stricto Sensu Graduate Program in Constitutional Law at the University of Fortaleza. Fiscal Attorney of the Attorney General's Office of the Municipality of Fortaleza. naterciasiqueira@yahoo.com.br.

How to cite this article/Como citar esse artigo:
BRAGA, Italo Farias; SIQUEIRA, Natércia Sampaio. Between Dworkin's liberalism and Luigi ferraiolo's garantism - theoretical approximations and divergences. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 187-201, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.7961.

RESUMO

O presente trabalho se propõe a comparar dois modos diversos de compreensão do direito, sob o propósito de assinalar suas aproximações e dessemelhanças e, com isto, melhor depurar a descrição da prática jurídica. Para tanto, investiu-se na análise comparativa doutrinária entre a teoria de Dworkin e Ferrajoli, tanto porque se mostram muito atrativas ao direito contemporâneo, como porque implicam diferente forma de concepção do direito com pretensa herança do positivismo e jusnaturalismo. Mediante pesquisa bibliográfica, expõe-se, a um primeiro momento, a teoria de Dworkin, para depois abordar a de Ferrajoli. Num terceiro momento, analisa-se de forma comparativa ambas as abordagens e conclui-se pela aproximação prática de uma e de outra, pois nestes modos teóricos se possibilitam o diálogo entre direito e moral. Não obstante, do diferente discurso sobre a relação entre direito e moral resultam diferentes possibilidades ao direito e à moral no âmbito de cada uma delas.

Palavras-chave: *Liberalismo. Luigi Ferrajoli. Ronaldo Dworkin. Direito e moral. Análise comparativa.*

1. INTRODUCTION

Justice has been a recurrent theme in philosophy and law throughout human history. Thus, in the course of time, aporetic questions, such as freedom and equality, have constituted the framework of ample discussions to contemporary jurists, who are inspired by sources such as jusnaturalism, juspostivism and the very interfaces between law and morality. Thus, the conception of law and justice is faced in its own way by Ronald Dworkin and Luigi Ferrajoli.

The academic interest in analysing the theories of these authors is justified by the fact that they have impacted the understandings of law and the directions taken by courts worldwide. On the one hand, Dworkin was - and still is - a methodological and theoretical foundation. On the other, Ferrajoli presents a theory that has been consolidated as the foundation of the limitations of the State in a post-positivist model, whose guidelines are also taken on a doctrinal scale. Thus, Dworkin and Ferrajoli represent facets of legal ideas that oppose and complement each other for the understanding of fair law.

In this way, the discussion about which models of rule of law are sufficient to guarantee the best legal security gains relevance, facing the limitations of the separations between law and moral, facing the liberal visions of the world. Above all, there is in the discussions the need to guarantee the comprehensibility of a just law, by the legal security of the liberal law and which is effective in dealing with the problems caused by classical positivism.

In this way, questions remain, such as what would be the decisional models proposed by Ronald Dworkin and Luigi Ferrajoli to deal with the problem of deciding well, facing the liberal paradigms of equality of the authors?

The objective of this work is then to understand the systematics of Ronald Dworkin's thought and subsequently Luigi Ferrajoli's theory, in the context of the moral of freedom and equality and the applicability of the just law, through legal certainty facing the problems of juspositivism.

These authors invest in different methodological discourses to explain law, which have proven to be paradigmatic: the positivist discourse on the one hand and the hermeneutic discourse on the other. Otherwise, the different methodologies proposed for legal practice imply different theories on the relationship between law and morality. In this panorama, the present article is dedicated to the comparative analysis of the two conceptions of law, that of Ferrajoli

and that of Dworkin, with the purpose of highlighting their similarities and differences, in order to make them clearer in their outlines.

Since this work proposes a comparative analysis between two thinkers and their conceptions of law, it presents an eminently bibliographical nature. In this sense, the present study approaches initially Ronald Dworkin's theory, especially the liberal model adopted that would be accomplished, elementarily, by the axiological official neutrality as a State restraint. Then, the theory of garantism is analyzed with the assumptions of Luigi Ferrajoli, who presents it as a general theory of law in a neo-positivist clothing that would be appropriate to neo-constitutionalism.

In a third moment, the conceptions of Ferrajoli and Dworkin are compared in order to seek approximations and divergences between them. At the end, we conclude that, although the methodological discourses are different, in practice, Ferrajoli's post-positivism is close to the Dworkian theory, since it enables an intense dialogue between law and morality through argumentative efforts. Nevertheless, this observation generates a double warning: a) even if we abstract from the discourse and focus on practice, the difference in the treatment of the relationship between morality and law by the two theories results in different ultimate foundations of law, with implications in some areas, especially international law; b) even if in both theories there is a different emphasis on the relevance of morality to law, philosophy should be taken seriously in both, so that law does not become a kaleidoscope of opinions without a solid foundation.

MERITUM MAGAZINE • v.15 • n.4 • p. 187-201 • 2020

2. RONALD DWORKIN'S THEORETICAL FOUNDATIONS

Equality and freedom are fundamental themes in the analytical framework of Ronald Dworkin (DWORKIN, 2000), who proposes a liberal model of state that conforms to a theory of justice whose axiological basis is committed to the content of equality: people are equal to the extent that the state treats with equal consideration the various models and choices of life. In this way, freedom and equality, as the content of justice, would imply material and discursive limitations on the State, but would also demand the assumption of duties by private individuals and by the public authority to ensure equality of resources - equalisation of environmental and personal differences so that all have equal opportunities to develop within their choices.

It goes further: for liberal theories, be they constituted by the classics, such as Locke, Kant, Mill or by contemporaries, such as Dworkin, Rails and even Ferrajoli, restrictions to freedom only fit into a supposedly democratic legal system upon plausible, rational and legitimate justification. In this sense, Dworkin would be proposing a model of freedom to which the axiological neutrality of the state would be an elementary condition, which implies abstentions, but also actions, in order to enable the exercise of personal formulations of each individual. (IOSA, 2017).

Thus, the limits for state intervention are not the exclusive result of the legal claim, but mainly of the philosophical understanding from which the interpretation of law derives. Thus, even under the positivist bias, acceptable by part of the liberal thought, or by a hermeneutic

thought more built in the jurisprudential view, the philosophical constitution drives the right (MELO; POMPEU, 2017).

It is important, however, not to lose the perspective that the claim to justify equal freedom as a parameter of limitation, but also of information and guidance of the State, is derived from the previous axiological conception that each human being is equal in dignity and has equal right to the equitable search for his best personal portion, thus understood the set of goods and rights that best suit the life model established by each person to himself. As each person is equally worthy to any other, each one may choose their own life model, without the State intervening - significantly - except, and from here we return to the Kantian warning, if personal choices interfere, directly and fundamentally, in the freedom of others who are equally worthy.

Freedom and equality express facets of formal and material protection by the State, which are not achieved, as already warned, by the non-intervention or abstraction of the State from imposing or inducing some model of good life for all. Equality and freedom would constitute models of society in which the allocation of goods is allowed, which are a function of the conceptions of life adequate to the personal aspirations of equally worthy human beings, in a formal and material way (FACHIN; SCHAUMAN, 2008).

To justify the material content he attributes to equality, as an equal system of freedoms that ensure the exercise of individual autonomy, Dworkin develops the “metaphor” of the auction on the desert island. Thus, he describes a fable that deals with the problem of the division of goods on an island among castaways (DWORKIN, 2005). To test the justice of the To test the justice of the distribution method, he makes a series of propositions: first, he suggests that the equal distribution of goods be carried out. In this case, he concludes that the method is unjust, since it would result in an undeservedly large share to those who do not deserve it, as well as imply a bad distribution of scarce resources, since it would impose a specific share of good to the castaways that, due to this condition, would not adequately satisfy the personal interests of each one. This distribution methodology would not pass the test of greed (DWORKIN, 2005, p. 81), which is why the mechanical division of resources would be insufficient to establish a standard of equality qualified by the freedom and autonomy of individuals.

He then proposes another method: the distribution of equal amount of tokens to the castaways for the realization of a dynamic similar to an auction. This system aims to reveal the market as a “just” instrument for distributing economic goods, given that each person would spend their tokens on a personal strategy of life plans; that is, to the limit that brings them personal satisfaction. In this hypothetically fair system, each person would be left equally free and responsible to allocate their goods, but under the cost of the sum of personal choices. (DWORKIN, 2005).

The market, therefore, would respect the “prior” axiology based on equality of freedom and responsibility. This is because a system of distribution of wealth in society reveals itself to be fair to the extent that formatted by a mechanics that allows people to be equally free and responsible for their fate. In short: the auction, as a metaphor for the market, proves to be fair as a method of distributing goods, since it equally respects the various models of life by giving everyone equal freedom, resources and responsibility to amass their share of good without implying, therefore, a homogenizing or dictatorial construction (MONTARROYOS, 2013).

The concern with equality as a reference of law is a maximum that goes beyond Dworkin's conceptions. It has equality, or at least the absolute non-equality, respecting the ways of life, as an essential parameter for a democratic criterion and especially for a criterion of fair law application (MARCO, SANTOS, MOELLER, 2019).

Thus, we have in Dworkin's theory the axiological foundations or justifications of social institutes, which is given by showing according to the formal and material conditioning of justice. It is a fact that, outside the hypothetical plane, the issues of developing and improving instruments and mechanisms that observe the conditions of justice acquire great complexity. However, for the purposes of this paper, the aim is to highlight the Dworkian methodology of ascertaining the justice of the methods of distribution of social goods through their conformity to the conditions of equal dignity of the individual.

But beyond the fair criterion of distribution of economic goods, Dworkin also ventures into the fair criterion of distribution of rights. This would be representative democracy (DWORKIN, 2000, p. 288), which would be limited and conditioned by the prior axiology of equality, as much concerning the economy, as other areas of regulation, such as civil rights and bioethics. Dworkin, in this way, maintains the tension between the concept of fundamental rights and democracy: democratic process would be fair to the extent that the various individualities were equally respected, in order to ensure equal dignity to the different models of life (VIRGÜEZ RUIZ, 2015).

In this sense, the Dworkian concept implies that democracy, per se, would not be sufficient to constitute a just model. However, a just model could not be non-democratic. That is, a just model depends on the democratic conception that personal wills have equal weight and relevance, both in economic and political relations. Thus, the interference of the state is legitimized both in the democratic process and in the axiology that is prior and basic to it: the equal individual autonomy as an integrating limit of the right, which is not incompatible with decision making based on moral standards of specific conceptions of life models (KYRITSIS, 2016).

Thus, Dworkin presents a criticism to positivism, making use of the paradigm of interpretation, so that the positivist structure would not be the only one to shape the law (RODRIGUES, 2013). However, even in the face of the theoretical application in which positivism would be structurally wrong, Dworkin does not rule out legislation and decisions through cooperative models of law with legal certainty.

Dworkin also proposes the distinction between the majoritarian and the cooperative model. The majoritarian model would be the one in which the simple decision of the majority would be sufficient to interfere in the freedom of the minority, including the largest possible minority, be it the individual. A cooperative or partnership model, on the other hand, understands that, as much as there is the possibility of joint action and interference due to public values, one must respect the ways of life and the axiology that provides for equal dignity among human beings. Only through a cooperative system of partnerships would a fair constitution be feasible, and, therefore, interference in individual autonomy would be rational (GOODHEART, 2013).

A liberal and just interpretative model would not, therefore, discard legality, which could suggest a rapprochement with positivism. However, the cut of legality does not mean that the literal interpretation is the only possible, on the contrary, the legal bases are posited and interpreted through the axiological element that serves as the integrating league of law: the

equal dignity of individualities. Law, for Dworkin, is not performed in a semantic framing practice which would be performed by the respective factual description. Rather, the legal practice would be interpretative, it would take place in the effort of argumentation through coherent considerations from a common value axis. Before the law finds its legitimacy and validation in a functional and a priori methodological structure, it would be legitimised by the construction of a serious interpretation, which, before venturing into the factual description of how it happens, proposes to present itself in its best lights.

MERITUM MAGAZINE • v.15 • n.4 • p. 187-201 • 2020

3. THE LEGAL GUARANTEEISM

The theory of garantism emerges as a structuring legal theory for the formulation of a general theory of law and as a parameter of post-positivist justice. In this way, it brings up the validity of legal rules and the vectors of normative application, so that the theoretical conceptualization of Ferrajoli's ideas is indispensable to establish the epistemological framework on which, significantly, contemporary law rests.

Moreover, in this work it is verified that garantism, in the orbit of domestic law, as a reflection of a liberal theory, talks with Dworkin's theory, which would lead to a preliminary observation that it would not be incompatible with the logic of garantism. However, the previous verification is not a contradiction of ideas, so that the models of Ronald Dworkin and Luigi Ferrajoli complement each other in the compression of the best application of the law.

3.1 THE GENERAL THEORY OF LEGAL GARANTISM

The theory of legal guaranteeism, as proposed by Luigi Ferrajoli, constitutes a spectrum of ideas linked to the trunk of theories on law that have legality and the protection of individual liberties as their parameters. Although there is a reasonable misrepresentation of the concepts of guarantee linked to common sense, even in a pejorative way due to movements linked to groups that protect human rights, it is necessary to understand what guarantee theories effectively imply.

In the etymological plan, the word garantism originates from the neo-latin languages, so that it brought, in the primary texts, the idea of guardianship, protection and safeguard of the weakest. That is, garantism, initially, meant the guarantee of protection. At first, these terms were linked to the countries of civil law culture, such as Italy, Portugal and even Brazil, and related to negative freedoms, i.e., limitations of the state by law (IPPOLITO, 2011). It should be noted that there is not even an old English translation for garantism, which uses the word "garantism", whose construction was totally brought from the Roman-Germanic doctrine.

This term had, with the advent of the welfare state, a semantic enlargement, so that it is no longer limited to mean the guarantee of individual protection, or limitation of state discretion. Rather, it was extended to the appropriate means for the effective protection of that which was intended to be a right. Thus, it was imposed not only the individual protection of the weak-

est, but also the positive need for the implementation of a constitutional matrix of protection of individual freedoms and the implementation of social rights (IPPOLITO, 2011).

Luigi Ferrajoli, when analyzing the etiological origin of the term, gives to the word constitutionalism (or garantism) three senses. It should be mentioned that these meanings of the word are not to be confused with the dimensions described in the book Law and Reason (FERRAJOLI, 2014), but they complement their understanding. The first sense would be in the word garantism as "paleopositivism", because, for Ferrajoli, it would embody the revisiting of legal positivism with a bias towards material protection. The second interpretation of the term would be linked to the definitions of validity and validity, in relation to which garantism would imply the guarantee of validity and validity within a constitutional model of the norms understood as fair by that society. The third meaning of the word garantism appears in the political philosophy model, under which a general theory of law would be based on material bases to define, in a democratic and legitimate way, what a "good government" would be like (COSTA and VERAS NETO, 2016).

Therefore, it is extracted from the etiology of the term garantism the idea of guarantee, effectiveness, security, defense, preservation of individuals against state discretion. Thus, there is in garantism a law model and a general theory by which individual freedom is guaranteed through a system of protections and protections based on legality and constitutionality under formal and material aspects (AVILA, 2017).

The considerations of garantism as a theory exclusive to criminal law or criminal procedure are quite common in lay understanding. However, there is no academic parallel of exclusive linking of garantism to the criminal or criminal procedural sphere. Rather, Ferrajoli's ideas deal with a general theory of law by philosophical shades, since, as a professor, he is dedicated to teaching the disciplines of General Theory of Law and Analytical Philosophy (FERRAJOLI, 2014).

It is verified, thus, the application of the guaranteeist postulates in all branches of law. As an example, Fredie Didier (2011, p. 211) deals with the applicability of the garantist doctrine in the procedural scope, covering in this case the civil procedure. In this way, the doctrine is described as the one that would aim to protect the citizen against abuses of the state in a liberal model of limitations. Thus, for Didier (DIDIER, 2011), the system of process garantist stops treating it as a mere duel between parties and considers it by the necessary conformation to principles, such as the guarantee of adversarial proceedings, the need for improvement of judicial decisions and even the construction of a theory of argumentation based on legality coupled with the material effectiveness of those principles considered indispensable.

It is true that in the book Law and Reason by Luigi Ferrajoli (2014), it deals several times with matters directly linked to the material and procedural criminal area. However, it is not possible to deduce, let us say once again, that the so-called garantist system is restricted to these issues. What can be verified is that, as a liberal theory based on the concepts of legality and molded by the previous liberal aspiration of limiting state discretion, Ferrajoli works on an axiology that can be clearly applied to criminal law, a source of various kinds of discretion and where the syllogistic character is traditionally reinforced. Therefore, Ferrajoli's theories constituted a basis to curb punitivism and meddled in useful points to criminal sciences, criminology and criminal law and criminal procedure itself (FREITAS, MANDARINO, ROSA, 2017).

MERITUM MAGAZINE • v.15 • n.4 • p. 187-201 • 2020

The garantist notion is posed, then, as a liberal theory of eminently constitutional nature. Thus, it is verified that, for garantism, the protection of the citizen should be that embodied in the unnecessary non-intervention of the State, and this in any legal branch, whether procedural or material law, which refrains - it is believed - the imposition of life model or logic persecutory of citizens. In short, garantism would be a liberal model founded on legality and constitutionality, under the respect of fundamental guarantees (SERETTI, 2009).

The structure of the garantist system proposed by Luigi Ferrajoli for the protection of individual liberties, with liberal foundation, uses essentially the legality, but without disregarding the constitutional advances of positive safeguards. In this way, the double face of normative respect to the constitutional text is formatted in the garantist system. The first face manifests itself in the guarantee of no unnecessary intervention, while the second is revealed in the need for positive action of the state to guarantee that defined as fundamental to the citizen (CADEMARTORI; GRUBBA, 2012).

Therefore, the garantist system defines three (3) structuring axes: the first to be embodied in the normative material hierarchy of the Constitution by a dynamic of "strict legality" under the epistemological plan; the second to reveal itself as a critical instance of law and reality, in which the norm is evaluated for compatibility and effectiveness, in order to avoid teratological decisions based on a solid argumentation; and the third ventures into philosophy and political criticism, instances by which the law is legitimized to protect the purposes of the state and in which work the characteristics of democratic society in a broad sense, i.e. under the focus that the wills and decisions of the majority prevail, provided that the minimum limits of minorities are respected (FERRAJOLI, 2014).

Alexandre Moraes da Rosa deals with four fronts or dimensions of garantism. i) The first front is described as the need to verify the formal and material compatibility of the norm with the Constitution, hierarchical primacy that must be fulfilled by positive binding; ii) the second dimension is the verification of a system by the imperative of democratic effectiveness. In this dimension, it is assumed that the norms must be legitimate, which occurs when observing the rights considered as fundamental; iii) the third front is the binding of judicial activity to the law, according to which the magistrate is strictly subject to the norms. He would be, therefore, bound to legality and constitutionality; iv) finally, the fourth dimension would be concerned with working on the critical sense of legal science with the purpose of avoiding teratological decisions (ROSA, 2003).

In this way, garantism implies a general theory of law, understood as a democratic theory of justice, applicable to the several branches of legal knowledge because it has a constitutional character. Guaranteeing is the theory that preaches the democratic conformation of respect to the constitutional text. In this way, the terms proposed by Luigi Ferrajoli (FERRAJOLI, 2014), when formulating the structuring axes of general theory conducts that bind the Public Power, differentiates the mere validity and vigor of the norms produced, while classifying them between illegitimate and legally valid. Norms can only subsist in a legal system if they are materially adequate to it.

Therefore, garantism is understood as the process applicable to constitutionalized post-positivism. The garantist formulation intends to be a guide not only for the judicial decision, but also for the legislative formulation itself, by establishing parameters of State action based on the non-intervention and on the effective fulfillment of the constitutional provisions. More-

over, for the theory of warranties, the principles, as norms, should be positivized even if they represent previous axiology (FERRAJOLI, 2014).

Thus, in order to have a democratic system and consequently closer to justice, it would be necessary from the epistemological point of view the separation between three categories: i) what can be decided by the majority; ii) what should be decided by the majority; iii) what cannot be decided by the majority. In this way, the legal system is consolidated by the limitations between what cannot be decided by the majority, because it hurts minimum guarantees inherent to the human condition, diverging from those issues whose public interest predominates, so that in these should be decided by the majority or can be decided by the majority (FERRAJOLI, 2014).

For such is that the democratic dimension of garantism is understood as the sharing of powers, in which the adherence of each one to its function allows the creation and application of the norm in a substantial way, here understood as the one in which freedoms exist and are respected not only at the formal level. That is, for garantism, the legislature has its specific function in the functioning dynamics of the state, which is circumscribed to the decision on what should be decided - that is, on the creation of legitimate norms -, while the judiciary has the duty of legitimate application of the norms produced by the legislature, which it does through critical normative application on rational grounds (CADEMARTORI; CADEMARTORI, 2006). Therefore, in an effectively democratic system, not everything can be decided, while decisions are taken through the system of laws, especially the Federal Constitution, which limits the powers of the state.

In this context, the garantist theory does not rule out a previous axiological limitation that is, in a way, based on morality. It only understands that the guarantees formulated by the security of the positivist liberal model should not be removed, constituting support to be applied in conjunction with the principles that would be positivized in the system, as the need of each society, according to a legislative process shaped from values (ZANON JÚNIOR, 2015).

Therefore, the garantist model is the one in which the system of principles is constitutionalized. It invests in the construction of a formal model of operation, legitimation and validation of the law, but it does it in an airy way to morality, since the application of the rules can be mitigated by the adoption of a principiological material interpretation, under the critical concern of avoiding teratology in its decisions.

4. APPROXIMATIONS AND DIVERGENCES BETWEEN LUIGI FERRAJOLI AND RONALD DWORKIN

Initially it should be said that Ferrajoli and Dworkin constituted their works and their ideas in different correlations of legal space and mentality. Dworkin turned to writing based on North American hard cases, in order to seek a formulation of serious arguments for decisions in a system typically described as Common Law. On the other hand, Ferrajoli developed his theories in Italy, surrounded by Civil Law theories and after long periods of low stability in the Italian peninsula.

It is noticeable that both authors make logical distinction of principles and rules, as well as consider that the principles would be somehow involved in the rules, so that the rules should be removed when they confront principles (ZANON JÚNIOR, 2015). Moreover, this applicability of principles would be based on a prior axiology conformed in a supposedly universal value system.

But what closely calls attention is the sharing, in general features, of a liberal philosophy. Ferrajoli adopts the liberal caveat that the state should not be allowed to intervene in decisions and models of life, which he does by warning that one should ensure maximum effectiveness to the advances arising from the welfare state, for which the construction of a constitutional dynamic is elementary (AVILA, 2017). In the same vein, Dworkin proposes himself as liberal, both for the warning that the State treats everyone as equal to the extent that it equally respects the various models of life, from which results the official axiology of neutrality, as for the legal epistemology that adopts, in the sense that the interpretation of law is serious while coherent, which claims the effort of argumentation under the integrating element "of equality" in the liberal garb of equal consideration to the various models of good life (AGUILHERA PORTALES, 2015).

The assumption of the material content of equality as equal dignity of individualities constitutes a common point to both theories. If for Ferrajoli this would be realized in the impossibility of the State to interfere in an illegitimate way, i.e., to take the decision for whom it cannot take it or to decide on what it cannot decide, for Dworkin the limitations to the State also consubstantiate elementary concern in his work, whose central axis gravitates on the conditioning of legitimate governmental actions, even if justified by the will of the majority, to equal consideration to the various models of life, so that "democracy", when understood by the political process, would be limited by the essential nucleus that safeguards the equal dignity of individualities.

Nevertheless, it is important to point out the differences, the greatest relevance of which, on a theoretical level, is found in the relationship between law and morality. For the theories of guarantee, at least in a linguistic formulation, law and morality should be kept separate. The former would consist only in the material content of the right, when justified by public interest (BARRETO, 2016). However, the idea of a theoretical distancing between law and morality does not exempt philosophical thought (MELO; POMPEU, 2017). Philosophy starts as a paradigm to indicate how legal the moral will be, in the face of possible state limitations, so that even in the face of the difference the logic and completeness of the system is maintained.

Ronald Dworkin, in turn, treats the right from the moral. Since earlier writings, such as Empire of Law, Dworkin works on the "integrating" epistemological element as an adequate methodology to the practice of law: integrity of principles. Said element, in turn, already had a material content, flirting with the concept of equality as equal relevance of the various models of life. It is true that, at that first moment, the epistemology of the integrity of principles, as well as its material content, were understood as a specific way the North American political community sees and conceives itself.

Nevertheless, on the occasion of his penultimate book, Justice for Hedghogs, Dworkin adopts the metaphysical perspective of liberal axiology: it would be inherent to the person and not to a culture. The person would have two moral duties elemental to his dignity: self-respect and authenticity (DWORKIN, 2011). That is: he should take his life seriously - and not

treat it as a wasted opportunity -, which he does by building a life narrative consistent with his elementary values. This metaphysical construction of the person, otherwise, is an element that is considered to be more strongly Kantinian than jusnaturalist heritage. Following Kant's example, Dworkin gives the law a fundamentally anthropological character, since he conceives and shapes it in adequacy to the elementary moral duty to the rational person: but while in Kant the moral duty is revealed in the categorical imperatives, in Dworkin it manifests itself in the existential dimension of building a life coherent to what is effectively valued.

Another relevant aspect is that Dworkin, on Justice for Hedghogs, warns that the hedgehog knows only one thing, but "the" essential: the integrating element of things. This element, for Dworkin, which limits, conditions, inspires and justifies social institutes, such as law, economics, the market, the political process, presents a specific axiological content, as already mentioned. Here, morality and philosophy are prior to law: they are not an element of the theory of law, as it is for the constructions of positivist hue. For the North American, it is repeated, morality would be the right's guide, especially in those difficult cases, for which the law and precedent are insufficient (KYRITSIS, 2016).

It is important to draw attention to the point that began to be addressed above: different epistemological conducts on law and morality. In the theory of garantism, positivism stands out as a system of legitimation: morality is an element that can even justify law, but does not integrate it per se. Philosophy integrates the general theory of law. It would be understood from a legal perspective. Dworkin, on the other hand, and this since the beginning of his works, works on a theory of overcoming positivism or legal practice which he calls semantics. Abstracting himself from the modulation of a legitimation and validation dynamic, Dworkin adopts the epistemological perspective that law is interpretation, which should be carried out from an integrating axiological element: morality embodied in the equal dignity of individualities. But this intimate relationship between morals and law, it is important to emphasize, would not be involved in absolute freedom or discretion on the part of the judge. The decisions of hard cases pass mainly through the choice of the best possible decision, i.e., the one that through a serious argumentation represents the "best choice" among the possible legitimate decisions to the case (MARINHO, 2017). And the knowledge of a philosophy that is not colonized by law would prove to be absolutely necessary for the construction of this serious interpretation, which is the correct one as long as it remains consistent in the face of the various counterfactual arguments.

Despite an apparently distinct formulation of law, positivism has come very close to morality. See: although positivism, in its positivist perspective, insists on the legitimation of the norm by a formal epistemology, the adequacy to the matter and to the form prescribed in the superior norms by those of lower hierarchy, the emphasis on the material adequacy, especially when the Constitution adopts moral principles of semantic openness, implies an intense dialogue between morality and law. Law is being built on moral principles, not only in a perspective of prior, aprioristic justification, but incorporating it into its content. In these terms, the practice of garantism is not fundamentally different from the interpretative theory of law adopted by Dworkin, although the theoretical formulation on the relationship between law and morality is different.

5. CONCLUSION

The present work aimed to bring different and usual theories into the discourse of legal practice, for which purpose the writings of Ronald Dworkin and Luigi Ferrajoli were taken as paradigmatic elements, in order to explain the similarities and differences and understand the epistemological conceptions of law that mark the legal practices of contemporaneity.

Ronald Dworkin, as we have reported in the course of this article, has impacted jusophilosophy with the construction of an interpretative theory of law based on axiological arguments of the liberal order. By adopting an axiological basis founded on the equal dignity of the various models of life that inspires, conditions and legitimizes state intervention, Dworkin has demonstrated not only the compatibility, but also the indispensability of the market and the democratic political process as instruments for the realization of this liberal axiology.

Dworkian theory, in large part, was formulated through the analysis of concrete cases, which already implied the effort for serious legal argumentation as a criterion for the realization of law. It reveals, on the other hand, his US culture informed by common law. In this methodology, he refrains from working on a closed model of legitimation and validation of the law: Dworkin opposed the positivist theory of law by conceiving it as an interpretative practice that is carried out by the method of integration of principles - he consequently abandons the conception of pragmatism and conventionalism. Ronald Dworkin, it is good to stress, works the law as an interpretative enterprise of several aprioristic data, Constitution, laws, precedents, under the effort of coherence and fidelity to reveal itself in the integration of principles as a methodology to better build a solution for the concrete case.

Luigi Ferrajoli, on the other hand, has constructed the theory of garantism. From the epistemological point of view, such theory is formulated as a general theory of law, in the democratic context that finds in political philosophy the justification for the model of centralization and hierarchy of the constitutional rules as a liberal primacy of protection and tutelage of rights. In this way, garantism does not despise a philosophical axiology, since it incorporates it as an element of interpretation of law and limitation of the state: but it does it in a colonized way to a preconceived model of validation and realization of law. Perhaps it does so because the garantist ideas were formulated in a context of countries that adopt as legal methodology a rigid system of legality.

The sharing of a liberal philosophy guided by individuality, which demands propositions of limitation and legitimation of the State, reveals that the liberal aspirations of equality and freedom have informed, axiologically, the law, which, when confirmed in other comparative analyses, will serve as an important element to those who cultivate the cultural aspect as a legitimating source of legal practice. Nevertheless, the two authors have invested in different methodological discourses. Garantism presents traces of positivism, in an effort to adapt it to post-constitutionalism, while Dworkin completely rejects the positivist perspective of law, to which he attributes a semantic effort of discovery and explanation of a fact as opposed to an interpretative enterprise, which would be the true essence of law. However, garantism, by insisting on material adequacy as an element of legitimation and validation of norms, in the context of the positivization of values, brings morality into law, incorporates it into legal practice. Therefore, before investing in garantism or in the integrity of principles, one should be open to a serious and responsible knowledge of philosophy, which will often serve as the last

argumentative instance of law. The study of philosophy, not only as an appendix to the general theory of law, but in its broad sense, undermines subjectivism whose Trojan horse, in not rare cases, presents itself in the figure of semantic abstraction principles that propitiate interpretations without substance.

It is necessary to raise philosophy to a relevant level in legal experience, so that a responsible legal practice is carried out, which is assessed by the quality of argumentation. In practice, therefore, the distinction between the positivist exercise and that of the integrity of principles is losing much of its sharpness; nevertheless, the maintenance of different discourses still reveals relevant empirical differences, especially with regard to the grounds. Positivism, by insisting on a formal and closed system of validation and legitimation of law by a hierarchical normative chain, limits the practical reach of axiology as a founding element of law: it is in force while incorporated by legal norms. This perspective is especially relevant in the context of international law, when there is a debate about a universal axiology that determines all peoples, regardless of their history and culture.

Otherwise, the perspective that law has a hierarchical and formal legitimising dynamic ends up working in a different way from the conception of law as an interpretative enterprise based on a prior axiology. In the first case, the epistemological emphasis on the method of validation and legitimation tends to relegate philosophy to the subject of law. Be that as it may, one cannot forget the warning: philosophy should be treated with due seriousness and respect, so that it does not corrupt the legal practice by achisms that end up colonizing the law to particular modes and points of view.

REFERÊNCIAS

AGUILERA PORTALES, Rafael Enrique. Human rights as political triumphs in the constitutional state: the dilemma between communitarian and liberal democracy in Ronald Dworkin. **Probl. anu. filos. teor. law**, Mexico , n. 9, p. 377-408, Dec. 2015 . Available at http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S2007-43872015000100010&lng=es&nrm=iso. Accessed 10 Dec. 2017.

AVILA, Jheison Torres. La teoría del Garantismo: poder y constitución en el Estado contemporáneo. **Law Journal**, Barranquilla , n. 47, p. 138-166, June 2017 . Available at http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-86972017000100138&lng=en&nrm=iso. Accessed 10 Dec. 2017.

BARRETO, Andrea Sangiovanni. A critical analysis of Luigi Ferrajoli's garantista system before Louk Hulsman's abolitionism. **Freedoms Journal**. Jan/April. 2016. Available at: http://www.revistaliberdades.org.br/_upload/pdf/26/Liberdades21_EscolasPenais01.pdf . Accessed: 10 Dec. 2017.

CADEMARTORI, Daniela; CADEMARTORI, Sérgio. The relation between rule of law and democracy in Bobbio and Ferrajoli's thought. **Sequence: Legal and Political Studies**, Florianópolis, p. 145-162, Jan. 2006. ISSN 2177-7055. Available at: https://periodicos.ufsc.br/index.php/sequencia/article/view/15097/13752. Accessed on: 15 Nov. 2016. doi:http://dx.doi.org/10.5007/15097.

CADEMARTORI, Luiz Henrique Urquhart; GRUBBA, Leilane Serratine. The foundation of human rights and their relationship with fundamental rights from the garantist dialogue with the theory of reinvention of human rights. **GV Law Journal**, São Paulo, v. 8, n. 2, p. 703-724, Dec. 2012. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322012000200013&lng=en&nrm=iso. Accessed 10 Dec. 2017. http://dx.doi.org/10.1590/S1808-24322012000200013.

COSTA, Oswaldo Poll; VERAS NETO, Francisco Quintanilha. GARANTISMO À BRASILEIRA: A CRITICAL ANALYSIS IN THE LIGHT OF THE APPLICATION OF THE PRINCIPLE OF INSIGNIFICANCE. **Journal of the Law School UFPR**, Curitiba, PR, Brazil, v. 61, n. 3, p. 165 - 187, Dec. 2016. ISSN 2236-7284. Available at: http://revistas.ufpr.br/direito/article/view/46467/29839. Accessed on: 12 Aug. 2017.

DIDIER JR, Fredie. The three models of procedural law: inquisitive, dispositive and cooperative. In: Journal of Procedure. Vol. 36. n 198. Aug. Brasília: STJ, 2011. P.213-225. Available at: http://bdjur.stj.jus.br/jspui/handle/2011/80945. accessed on: 31 Aug. 2016.

DWORKIN, Ronald. **The sovereign virtue - The theory and practice of equality**. São Paulo: Martins Fontes, 2005.

DWORKIN, Ronald. **Justice for hedgehogs**. Cambridge: Havard University Press, 2011.

DWORKIN, Ronald. **A matter of principle**. Translation by Carlos Borges. São Paulo: Martins Fontes, 2000.

FACHIN, Luis Edson. SCHULMAN, Gabriel. **CONTRACTS, ECONOMIC ORDER AND PRINCIPLES: a dialogue between Civil Law and the Constitution 20 years later**. In: Bruno Dantas et. al. (Org.). Constitution of 1988, Brazil 20 years later. Brasília: Federal Senate, 2008, v. IV, p. 347-377).

FREITAS, Marisa Helena D'Arbo Alves de; MANDARINO, Renan Posella; ROSA, Larissa. Criminal Garantism for Whom? The Liberal Penal Discourse Facing its Deconstruction by Criminology. **Sequence (Florianópolis)**, Florianópolis , n. 75, p. 129-156, Apr. 2017. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2177-70552017000100129&lng=en&nrm=iso. Accessed on 10 Dec. 2017.

FERRAJOLI, Luigi. **Right and Reason**. Theory of Penal Garantism. 4th edition. revised. current. São Paulo: Revista dos Tribunais, 2014.

GOODHEART, E. Deal or No Deal. **Society**. 50, 3, 224-229, June 2013. ISSN: 01472011.

IPPOLITO, Dario. The Luigi Ferrajouli's garantism. In: **Journal of Constitutional Studies, Hermeneutics and Theory of Law (JCSHTL)**, jan-ju.2011. São Leopoldo: Unisinos, 2011.

IOSA, Juan. NEGATIVE FREEDOM, PERSONAL AUTONOMY AND CONSTITUTION. **Chilean. Law Journal**, Santiago , v. 44, n. 2, p. 495-518, agosto 2017. Available at http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-34372017000200495&lng=es&nrm=iso. accessed on 09 Dec. 2017.

KYRITSIS, Dimitrios. A New Interpretivist Conception of the Rule of Law. **Probl. anu. filos. teor. derecho**, México , n. 10, p. 91-109, dic. 2016 . available at http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S2007-43872016000100091&lng=es&nrm=iso. accessed 09 Dec. 2017.

MARCO, Cristhian Magnus; SANTOS, Paulo Júnior Trindade; MOELLER, Gabriela Samrsla. THE THEORY OF JUSTICE REVISITED BY THE THEORY OF INJUSTICE: DEMOCRACY AND LAW TO TALK ABOUT JUSTICE TODAY. **Thesis Juris Magazine**. V.8 n2. Available at: https://periodicos.uninove.br/index.php?journal=thesisjuris&page=article&op=view&path%5B%5D=14832&path%5B%5D=pdf accessed on 20 Mar. 2020.

MARINHO, Jefferson L. A. Ronald Dworkin's theory of integrity: a mathematical look at the correct answer thesis. **Prisma Jur**., São Paulo, v. 16, n. 1, p. 75-95, 2017. Available at: http://www4.uninove.br/ojs/index.php/prisma/article/view/7185/pdf_67. Accessed on 17 Jan. 2018.

MELO, Rafael Veras Castro; POMPEU, Gina Vidal Marcílio. law and philosophy: is it possible to build a coherent legal theory without philosophical reflection? **Revista Thesis Juris - RTJ**, eISSN 2317-3580, São Paulo, v. 6, n.2, p. 312-327, may/ago. 2017. Available at: http://periodicos.uninove.br/index.php?journal=thesisjuris&page=article&op=view&path%5B%5D=9005&path%5B%5D=3839. Accessed 1 Apr. 2019.

MONTARROYOS H. Ronald Dworkin constitutional observatory: reconstructing liberalism from the book "Sovereign virtue: the theory and practice of equality". **Universitas Jus [serial online]**. January 2013;24(1):89-117. Available at: Academic Source, Ipswich, MA. Accessed: 06 Dec. 2017.

ROSA, Alexandre Moraes da. **What is legal garantism?** General Theory of Law. Florianopolis: Habitus, 2003.

RODRIGUES, Fernando. Criticism of positivism and interpretation. **Revista Direito e Práxis**. Vol. 4, n. 7. 2013, online, p. 305-318. Available at: http://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/8351/637.2 accessed 26 Mar. 2018.

SERETTI, Andre P. Fundamental rights, constitutional penal principles and penal garantism. **Revista Direitos Fundamentais & Democracia**. N 17. Jan-2015. Online, 2015. Available at: http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd. accessed 15 Nov. 2016.

VIRGÜEZ RUIZ, S.. DEMOCRACY, DISAGREEMENT AND CONSTITUTIONAL LAW. A REVISION OF THE TENSION BETWEEN CONSTITUTIONALISM AND DEMOCRACY IN THE DWORKIN-WALDRON DEBATE. (Spanish). Revista De Derecho Público, (35), 1-31. Online. Available at: https://derechopublico.uniandes.edu.co/index.php?option=com_content&view=article&id=541%3Ademocracia-desacuerdo-y-derecho-constitucional-una-revision-a-la-tension-entre-constitucionalismo-y-democracia-en-el-debate-dworkin-waldron&catid=42%3A35&Itemid=132&lang=es. Accessed on 28 Mar. 2020.

ZANON JÚNIOR, Orlando Luiz. LEGAL GARANTISM: THE EFFORT OF FERRAJOLI FOR THE IMPROVEMENT OF LEGAL POSITIVISM. **ESMESC REVISTA**, v. 22, n. 28, p. 13-38, 2015.

Received/*Recebido:* 01.06.2020.

Approved/*Aprovado:* 09.07.2020.

MERITUM MAGAZINE • v.15 • n.4 • p. 202-218 • 2020

THE IMPORTANCE OF COMPLIANCE FOR THE ACCOMPLISH OF PUBLIC GOVERNANCE IN MUNICIPAL ADMINISTRATION

A IMPORTÂNCIA DO COMPLIANCE PARA A EFETIVAÇÃO DA GOVERNANÇA PÚBLICA NA ADMINISTRAÇÃO MUNICIPAL

Pablo Esteban Fabricio Caballero[1]
Alfredo Copetti Neto[2]

ABSTRACT

This paper has the purpose of highlighting the importance of compliance programs in the administration, especially in municipalities, so that public governance can be accomplished. For this, deductive methodology is used through an essentially critical approach, so that the concepts involving the matter, the emergence and expansion of compliance in Brazil can be analyzed, as well as its relation with public governance. In the same way, considerations will be made regarding the adoption of this mechanism by the administration, starting from laws, guidelines and examples arising from the jurisdiction of the Union and the States. From that, the idea is to evidence the instruments of the compliance programs in the public sector and its fundamental application for greater effectiveness and improvement of municipal public governance. In the end, we conclude to be fundamental and positive the application of compliance programs as a tool for effectiveness of public governance in municipalities, especially because it has the consequence of reducing risks to the administration and the fact of present itself as an essential mechanism for greater ethics and efficiency in the public sector.

Keywords: Municipal Public Administration. Compliance. Governance. Integrity.

1 Bachelor of Laws from the State University of Western Paraná. Post-graduate student in Compliance and Corporate Integrity at PUC-MG. Secretary of the Legal Compliance Commission of OAB - Foz do Iguaçu. ORCID iD: https://orcid.org/0000-0002-4657-8903. E-mail: pablofabricio09@gmail.com.

2 Doctor in Theory of Law and Democracy at the Università degli Studi Roma Tre (UNIROMATRE), He has a postdoctoral degree at the University of Vale do Rio dos Sinos (UNISINOS) and a Master's in Public Law (Philosophy of Law) at the University of Vale do Rio dos Bells (UNISINOS). Visiting Professor at Universitá di Roma (La Sapienza), Adjunct Professor of Theory of Law at Paraná State University (UNIOESTE), Professor at PPG-G UniFG and Univel. CAPES Ad Hoc Consultant. He is a founding member of the "Centro di Studi di Diritto dellEconomia Brasile-Italia". Member of the Brazil-Italy-Spain Public Law Network. Member of the Brazilian Compliance Committee. ORCID iD: https://orcid.org/0000-0002-6997-9603. Email: alfredocopetti@yahoo.com.

How to cite this article/Como citar esse artigo:
CABALLERO, Pablo Esteban Fabricio; COPETTI NETO, Alfredo. The importance of compliance for effective public governance in municipal administration. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 202-218, 2020. DOI: https://doi.org/10.46560/meritum.v15i4.8072.

RESUMO

Este artigo tem por finalidade evidenciar a importância dos programas de compliance na administração, em especial nos municípios, para a efetivação da governança pública. Para isso, utiliza-se o método de abordagem dedutiva através de técnica essencialmente crítica, de forma que serão analisados os conceitos que envolvem a matéria, o surgimento e expansão do compliance no Brasil e sua relação com a governança pública. Da mesma forma, são feitas considerações acerca da adoção desse mecanismo pela administração, a partir de leis, orientações e exemplos surgidos da competência da União e dos Estados. A partir disso, a ideia é demonstrar as ferramentas dos programas de compliance no setor público e sua aplicação fundamental para maior efetivação e aprimoramento da governança pública municipal. Ao final, conclui ser fundamental e positiva a aplicação dos programas de compliance como ferramenta de efetivação da governança pública nos municípios, especialmente por ter como consequência a redução de riscos à administração e pelo fato de se apresentar como mecanismo essencial para o fortalecimento ético e eficiente no setor público.

Palavras-chave: *Administração Pública Municipal. Compliance. Governança. Integridade.*

1. INTRODUCTION

The rejection of the lack of ethics in the public and private sector has been growing, especially since the disclosure of numerous corruption and other illicit scandals and the resulting publicity given by the media to these events. As a result, corruption increasingly attracts the attention of society, whether on the national or international scene, requiring a united effort to combat it.

According to the Corruption Perception Index, created by Transparency International, a non-governmental organization based in Berlin, Germany, and considered the main indicator of corruption in the public sector in the world, Brazil reached its worst position in the historical series, with the position out of 106 out of 180 countries in 2019. The country's score was 35 points on a scale ranging from 0 (highly corrupt) to 100 (very healthy).[3]

Such a position is a worrying example, but it demonstrates the reasons for the increasing search for improving public governance and tools to fight corruption, whether by the public administration, private entities, or by the doctrine, which has increasingly dedicated greater space for these studies.

Based on this, this article focuses on the need to understand compliance as a tool to fight corruption, especially within the scope of municipal public governance, with the aim of contributing to its improvement.

Brazil has an enormous number and diversity of municipalities, in which the structure and capacity to control corruption and other illicit acts generally differ in a wide spectrum.

To carry out the investigation of this problem, the deductive approach method is used, with essentially critical technique, through exploratory, descriptive and explanatory research, based basically on legislation, doctrine and documentary research, to highlight the importance that compliance programs have in the search for a more integral and effective public governance in the municipalities.

3 For more information on the Corruption Perception Index, cf. INTERNATIONAL TRANSPARENCY. Corruption Perception Index 2019: Transparency International Brazil, 2020. Available at: https://transparenciainternacional.org.br/ipc/.

Therefore, it will be sought to verify how this improvement has been made and what are the possible paths for its success, based on guidelines from bodies such as the Comptroller General of the Union - CGU, as well as the examples of the others federation entities that can serve as a model for municipalities for a better formulation of compliance programs, which lead to alignment with public governance objectives. In the end, it will be sought to answer whether compliance programs contribute to the improvement of municipal public governance, and how they should be instituted to achieve this objective.

2. COMPLIANCE PROGRAMS AND PUBLIC GOVERNANCE

The expansion of a true culture for integrity in companies and organizations, and, more recently, in the public sector, found refuge in compliance programs, which began to be instituted in Brazil, mainly after the emergence of the Anti-Corruption Law (Law 12.846 / 2013, regulated by Decree nº 8,420 / 2015), and of the Law of State-owned companies (Law nº 13.303 / 2016, regulated by Decree nº 8,793 / 2016)[4].

The word compliance comes from the English verb to comply, which expresses, in an expanded sense, a state of being in accordance with certain established guidelines or standards, whether specifications or legislation. The term integrity, which is often used as a synonym for this, can be established as an essential value that is the cause of the compliance program, which not only guides it, but is a fundamental element of an entire integrity system. (OLIVEIRA; ACOCELLA, 2019, p. 81).

In practice, compliance programs, as a technique, are not just an organized addressing of internal audit or arbitration systems, as they go much further, revealing themselves as a kind of institutional acceptance guided by the preventive purpose, programmed by a series of conducts aimed at reducing the risks of the activity, and which encompasses the various decision-making perspectives of the business sphere. (SILVEIRA; SAAD-DINIZ, 2015, p. 255)

Appeared in the United States, compliance became relevant mainly after the appearance of the FCPA - Foreign Corrupt Practices Act, in 1977, which systematized the control of acts of corruption by American companies abroad. (SPORKIN, 1997, p. 271-272). Furthermore, its jurisdiction is capable of encompassing individuals from any other country that use means located in the United States to carry out acts of corruption. (VENTURINI; CARVALHO; MORELAND, 2019, p. 319).

The anti-bribery provisions of the Foreign Corrupt Practices Act - FCPA include a prohibition on paying, offering or promising to pay foreign government officials to influence any state act, or to influence employees to act or fail to act contrary to their legal obligation, or to induce the use of its influence before the government to gain business. (GLYNN; KOBRIN; NAÍM, 1997, p. 18).

4 Although the growth of the programs was considerable after the creation of the aforementioned regulations, compliance in Brazil emerged initially as a result of Law No. 9.613 / 1998, which provides for money laundering crimes, by establishing, in its articles 9, 10 11, the duty of information on the part of financial institutions to the competent authorities, under penalty of liability.

MERITUM MAGAZINE • v.15 • n.4 • p. 202-218 • 2020

However, the pioneering adoption by the United States to punish transnational corruption ended up creating a sense of business disparity in the top executive commands of American companies. It turns out that no other industrialized country had enacted or enforced similar standards, and, especially in the 1980s and 1990s, the Foreign Corrupt Practices Act - FCPA remained a very sensitive and controversial point for the American business community, especially because their business abroad now corresponds to an increasing share of the income of these corporations. (GLYNN; KOBRIN; NAÍM, 1997, p. 18).

Taking into account their diverse views on the Foreign Corrupt Practices Act-FCPA, the executives of North American multinationals were almost unanimous in their interest in greater equality of conditions, so that they encouraged the United States government to act for the standard's predictions to be internationalized or even to persuade other countries to adopt similar laws. (GLYNN; KOBRIN; NAÍM, 1997, p. 19).

These conditions were fundamental for the American government to increase the pressure for anti-bribery recommendations to be approved by international organizations and by the countries that participated in them. In 1994, two factors were fundamental when the Organization for Economic Cooperation and Development - OECD produced recommendations against international corruption: pressure from the US government for more serious actions against bribery, as well as an anti-corruption sentiment. that existed in Europe, which made it increasingly difficult for European governments to publicly oppose the initiative of the United States. (GLYNN; KOBRIN; NAÍM, 1997, p.19-20).

The process of globalization of the economy was, likewise, fundamental in bringing a new urgency to the problem. It turns out that this process of economic integration has increased the likelihood that the impacts of corruption will expand and end up influencing the entire global economy, so that globalization, by facilitating the occurrence of corruption, also served to highlight and combat it. (GLYNN; KOBRIN, NAÍM, 1997, p. 12-13).

Precisely as a result of this new concern with corruption and the historical context involved, there were several international commitments assumed by Brazil, such as, for example, the Inter-American Convention against Corruption, internalized in the Brazilian system as of Decree 4.410, of 7 October 2002 (BRASIL, 2002, online), the United Nations Convention against Corruption, internalized through Decree No. 5.687, of January 31, 2006 (BRASIL, 2006, online) and the Convention on Combating Corruption of Foreign Public Officials in International Business Transactions, of the Organization for Economic Cooperation and Development - OECD, internalized through Decree No. 3.678, of November 30, 2000. (BRASIL, 2000, online).

The purpose of the Inter-American Convention against Corruption, of the Organization of American States - OAS, was to raise collective awareness of the seriousness of the existing problem, in order to encourage actions to combat transnational corruption among states, and to focus especially on prevention, detection and sanction of corruption in the civil service and related activities. (BLOK, 2014, position 747).

Susan Rose-Ackerman (2001, p. 255), one of the most eloquent researchers on the subject, says that "the Convention requires a good degree of border cooperation and demands from countries that prohibit and punish international bribes."

Likewise, Brazil adhered to the guidelines in the Partnership for the Open Government or OGP - Open Government Partnership, an initiative that brings together nations and civil society

organizations in the search for the strengthening of democracies and in the fight against corruption, among others. (CGU, [2020b?]).

Therefore, from the international commitments assumed, there was a direction for Brazil to start adopting new tools in the fight against corruption and other illicit acts, as well as for the strengthening of constitutional democracy (COPETTI NETO, 2016, passim) and governance public.

Governance primarily originated at the corporate level, and was related to the historical moment in which business organizations moved away from the classic management model by the owner and moved to management by third parties, who were given the power and authority for management. from the company. However, many times, the disagreements between these new managers and the owners ended up generating conflicts of interest, so that each party had as a motto to obtain the maximum of their own benefit. (TCU, 2014, p. 11).

It turns out that corporate governance is a diffuse concept, which should not necessarily be applied solely and exclusively to business management, but that it can be used to preserve the environment, such as environmental governance, as well as to combat bribery and corruption in the public service, in the case of public governance. (MAZALLI; ERCOLIN, 2018, p. 16 apud Alves, 2001).

Public governance, therefore, had its origin in the idea of corporate governance, and can be understood as a system that defines the balance of power between citizens, government officials, senior management, managers and employees, with the purpose of enabling the prevalence of the common good over individual or group interests. (TCU, 2014, p. 17-18 apud MATIAS-PEREIRA, 2010, adapted).

It turns out that the fiscal crisis of the 1980s demanded a new international economic and political arrangement, with the intention of making the State more efficient. (TCU, 2014, p. 13). This context promoted the discussion of public governance, which, according to the International Federation of Accountants - IFAC, is governed by the principles of transparency (openness), integrity (integrity) and accountability[5] (accountability). (IFAC, 2001, p. 20).

It is important to highlight that, in Brazil, several instruments emerged and continue to emerge in the search for strengthening public governance, beginning in the 1990s, such as: a) the Code of Professional Ethics of the Civil Public Servant of the Federal Executive Branch (Decree 1,171 , of June 22, 1994); b) the Fiscal Responsibility Law (Complementary Law 101, of May 4, 2000); c) the National Program for Public Management and Bureaucratization (GesPública), instituted in 2005, revised in 2009 and 2013; d) Law 12.813, of May 16, 2013, which provides for the conflict of interests in the exercise of the position or employment of the Federal Executive Branch. (TCU, 2014, p. 15).

However, the definitions brought by Decree nº 9.203 / 2017 BRAZIL, 2017, online) deserve special mention, which provides for the governance policy of the direct, autarchic and foundational federal public administration, which are basic and of fundamental importance for the

5 In this article, the term ‘accountability’ will be used as a translation of the original term in the English language accountability, according to the TCU Governance Framework (2014, p. 13). This is because the translation of the term into Portuguese and its definition are still the subject of doctrinal debate in Brazil. See CAMPOS, Anna Maria. Accountability: when can we translate it into Portuguese? Public Administration Magazine, Rio de Janeiro, Feb./abr. nineteen ninety; Cf. DE PINHO, José Antonio Gomes; SACRAMENTO, Ana Rita Silva. Accountability: can we translate it into Portuguese yet? Public Administration Magazine, Rio de Janeiro, Nov / Dec. 2009.

understanding of the Institute. According to item I of art. 2 of the federal regulations, public governance is the set of mechanisms of leadership, strategy and control put in place to evaluate, direct and monitor management, with a view to conducting public policies and providing services of interest to society. The principles of public governance, in turn, under the terms of art. 3rd, will be the responsiveness, integrity, reliability, regulatory improvement, accountability and responsibility, as well as transparency.

Art. 4 of Decree nº 9.203 / 2017 (BRASIL, 2017, online) also establishes a series of guidelines for public governance, highlighting item V, which deals with the provision of incorporating high standards of conduct by senior management to guide the behavior of employees. public agents, as well as item VI, which has the need to implement internal controls based on risk management, which should prioritize strategic preventive actions before sanction processes.

It should also be highlighted the definition provided in item III of art. 5 of the aforementioned Decree (BRASIL, 2017, online), which provides for control as a mechanism of public governance and which comprises structured processes to mitigate risks, aiming at the achievement of institutional objectives, in order to guarantee orderly, ethical, economic, efficient execution and effective of the organization's activities, with preservation of legality and economy in the expenditure of public resources.

In its article 19, Decree nº 9.203 / 2017 expressly provides for the adoption of integrity programs by the bodies and entities of the direct, autarchic and foundational public administration:

> Art. 19. The bodies and as entities of the direct, autarchic and foundational administration, institution of integrity program, with the objective of promoting the adoption of measures and institutional actions destined to the prevention, detection, punishment and remediation of fraud and acts of corruption, structured in the following axes:
>
> I - commitment and support from senior management;
>
> II - existence of a unit responsible for implementation in the body or entity; III - analysis, assessment and management of risks associated with the integrity theme; and
>
> IV - continuous monitoring of the attributes of the integrity program. (BRASIL, 2017, online).

It is possible to understand, therefore, the relationship between compliance and public governance, as the axes and guidelines of both are aligned and complement each other, as Decree No. 9.203 / 2017 makes clear, as well as the purpose for which they are intended, which it is the ethical and efficient fulfillment of the organization's activities, the preservation of legality and the reduction of risks to management. (BRASIL, 2017, online).

The importance of the relationship between public governance and the axes of compliance programs can also be highlighted by understanding organizations such as the Independet Commission for Good Governance in Public Services - ICGGPS, the World Bank and the Institute of Internal Auditors - IIA, who understand that , in order to better serve the public interest, it is essential that ethical behavior, integrity, responsibility, commitment and transparency of leadership is guaranteed, as well as that: a) corruption is controlled; b) that a code of ethics and conduct is effectively implemented; c) observing and ensuring that organizations adhere to regulations, norms, codes and standards; d) that communications are transparent

MERITUM MAGAZINE • v.15 • n.4 • p. 202-218 • 2020

and effective; e) that interests are balanced and effectively cover stakeholders (be they citizens, users of services, private initiative or shareholders. (TCU, 2014, p. 13).

The provision of high standards of conduct for members of management, as well as the existence of control mechanisms to reduce risks and the consequent implementation of internal controls are fundamental, therefore, in the construction of effective public governance. These are also pillars of compliance programs, as seen previously, and must be implemented to improve public governance.

Having presented such concepts, the effectiveness and importance of public compliance programs should be analyzed, more specifically at the municipal level, as well as what are the basic guidelines for their implementation, so that one can move towards a more ethical and integral public administration that is in accordance with the precepts of better public governance.

3. COMPLIANCE PROGRAMS AT THE MUNICIPAL SCOPE AND THE GUIDELINES OF THE CGU

Once the remarkable link between public governance and compliance has been demonstrated, it is important to highlight how the work of the Comptroller General of the Union - CGU has been fundamental in the process of expanding these institutes in the municipalities, as well as for their improvement.

Based on initiatives such as the Transparent Municipality Collection, the agency proposes to Municipalities from suggestions for regulation via the Decree of the Anti-Corruption Law (Law No. 12.846 / 2013) to guides for strengthening management, as well as guidelines for the implementation of municipal corregidor offices. (CGU, 2017, online).

The role of the Comptroller General of the Union - CGU in the application of the anti-corruption law is crucial, since, without a doubt, it is the body that has the best structure and is most skilled for this function, since it has the competence and training to do so. , as well as the fact that its employees have experience and knowledge of what is effective compliance, having participated in international forums and groups, including the Organization for Economic Cooperation and Development - OECD. (BLOK, 2014, position 1213).

Specifically in the How to Strengthen Your Management Guide, the agency guides municipal entities and public bodies especially to: 1) regulate the Anti-Corruption Law at the municipal level; 2) register the agency or public entity in the Integrated Registration System of the National Registry of Inidonous and Suspended Companies - CEIS and in the National Registry of Punished Persons - CNEP; 3) to encourage the adoption of integrity programs by legal entities that relate to their agency or entity and 4) to promote training, in order to ensure that public servants or managers are aware of the legislation. (CGU, 2017, online).

Such steps are basic in order to consolidate the basis of public governance. This occurs since without the regulation of the anti-corruption law in the municipality, (1st step of the guidance of the CGU in the How to Strengthen Your Management Guide), this entity will not be able to repress any wrongdoing committed. The regulation establishes the legal norms and

MERITUM MAGAZINE • v.15 • n.4 • p. 202-218 • 2020

expands the ways in which the public administration can adequately inspect and punish illegal and unethical conduct.

The municipal manager must also include the public entity and its bodies in the registers of the National Register of Inidonous and Suspended Companies - CEIS and in the National Register of Punished People - CNEP (2nd step of the guidance of CGU in the Guide for Strengthening Management) so that punishments derived from the regulations of the Anti-Corruption Law can be included in the national system.

The application of the law will also require training from the municipal public administration and bodies prepared to exercise this function. The creation of a body, such as an Internal Affairs Unit, for example, may make it responsible for spreading knowledge, by promoting training and qualification for public servants, so that they are aware of the law and are prepared to apply it, as recommended by the Comptroller. -General of the Union in the 4th step of the guidance in the How to Strengthen Your Management Guide. (CGU, 2017, online).

Regarding the adoption of integrity programs by legal entities that relate to the municipal entity, the third step of the guidance of the Comptroller General of the Union - CGU in the Guide for Strengthening Management, these can be encouraged through the mandatory adoption of a program compliance within the scope of public contracts, which, due to their relevance, will be highlighted in the following chapters of this article. (CGU, 2017, online).

It is also essential, for the effectiveness of compliance programs in public administration, the adoption of codes of conduct, whose function is essential for the formation of a culture of compliance with the rules. These codes must cover different situations of daily life, but they must have effective reporting channels that protect the identity of the whistleblowers, so that no type of reprisal against them occurs (CARVALHO et al., 2019, p. 648). The Federal Government, for example, adopts the Code of Conduct of the High Federal Administration, in which it seeks to ensure the high standard of ethical behavior of its employees, which can guarantee the smoothness and transparency of the acts practiced in the conduct of public affairs. (BRASIL, 2000, online).

In addition, when defining what conducts are prohibited, it seeks to guarantee public agents greater security by indicating the limitations of their acts, as well as giving control bodies within the municipal public administration the basis for investigating potential practices that are not permitted.

The code of conduct must, therefore, establish how the agent should behave, as well as the companies that relate to the municipal power, imposing, properly, the policies aimed at these fundamental participants in public-private relations. However, codes of conduct will only be effective if they really reflect what happens within the administrative scope, with emphasis on the joint need for a whistleblowing channel, which plays a fundamental role for the effectiveness of the rules described therein and the integrity program itself. (CARVALHO et al., 2019, p. 650).

The role of the whistleblowing channel is essential, as it will be the one who will receive reports of possible acts of corruption, unethical conduct or practices that violate the code of conduct, which can take place through one or more systems, such as the telephone, and -mail, internet or intranet.

Care should be taken to ensure that the whistleblowing channel does not alienate potential employees concerned about some type of reprisal in the municipal public sphere, such as the opening of disciplinary administrative proceedings, which would probably discourage the reporting of irregularities.

Therefore, it is also important to create mechanisms to protect whistleblowers that seek to make the whistleblowing channel effective, in order to guarantee its real applicability and functioning. In this sense, there is the example of Decree No. 10.153 / 2019, from the Federal Government, which establishes safeguards for the protection of whistleblowers and irregularities against the federal public administration. (BRAZIL, 2019, online). Such a safeguard is essential, as it would be useless to have the best reporting channel available, but that behind it there are no adequate measures to safeguard the whistleblower, placing him at the mercy of possible retaliation.

As demonstrated, whether based on legal regulations or the guidelines of the Federal Comptroller General - CGU, there will only be real effectiveness of a compliance program, based on public governance, at the municipal level, if its implementation is real, so that it must have the necessary mechanisms so that there is effectiveness on the material plane. To this end, in addition to regulating the anti-corruption law, municipalities must include companies in the registers of the Integrated Registration System of the National Registry of Inidonous and Suspended Companies - CEIS and in the National Registry of Persons Punished - CNEP, as well as promoting the training of agents public, elaborate a code of conduct and establish a denouncement channel, in addition to including rules regarding the adoption of compliance programs by companies that relate to the public administration, which will be analyzed below.

4. THE REQUIREMENT FOR COMPLIANCE PROGRAMS FOR PUBLIC CONTRACTING

The requirement for the adoption of compliance programs by companies that report to the public administration, especially in the hiring processes, arose at the initiative of the State of Rio de Janeiro (Law No. 7.753 / 17) and the Federal District (Law No. 6.112 / 18). Innovation has multiplied and is already adopted by other states of the federation, as well as expanded to several Brazilian municipalities[6].

In this sense, it is important to analyze compliance in the scope of public procurement, to report how the initiatives of state entities have been reproduced by the municipalities, as well as to highlight the importance that these entities comply with the recommendations of the Comptroller General of the Union - CGU so that, based on the correct formulation of the programs, greater effectiveness is guaranteed to municipal public governance.

6 See Bill no. 16/20 of Cascavel-PR, which establishes a series of requirements for contracting with the Government.

4.1 CONTEXT

As portrayed, the fight against corruption and other illicit acts, through public governance, has left the sphere of the Federal Government to expand to the States and Municipalities, so that many already demand that companies or organizations that relate to the public power implement programs compliance.

Discussions arise in the doctrine regarding possible unconstitutionality biases that the rules for the requirement of compliance programs in public tenders and contracts could bring. (CASTRO; ZILIOTTO, 2019, p. 22).

The requirement for compliance in contracting is not unconstitutional, since it does not conflict with the provisions of item XXI of art. 37 of the Constitution of the Republic, nor with the rules established by the General Bidding Law (No. 8.666 / 1993), but which, in fact, complements them, in line with the needs of each entity. (CASTRO; ZILIOTTO, 2019, p. 43).

It so happens that the Constitution of the Republic, in its article 37, defines the principle of morality as the governor of administrative activity. Federal Law No. 8.666 / 1993, related to bidding, brings, in the same way, in its article 3, the principle of morality as one of the pillars of the administration. The norm establishes, in the same sense, that the promotion of sustainable national development is one of the objectives of the bidding. (CASTRO; ZILIOTTO, 2019, p. 25-26).

Part of this reasoning arises from the fact that it is possible for the State to develop social policies of public interest, even in hiring, as long as authorized by the legal order. (GUIMARÃES; REQUI, 2018, p. 207).

It happens that, since administrative law is responsible for conducting public action and for establishing the standards within which the public power must act towards the purpose guided by the Constitution, it is of fundamental importance that it be delimited with a plurality of themes that it seeks to ensure effective performance. (DIAS; COIMBRA, 2019, p. 4).

In the case of tenders, however, care must be taken that there is no offense or obstacle to participation in the competition, which would disrespect the provisions of item XXI of Article 37 of the 1988 Constitution.

There is no violation if the requirement does not address the qualification condition, which would lead to unconstitutionality, but rather a contractual obligation, so that compliance programs should only be required in the third phase of contracting, that is, in the execution of the administrative contract. (DE CASTRO; ZILIOTTO, 2019, p. 44).

In turn, such defects can only be properly analyzed on a case-by-case basis, in each legislation, based on a careful observation and the semantics of the legal wording. (LOSINSKAS; FERRO, 2019, p. 671).

What the requirements of integrity programs in public procurement intend, in fact, is to reduce risks to the public administration, especially in relation to economic losses derived from corruption, such as collusion or cartels. (GUIMARÃES; REQUI, 2018, p. 208).

Thus, the movement of state and municipal entities against illicit acts such as corruption and other deviations is shown to be positive, especially when demanding integrity programs that combat unethical or illegal conduct, precisely when aiming at their reduction and, at the same time, in the search to implement the guiding principles of public administration, namely

legality, impersonality, morality, publicity and efficiency, as provided for in article 37 of the Constitution of the Republic. (BRASIL, 1988, online). At the same time, the initiatives comply with the recommendation of the Comptroller General of the Union in item 3) of the How to Strengthen Your Management Guide (CGU, 2017, online), which is to encourage the adoption of integrity programs by the legal entities that are related with your organ or entity, as previously seen.

It is certain, in any case, that state and municipal laws have taken the legal initiative to demand compliance programs for public contracts in order to improve public governance. (LOSINSKAS; FERRO, 2019, p. 671).

Consequently, it is interesting to verify how the requirement for compliance programs in public tenders and contracts has been made and how it can be improved, so that, in the end, the initial purpose is reached, that is, the search for the reduction of acts corruption and other illicit acts in the public administration.

4.2 THE DEMAND CRITERIA IN THE STATES AND THEIR GROWTH IN THE MUNICIPALITIES

To date, there is no federal regulation that requires private organizations to implement compliance programs for public procurement, so that state laws are the main points of reference for municipalities.

Currently, at least seven states have laws or decrees that oblige contractors with the public administration to establish a compliance program. (DE FARIA; CHIZZOTTI, 2020, online).

Despite the fact that the State of Rio de Janeiro (2017, online) was a pioneer in Brazil, since Law 7.753 / 17 has made compliance programs mandatory for companies that have relations with the public administration, it matters here, to analyze the rules of the Federal District, especially due to the mixed nature of state and municipal entities, the latter as the focus of this article, not with the aim of exhausting it, but merely to exemplify the criteria adopted by it.

As of Law No. 6.112 / 18, the Federal District (2018, online) established the mandatory integrity programs for hiring, for all spheres of power, as long as the values are higher for hiring in the price taking modality, which is provided for in Law 8.666 / 1993, and provided that the contract has a term of more than 180 (one hundred and eighty) days. (DE CASTRO; ZILIOTTO, 2019, p. 37). Initially, the standard predicted that the values would be equal to or higher than the bidding in the price taking modality, estimated between R $ 80,000.00 (eighty thousand reais) and R $ 650,000.00 (six hundred and fifty thousand reais), even though form of electronic trading. However, after a legislative change in 2019, the Federal District regulations (2018, online) started to provide that the obligation would apply to amounts greater than R $ 5,000,000.00 (five million reais).

It is important to note that the district regulations also provided for the methodology for evaluating compliance programs, by emphasizing that facade programs or scham programs, those that are merely formal but that, in fact, are ineffective to reduce, will not be accepted. the risk of harmful acts against the public administration provided for by law. (CARVALHO; VENTURINI, 2018, online).

Well, from the example of the Federal District rule, it is noted that the municipal entity must define, at least, the following criteria: a) the minimum contract term, b) the minimum contract value and c) how it will take place the evaluation of compliance programs.

This is because the establishment of a compliance program is complex, often requiring a term longer than one hundred and eighty days, as provided by the Federal District Law (2018, online). The municipality that intends to regulate the compliance requirement for public procurement must, therefore, take this criterion into consideration, under penalty of many companies accelerating the establishment of these programs to meet the contractual deadlines, without considering, in fact, their real effectiveness or adequacy, creating real scham programs.

In the case of the evaluation of compliance programs, especially in the requirements after the conclusion of the contract, the evaluation method, which can take place through certifications, aims to ensure that the public authorities are truly effective, in order to avoid, precisely, a scham program.

The central element of the debate in favor of evaluating compliance programs through certification is based on the fact that, when evaluating these programs, it may prove excessively difficult for the public administration to do so with the appropriate technical analysis. It happens that, for many times, there are no public agents prepared in sufficient numbers to be able to fulfill this role. It is for this reason, too, that the municipal bodies charged with the control of the anti-corruption law and the inspection of contracts must have trained and qualified civil servants, as recommended by the Office of the Comptroller General in item 4) in its Management Strengthening Guide, which is to promote training, in order to ensure that public servants or managers know about the legislation. (CGU, 2017, online).

It is important to note that, to date, there is no regulation or reference of which, or which, would be the most appropriate certifications, which is under debate before the Government's doctrine and bodies.

Certification widely recognized internationally is ISO 37001, which deals with anti-bribery management systems, approved in 2016 with the participation of Brazil, through the Brazilian Association of Technical Standards. (ABNT, 2017, p. 6). In turn, the Empresa Pró-Ética initiative, of the Comptroller General of the Union (CGU, [2020a?], Online), which consists of promoting the voluntary adoption of integrity measures by companies, through public recognition of those who, regardless of size and industry, they are committed to implementing measures aimed at preventing, detecting and remedying acts of corruption and fraud.

Obviously, the question of evaluation centrally covers the entire functioning of the compliance program and the reduction of risks for the public administration. Therefore, if adopted, it is essential that the evaluation method is adequate, and that this is provided for in the law or in specific municipal regulations.

Still, it must be considered: what is the reasonable value for the compliance requirement? This may be the most difficult question to answer. For this, it seems more reasonable that it is appreciated, by the regulating municipality, what would be the appropriate value according to the local reality, as well as the companies that negotiate with the entity. The importance of this consideration is fundamental, as it does not seem balanced to require a robust compliance program from a company that contracts for low amounts, which can lead to distortions in bidding processes and the elimination of competition. The size and specifics of the legal entity

MERITUM MAGAZINE • v.15 • n.4 • p. 202-218 • 2020

MERITUM MAGAZINE • v.15 • n.4 • p. 202-218 • 2020

must be considered, in order to avoid misrepresentations, as also provided in § 1 of article 6 of the Federal District rule. (2018, online).

Therefore, based on the state regulations and their improvements, there have been many initiatives by the municipal executive and legislative branches regarding the requirement for such programs. Cities of relevant importance in their states have joined projects to implement public compliance. The cases of Jaraguá do Sul / SC (2019, online) are cited as an example, through Decree nº 12.533, Foz do Iguaçu / PR (2019b, online), by Municipal Law nº 4.832 and Ponta Grossa / PR (2019, online), by Decree nº 15.520.

Regarding the requirement for compliance programs to contract with management, there was adoption by the city of Vila Velha - Espírito Santo (2018, online), with Law No. 6,050. In the city of Foz do Iguaçu / PR (2019a, online), there is already a bill in this regard (Bill 172).

It is possible to verify, from all these initiatives, that the intention in adopting compliance programs is really to establish a means for changing public governance and corporate culture, and it is expected that the growing rejection of corruption and other irregularities in the public sector will continue to inspire various initiatives and bills in many of the 5.576 Brazilian municipalities (IBGE, 2017, online), in order to follow the trend towards adapting to the best public governance standards based on the creation of adequate compliance programs.

5. FINAL CONSIDERATIONS

It is notable that the innovations introduced in recent years to the country's legal system, as well as international commitments assumed by Brazil, seek to promote the dissemination of ethics and integrity, both in the public and private sectors.

It is from this new conjuncture that public governance arises, supported by compliance, which has been presented as an essential mechanism in the construction of a new public governance, more ethical and efficient, not only as good practice, but as a need that goes to the meeting of the administrative principles established by the constitutional order.

Compliance programs seek to reduce the risks of wrongdoing for the public administration, such as acts of corruption and other deviations in licenses, public contracts, among others. Therefore, such initiatives have been replicated. Within the scope of the Union, the important guiding role of the Comptroller General of the Union - CGU is noteworthy. It is extremely important, as recommended by this body, that the municipalities regulate the anti-corruption law at the municipal level, register the body or public entity in the Integrated Registration System of the National Register of Incumbent and Suspended Companies - CEIS and in the National Register of Punished People - CNEP , encourage the adoption of integrity programs by legal entities that relate to their agency or entity and promote their training, in order to ensure that public servants or managers are aware of the legislation. In this sense, the tools of the compliance programs at the municipal level must be applied together, as true pillars, because this way there will really be a possibility for public governance to be implemented.

Special emphasis is given to the fact that several States have required compliance programs in private companies to be mandatory in order to participate in public contracts. This

is mainly due to the fact that public contracts are more susceptible to illegal or unethical conduct, so that it has received special attention.

It was clear, therefore, in the present work, that the adoption of compliance and its tools in the search for the effectiveness of public governance in the municipal public administration is fundamental and positive, presenting itself as an essential and indispensable mechanism so that greater ethics and efficiency in the public sphere.

Therefore, it is not possible to dissociate the search for a more integral public governance that intends to be effective from compliance, as this is an essential tool in the pursuit of the objectives that should be pursued by management, according to the principles present in the legal order. The adoption of compliance programs thus constitutes an essential role for public governance, and must be replicated in order to achieve a more complete and effective administration for the benefit of society.

REFERENCES

ASSOCIAÇÃO BRASILEIRA DE NORMAS TÉCNICAS. ABNT NBR ISO 37001: 2017. **ISO 37001 - Normas de Gestão Antissuborno**. Rio de Janeiro, RJ: ABNT, 6 mar. 2017.

BLOK, Marcella. A Nova Lei Anticorrupção (Lei 12846/2013) e o Compliance. 1. ed. São Paulo, SP: **Revista de Direito Bancário e do Mercado de Capitais**, 2014. v. 65. E-book Kindle.

BRASIL. **Constituição da República Federativa do Brasil de 1988**. Brasília, DF: Diário Oficial da União, 5 out. 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 19 maio 2020.

BRASIL. Exposição de Motivos nº 37, de 21 de agosto de 2000. **Código de Conduta da Alta Administração Federal**. Brasília, DF: Diário Oficial da União, 22 ago. 2000. Disponível em: http://www.planalto.gov.br/ccivil_03/codigos/codi_conduta/cod_conduta.htm. Acesso em: 19 maio 2020.

BRASIL. **Decreto nº 3.678, de 30 de novembro de 2000**. Promulga a Convenção sobre o Combate da Corrupção de Funcionários Públicos Estrangeiros em Transações Comerciais Internacionais, concluída em Paris, em 17 de dezembro de 1997. Brasília, DF: Diário Oficial da União, 1 dez. 2000. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/D3678.htm. Acesso em: 3 set. 2020.

BRASIL. **Decreto nº 4.410, de 7 de outubro de 2002**. Promulga a Convenção Interamericana contra a Corrupção, de 29 de março de 1996, com reserva para o art. XI, parágrafo 1º, inciso "c". Brasília, DF: Diário Oficial da União, 8 out. 2002. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4410.htm. Acesso em: 19 maio 2020.

BRASIL. **Decreto nº 5.687, de 31 de janeiro de 2005**. Promulga a Convenção das Nações Unidas contra a Corrupção, adotada pela Assembléia-Geral das Nações Unidas em 31 de outubro de 2003 e assinada pelo Brasil em 9 de dezembro de 2003. Brasília, DF: Diário Oficial da União, 1 fev. 2006. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/decreto/d5687.htm. Acesso em: 2 set. 2020.

BRASIL. **Tribunal de Contas da União**. Referencial básico de governança aplicável a órgãos e entidades da administração pública / Tribunal de Contas da União. Versão 2 - Brasília: TCU, Secretaria de Planejamento, Governança e Gestão, 2014.

BRASIL. **Instrução Normativa Conjunta nº 1, de 10 de maio de 2016**. Dispõe sobre controles internos, gestão de riscos e governança no âmbito do Poder Executivo Federal. Diário Oficial da União: Seção 1, Brasília, DF, ano 128, p. 14-17, 11 maio 2016. Disponível em: http://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/21519355/do1-2016-05-11-instrucao-normativa-conjunta-n-1-de-10-de-maio-de-2016-21519197. Acesso em: 2 mar. 2020.

BRASIL. **Decreto nº 9.203, de 22 de novembro de 2017**. Dispõe sobre a política de governança da administração pública federal direta, autárquica e fundacional. Diário Oficial da União: Seção 1, Brasília, DF, ano 129, p. 3-4, 23 nov. 2017. Disponível em: http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=23/11/2017&jornal=515&pagina=3&totalArquivos=112. Acesso em: 2 mar. 2020.

BRASIL. **Decreto nº 10.153, de 3 de dezembro de 2019**. Dispõe sobre as salvaguardas de proteção à identidade dos denunciantes de ilícitos e de irregularidades praticados contra a administração pública federal direta e indireta e altera o Decreto nº 9.492, de 5 de setembro de 2018. Brasília, DF: Diário Oficial da União, ano 131, v. Seção 1, p. 1-2, 4 dez. 2019. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D10153.htm. Acesso em: 5 mar. 2020.

CARVALHO, André Castro; BERTOCCELLI, Rodrigo de Pinho; ALVIM, Tiago Cripa; VENTURINI, Otavio. **Manual de Compliance**. 1ª. ed. Rio de Janeiro: Forense, 2019. cap. 16, p. 319-348. ISBN 9788530983154.

CARVALHO, André Castro; VENTURINI, Otavio. **Discussões sobre as novas regras locais de compliance nas contratações públicas**. [S. l.], 5 mar. 2018. Disponível em: https://congressoemfoco.uol.com.br/opiniao/colunas/discussoes-sobre-as-novas-regras-locais-de-compliance-nas-contratacoes-publicas/. Acesso em: 4 mar. 2020.

CASTRO, Rodrigo Pironti Aguirre de; ZILIOTTO, Mirela Miró. **Compliance nas contratações públicas**: exigências e critérios normativos. 1. Reimpr. Belo Horizonte: Fórum, 2019.

CONTROLADORIA-GERAL DA UNIÃO (CGU). **Empresa Pró-Ética**. Brasília, DF: CGU, [2020a?], Disponível em: https://www.gov.br/cgu/pt-br/assuntos/etica-e-integridade/empresa-pro-etica. Acesso em: 2 abr. 2020.

CONTROLADORIA-GERAL DA UNIÃO (CGU). **Programa de Integridade**: Diretrizes Para Empresas Privadas. Brasília, DF: Controladoria-Geral da União, set. 2015. Disponível em: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/etica-e-integridade/arquivos/programa-de-integridade-diretrizes-para-empresas-privadas.pdf. Acesso em: 2 abr. 2020.

CONTROLADORIA-GERAL DA UNIÃO (CGU). **Como Fortalecer Sua Gestão: Lei Anticorrupção e Programas de Integridade**. Coleção Município Transparente, Brasília, DF, maio 2017. Disponível em: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/transparencia-publica/colecao-municipio-transparente/arquivos/como-fortalecer-sua-gestao-lei-anti-corrupcao-e-programa-de-integridade.pdf. Acesso em: 5 mar. 2020.

CONTROLADORIA-GERAL DA UNIÃO (CGU). **O que é a iniciativa**. [2020b?]. Disponível em: http://www.governoaberto.cgu.gov.br/dados_ogp/Ogp/a-ogp/o-que-e-a-iniciativa. Acesso em: 1 abr. 2020.

COPETTI NETO, Alfredo. **A democracia constitucional sob o olhar do garantismo jurídico**. Florianópolis: Empório do Direito, 2016.

DIAS, Jean Carlos; COIMBRA, Felipe Augusto Hanemann. ANÁLISE ECONÔMICA DO DIREITO ADMINISTRATIVO BRASILEIRO: CONSIDERAÇÕES SOB A PERSPECTIVA DA FORMULAÇÃO DE POLÍTICAS PÚBLICAS. **Meritum**: Revista de Direito da Universidade FUMEC, Belo Horizonte, MG, v. 13, n. 2, p. 420-444, Jul/Dez 2018. Disponível em: http://www.fumec.br/revistas/meritum/article/view/6570. Acesso em: 20 maio 2020.

DISTRITO FEDERAL. **Lei nº 6.112, de 2 de fevereiro de 2018**. Dispõe sobre a implementação de Programa de Integridade em pessoas jurídicas que firmem relação contratual de qualquer natureza com a administração pública do Distrito Federal em todas as esferas de poder e dá outras providências. Brasília, DF: Diário Oficial do Distrito Federal, 6 fev. 2018. Disponível em: http://www.sinj.df.gov.br/sinj/Norma/3bf29283d9ea42ce9b8feff3d4fa253e/Lei_6112_02_02_2018.html. Acesso em: 4 maio 2020.

DE FARIA, Wilson; CHIZZOTTI, Camila. **Obrigatoriedade de compliance para contratação pública**. [S. l.]: Legis Compliance, 27 fev. 2020. Disponível em: https://www.legiscompliance.com.br/artigos-e-noticias/2106-obrigatoriedade-de-compliance-para-contratacao-publica. Acesso em: 6 maio 2020.

FOZ DO IGUAÇU. **Projeto de Lei nº 172/2019, de 20 de dezembro de 2019**. Dispõe sobre a obrigatoriedade da implementação de "Programa de Integridade e Conformidade com as Normas" em pessoas jurídicas que firmem relação contratual de qualquer natureza com a Administração Pública no Município de Foz do Iguaçu – PR. Câmara Municipal de Foz do Iguaçu/PR, 20 dez. 2019. Disponível em: https://sapl.fozdoiguacu.pr.leg.br/materia/7792. Acesso em: 6 mar. 2020.

FOZ DO IGUAÇU. **Lei nº 4.832, de 20 de dezembro de 2019**. Dispõe sobre a criação do Programa de Integridade e Conformidade com as Normas da Administração Pública Municipal e adota outras providências. [S. l.]: Diário Oficial do Município, 6 jan. 2020. Disponível em: https://leismunicipais.com.br/a/pr/f/foz-do-iguacu/lei-ordinaria/2019/484/4832/lei-ordinaria-n-4832-2019-dispoe-sobre-a-criacao-do-programa-de-integridade-e-conformidade-com-as-normas-da-administracao-publica-municipal-e-adota-outras-providencias. Acesso em: 15 abr. 2020.

GLYNN, Patrick; KOBRIN, Stephen J.; NAÍM, Moisés. The Globalization of Corruption. In: ELLIOTT, Kimberly Ann (ed.). Corruption and the Global Economy. 1ª ed. Washington, DC: Institute for International Economics, 1997. cap. 1, p. 7-27. ISBN 0-88132-233-4.

GUIMARÃES, Fernando Vernalha; REQUI, Érica Miranda dos Santos. Exigência de Programa de Integridade nas Licitações. In: **COMPLIANCE, Gestão de riscos e Combate à Corrupção**: Integridade Para o Desenvolvimento. 2ª Reimpressão. 1ª Ed. Belo Horizonte: Fórum, 2018. v. 1º, cap. 10, p. 203-215. ISBN 9788545004738.

INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE). **Panorama Cidades**. IBGE, 2 jan. 2017. Disponível em: https://cidades.ibge.gov.br/brasil/panorama. Acesso em: 4 mar. 2020.

INTERNATIONAL FEDERATION OF ACCOUNTANTS (IFAC). **Governance in the Public Sector**: A Governing Body Perspective. International Federation of Accountants, New York, p. 1-93, Ago. 2001. Disponível em: https://www.ifac.org/system/files/publications/files/study-13-governance-in-th.pdf. Acesso em: 2 set. 2020.

JARAGUÁ DO SUL. **Decreto nº 12.533, de 25 de janeiro de 2019**. Institui Comissão Especial Responsável Pela Elaboração do Programa de Integridade Pública (Compliance Público) da Administração Pública Direta do Município de Jaraguá do Sul - SC. [S. l.]: Diário Oficial do Município, 29 jan. 2019. Disponível em: https://leismunicipais.com.br/a/sc/j/jaragua-do-sul/decreto/2019/1254/12533/decreto-n-12533-2019-institui-comissao-especial-responsavel-pela-elaboracao-do-programa-de-integridade-publica-compliance-publico-da-administracao-publica-direta-do-municipio-de-jaragua-do-sul-sc. Acesso em: 18 maio 2020.

MAZALLI, Rubens; ERCOLIN, Carlos Alberto. **Governança Corporativa**. Rio de Janeiro: FGV Editora, 2018.

NETO, Giseppe Giamundo; DOURADO, Guilherme Afonso; MIGUEL, Luiz Felipe Hadlich. Compliance na Administração Pública. In: CARVALHO, André Castro; BERTOCCELLI, Rodrigo de Pinho; ALVIM, Tiago Cripa; VENTURINI, Otavio. **Manual de Compliance**. Rio de Janeiro: Forense, 2019. cap. 31, p. 645-662. ISBN 9788530983154.

OLIVEIRA, Rafael Carvalho Rezende; ACOCELLA, Jéssica. A Exigência de Programas de Compliance e Integridade nas Contratações Públicas: o Pioneirismo do Estado do Rio de Janeiro e do Distrito Federal. In: OLIVEIRA, Rafael Carvalho Rezende; ACOCELLA, Jéssica (coord.). **Governança Corporativa e Compliance**. Salvador: Editora JusPodivm, 2019. cap. 3, p. 71-100.

PAULA, Marco Aurélio Borges de; CASTRO, Rodrigo Pironti Aguirre de (Coord.). **Compliance, gestão de riscos e combate à corrupção: integridade para o desenvolvimento**. Belo Horizonte: Fórum, 2018. 452 p. ISBN 978-85-450-0473-8.

PONTA GROSSA. **Decreto nº 15.520, de 11 de fevereiro de 2019**. Institui normas para as Unidades de Gestão e Compliance - UGC da Administração Direta e Indireta do Município de Ponta Grossa. [S. l.], 12 fev. 2019. Disponível em: https://leismunicipais.com.br/a/pr/p/ponta-grossa/decreto/2019/1552/15520/decreto-n-15520-2019-institui-normas-para-as-unidades-de-gestao-e-compliance-ugc-da-administracao-direta-e-indireta-do-municipio-de-ponta-grossa?q=15.520. Acesso em: 19 maio 2020.

RIO DE JANEIRO. **Lei nº 7.753, de 17 de outubro de 2017**. DISPÕE SOBRE A INSTITUIÇÃO DO PROGRAMA DE INTEGRIDADE NAS EMPRESAS QUE CONTRATAREM COM A ADMINISTRAÇÃO PÚBLICA DO ESTADO DO RIO DE JANEIRO E DÁ OUTRAS PROVIDENCIAS. Rio de Janeiro, RJ: Diário Oficial do Estado, 18 out. 2017. Disponível em: http://alerjln1.alerj.rj.gov.br/contlei.nsf/c8aa0900025feef6032564ec0060dfff/0b110d0140b3d479832581c3005b82ad?OpenDocument&ExpandSection=-1%2C-5&Highlight=0,7753#_Section1. Acesso em: 19 maio 2020.

ROSE-ACKERMAN, Susan. **La Corrupción y los Gobiernos**: Causas, consecuencias y reforma. 1ª ed. Madrid, España: Siglo XXI de España Editores, 2001. ISBN 84-323-1063-8.

SILVEIRA, Renato de Mello Jorge; SAAD-DINIZ, Eduardo. **Compliance, Direito Penal e Lei Anticorrupção**. 1ª ed. São Paulo: Saraiva, 2015.

SPORKIN, Stanley. The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday. **Northwestern Journal of International Law & Business**, Chicago, IL, v. 18, n. 2, p. 271-272, 1997-1998.

TRIBUNAL DE CONTAS DA UNIÃO (TCU). **REFERENCIAL BÁSICO DE GOVERNANÇA**. Brasília, DF: 2ª v. 2014. Disponível em: https://portal.tcu.gov.br/data/files/84/34/1A/4D/43B0F410E827A0F42A2818A8/2663788.PDF. Acesso em: 2 set. 2020.

VENTURINI, Otavio; CARVALHO, André Castro; MORELAND, Allen. Aspectos Gerais do U.S Foreign Corrupt Practices Act (FCPA). In: CARVALHO, André Castro; BERTOCCELLI, Rodrigo de Pinho; ALVIM, Tiago Cripa; VENTURINI, Otavio. **Manual de Compliance**. Rio de Janeiro: Forense, 2019. cap. 16, p. 319-348. ISBN 9788530983154.

VILA VELHA. **LEI nº 6.050, de 27 de agosto de 2018**. DISPÕE SOBRE A OBRIGATORIEDADE DA IMPLANTAÇÃO DO PROGRAMA DE INTEGRIDADE (COMPLIANCE) NAS EMPRESAS QUE CONTRATAREM COM A ADMINISTRAÇÃO PÚBLICA DO MUNICÍPIO DE VILA VELHA, EM TODAS ESFERAS DE PODER, E DÁ OUTRAS PROVIDÊNCIAS. [S. l.]: Diário Oficial do Município, 28 ago. 2018. Disponível em: https://www.vilavelha.es.gov.br/legislacao/Arquivo/Documents/legislacao/html/L60502018.html. Acesso em: 18 maio 2020.

Received/*Recebido:* 03.07.2020.

Approved/*Aprovado:* 26.09.2020.

FORMS OF ARTIFICIAL INTELLIGENCE AND THE IMPACTS ON CONSUMER PATTERNS AND THE PROTECTION OF PERSONALITY RIGHTS

DAS FORMAS DE INTELIGÊNCIA ARTIFICIAL E OS IMPACTOS NOS PADRÕES DE CONSUMO E A PROTEÇÃO DOS DIREITOS DA PERSONALIDADE

Jaqueline Silva Paulichi[1]
Valéria Silva Galdino Cardin[2]

ABSTRACT

In this research, the concept of consumer as a minority and vulnerable group will be presented in relation to the advertisements that are presented to him daily via social networks and other means of communication through artificial intelligence. Artificial intelligence checks people's consumption patterns and uses this information to reproduce ads that are supposed to be in the consumer's interest, which can lead to a violation of their personality rights, such as intimacy, privacy, among others. The research used the hypothetical-deductive method, analyzing the existing doctrines on the subject, as well as scientific articles and jurisprudence.

Keywords: Artificial intelligence. Personality rights. Right to privacy.

RESUMO

Nesta pesquisa apresentar-se-á o conceito de consumidor como minoria e grupo vulnerável em relação aos anúncios que lhe são apresentados diariamente via redes sociais e demais meios de comunicação por meio da inteligência artificial. A inteligência artificial verifica quais são os padrões de consumo das pessoas e utiliza essas informações para a reprodução de anúncios que sejam, supostamente, do interesse do consumidor, o

1 Doctoral Student in Legal Sciences with Unicesum ar- Scholarship Prosup. Master in the Master's Program in Personality Rights at Centro Universitário Cesumar (UNICESUMAR); Specialist in Applied Law by the School of Magistrates of Paraná (EMAP); Lawyer in Maringá-PR. Specialist in Civil Law and Civil Procedure. Specialist in Tax Law. Professor of Civil Law (Contracts and Real Law) Business, and Supervised Internship in Civil and Business Law I. ORCID iD: http://orcid.org/0000-0003-4113-1878. E-mail j.paulichi@hotmail.com.

2 Post-doctorate in Law at the University of Lisbon; Doctor and Master in Social Relations Law from PUC-SP; Professor at UEM and Unicesumar; Researcher at ICETI. Lawyer in Paraná. ORCID iD: http://orcid.org/0000-0001-9183-0672. E-mail: valeria@galdino.adv.br

How to cite this article/Como citar esse artigo:
PAULICHI, Jaqueline Silva; CARDIN, Valéria Silva Galdino. Forms of artificial intelligence and the impacts on consumer patterns and the protection of personality rights. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 219-235, 2020. DOI: https://doi.org/10.46560/meritum.v15i4.7954.

que pode levar a violação de seus direitos da personalidade, como intimidade, privacidade, dentre outros. A pesquisa se utilizou do método hipotético-dedutivo, analisando as doutrinas existentes acerca do tema, bem como artigos científicos e jurisprudência.

Palavras-chave: *Inteligência artificial. Direitos da personalidade. Direito à privacidade.*

1. INTRODUCTION

This present work will address the concepts about artificial analytical intelligence and how they influence the consumer's behavior, which is seen as a vulnerable group.

Initially, this work will approach the consumer as a vulnerable group and their legal protection in the country, - since consumers are the most impacted group by artificial intelligence in relation to advertisement - to then, deal with the concepts of artificial intelligence, analytical and algorithmic, including predictive analytical intelligence, which in turn has the function of generating reports with the consumption pattern of the user of social media and other shopping sites.

Later on, the Brazilian legislation on the subject will be analyzed, as the erosion of personality rights and the violation of personality rights, such as: honor, image, voice, intimacy, privacy, among others..

The research intends to cover the theoretical field, analyzing the existing subject's bibliography, like specialized legal journals, foreign doctrine and the jurisprudence applied to the proposed discussion.

Therefore, the hypothetical-deductive approach method will be adopted, based on the hypotheses that will be raised throughout the research. Afterwards, the hypotheses will be taken to the confrontation with the facts, and with the analysis of some current jurisprudence that deals with artificial intelligence and personality rights.

2. THE CONSUMER AS A VULNERABLE GROUP

The consumer is considered as a vulnerable group due its need of protection towards the large companies and mercantile conglomerates. The Consumer Defense Code brings the concepts of hypo-sufficiency and vulnerability, this way the person is protected in cases where the consumer relationship is characterized.

Initially, minorities and vulnerable groups should be conceptualized and differentiated;

> Vulnerable groups: there is no identity, a common trait between individuals as a factor that attracts them; they are groups composed by society in general. For example, consumers, litigants, unions, the disabled, the criminal accused. It is understood that they are individuals susceptible to being hurt, offended or attacked. (SENGUIN, 2017)

The minority would be a sort of vulnerable group, subdivided into several others, such as ethnic, racial, religious, sexual, forestry, handicapped, women, children, among others. (PEREIRA SIQUEIRA, CASTRO, 2017)

There are some elements that are common when conceptualizing “minorities”, such as: the fact that it is considerable or a high numerical group; as well as the existence of a non-domination’s position, and a subjective bond of solidarity among its members. Minorities exercise a influence position in society because they are part of an expressive numerical group despite being called “minorities”. (BRANDI CAMARGO, 2013, p.49)

Minorities are characterized as groups of non-dominance or disadvantage in relation to other groups and may receive discriminatory treatment by the majority. (CHAVES, 1970, p. 149-168)

They also feature the organization of social movements in order to participating in government political decisions. Vulnerable groups, on the other hand, articulate social acceptance. Thus, the actions developed by vulnerable groups are set without a second plan, lacking state protection. (BRANDI CAMARGO, 2013, p.49)

The 1988 Constitutional System is an open list of fundamental rights, this derives from the axiological normative principle of the dignity of the human person. The concept of these rights enshrined in art. 5 points to the existence of positive rights in other parts of the constitutional charter and also in international treaties. (SARLET, 2012, p. 69-71)

The Constitutional text considered solidarity, citizenship, the dignity of the human person, the political pluralism and social values of work and free initiative as the foundations of the Federative Republic of Brazil. Thus, the fundamental principle of citizenship and the dignity of the human person must be analyzed according to the project of society, the State and the Law, which the Federal Constitution sought to consolidate, bringing the positivation of several fundamental rights not only in its Article 5, but also throughout the Constitution. (COPETTI SANTOS, 2013)

Consequently, the fundamental principles described above have their meaning built from an amplification of the constitutional axiological complexity, composing a democratic framework of law that unites several fundamental rights and protects minorities and vulnerable groups.

There are mechanisms in the Federal Constitution to instrumentalize a pluralist society. It is seen that art. 3, inc. IV, provides that the fundamental goals of the Federative Republic of Brazil are to promote the good of all, without prejudice of origin, race, sex, color, age and other forms of discrimination. Thus, the Federal Constitution provides for various forms of protection for minorities and vulnerable groups, and in the case of this work, consumer protection.

With the promulgation of the Federal Constitution, the minorities’ demands were established in the constitutional text, culminating in several infraconstitutional norms so that “they could receive such a historical political movement and materialize, in a more effective and analytical way, the guardianship to more particularized and less universal social goods. (COPETTI SANTOS, 2013)

Some legal predictions on consumer protection in the Federal Constitution are brought to the understanding of this work. Article 5, inc. XXXII foresees the obligation of the State in the defense of the Consumer, as well as the responsibility of the Union, the States and the Federal District to legislate, concurrently, on consumers right. Art. 150 foresees measures for the con-

sumers to be enlightened about the taxes that are applied on goods and services. Finally, art. 170 concerns the economic order, observing the principle of consumer protection.

One of the principles that regulate the Consumer Defense Code is the principle of protection and necessity: “Article 1 This code establishes norms of protection and defense of the consumer, of public order and social interest, under the terms of articles 5, item XXXII, 170, item V of the Federal Constitution and article 48 of its Transitional Provisions”. There is also provision for consumer vulnerability, as provided for in art. 4, inc. I of the CDC.

What justifies the existence of this law is the need for consumer protection when purchasing products and services, in which it requires State intervention in front of the scope of the market. The State must intervene as a way of protecting the consumers, so that they aren’t harmed and has their individual rights and guarantees respected. (NUNES, 2013, p. 177)

Cláudia Lima Marques says that the Consumer Defense Code’s system harmonizes with postmodernity, as it seeks to give effectiveness to human rights, such as the rights of the different, the weakest and the consumer in the current market. (MARQUES, 2010)

Being vulnerable means being subject to or in danger of being damaged. The basic State has the policy of protecting the vulnerable, and it is accepted by all of society. Therefore, the protection of vulnerability is inspired by the principle of justice.

Vulnerability can be divided into two approaches: the first is related to the basic vulnerability that is intrinsic to the human being and the second are those circumstantial vulnerabilities. This second form is also called derived vulnerability, and it is configured as a state of predisposition to suffer more damage. The derivative or secondary type will have specified causes, and the vulnerable subjects must be tutored, in which the State promotes forms to remove what leave them unprotected. (KOTTOW, 2013, p.74-75)

The sense of acquired vulnerability is that the individual has increased susceptibility to harm. Individuals will be vulnerable when they do not possess what is fundamental to them, having rights reduced, suffering from unmet needs, making them fragile and predisposed to suffer damages. The resulting vulnerability is susceptible to negative actions that are carried out by the strongest, causing damage by inattention, negligence and malice, which destines the vulnerable to suffer the damage, requiring more discussion about the state in which the subject is. (KOTTOW, 2013, p.35)

Due to their vulnerability in the consumer market, the consumer needs greater State’s protection. The natural person who buys products and services is in a fragile situation in economic, technical and several other aspects. The person’s fragility is analyzed through the nature of the activity in which they acquires their product or service, and not their own characteristics. (BESSA, 2009, p. 35)

The consumer is the fragile part in the various legal relationships established in the consumer market. This way, the consumer needs differentiated treatment in the relationships that are established with the supplier, as a way to densify the principle of isonomy, foreseen on the Federal Constitution. The consumer was the only economic agent to be included in the list of fundamental rights in Article 5 of the Federal Constitution, and this is part of the implementation of the constitutional principle of equality, of unequal treatment to unequal ones, which

aims at material and momentary equality for a subject with different rights, the vulnerable and weakest one, which is the consumer. (MARQUES, 2010, p.384)

Consumer protection is provided for in art. 5 of the Federal Constitution, inc. XXXII, in the general principles of economic activity, art. 179, inc. V, and in art. 48 of the Transitory Constitutional Provisions. This defense has been elevated to an eminent position of fundamental right, and is attributed to it as a structural principle of the legal order. The protection that is given to the consumer by the legal order should be studied as part of a broader tutelage, which is that of the human personality.

The vulnerability and fragility of the consumer in the market are the purpose of the CDC's existence, it can be affirmed that vulnerability is the starting point of any general theory of consumer law, and it is much greater than just the reflection of inequality that there is between consumer and supplier, as it encompasses other countless aspects, such as the lack of information about what one buys, the maneuvers of entrepreneurs to fraud the competition, the use of abusive marketing, among others. (BESSA, 2009, p. 42)

Therefore, when analyzing a case that discusses the application or not of the CDC, one must evaluate the vulnerability of the said consumer under five different approaches, which are: the factual, technical, legal, informational and psychic vulnerability. And these aspects should serve as criteria for solving the hard cases on the incidence of consumer law.

The concept of what the consumer is, should be used for issues involving civil liability for the product or service provided addiction, and for disregarding the legal personality. Other subjects that are related to the civil law are ruled by the concepts of consumer and its equivalents, in which the activity of the consumer market stands out much more than the subject damaged by the activity.

Leonardo Roscoe Bessa explains that one of the problems of fitting some difficult cases in the concept of consumer is that very often the art. 29[3] of CDC is ignored, which in turn brings the concept of equivalent consumer. (BESSA, 2009, p. 58)

Another point that makes it difficult to frame the CDC in difficult cases is the division of the law, in which the matters discussed are divided by topics, without internal dialogue, since the law provided for is linked to the principles guidelines of articles 4 and 6.

Thus, the division of the law by topic does not mean that there is thematic division. In order to have a fair understanding, it is necessary to analyze the articles disposed by the own law under different concepts of what is consumer. So, the recommendation to be made is to use a hermeneutic guideline: the subject's vulnerability for the difficult cases. (BESSA, 2009, p. 59)

In difficult cases the vulnerability of the consumer must be analyzed in the specific case, in order to reach the conclusion that the CDC should or shouldn't be applied

In these cases the theory of in-depth finalism applies, Cláudia Lima Marques says that "the more solid and in-depth the finalist interpretation, the more important will be the application of legal equations and the notion of vulnerability. (MARQUES, 2010, p.353)

3 Art. 29 For the purposes of this Chapter and the following, all persons, determinable or not, exposed to the practices set forth in it, shall be treated as consumers.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 219-235 • 2020

The Federal Constitution, by providing on the principle of human dignity and personality rights, also ends up protecting the consumer, who is a person, and is exposed to the consumer market.

The CDC begins to guard with greater caution the subject's existential and patrimonial interests, in view of the activities that are developed in the market. If the caput of art. 4 of the CDC provides for the service to consumers, respecting their dignity, health, etc., and art. 6 reinforces the duty of the State to protect the life, health, and safety of the consumer, it is clear that this refers to the general clause provided in the Federal Constitution to protect the dignity of the human person. (BESSA, 2009, p. 60-61)

The use of various technologies on the market, such as the use of social networks, applications for editing images and videos, voice recognition, and data storage has as its main purpose the provision of services, and must have its relationship protected by the Consumer Defense code.

The interpretation of consumer law should not be done in a philological or literal way, so that it reduces to the quality of a product or service everything that is related to consumption relationship. This is not the purpose of the law. Its purpose is to protect the consumer who is the hypossufficient and vulnerable part of the relationship. Cláudia Lima Marques says that the concept of final recipient is interpreted in accordance with the theory of in-depth finalism, and the CDC should be applied in the cases mentioned above. (MARQUES, 2006)

The Consumer Defense Code was born to protect the one in a situation of inequality towards the supplier of products or services, the vulnerable. Given the above, it can be said that Internet users, social networks and other applications are vulnerable, also being characterized as consumers. Thus, it is understood that the Consumer Defense Code should be applied to relationships involving users of applications and software, blogs, websites, and the like, given the vulnerability they find themselves in. It should be emphasized that even with the existing laws about the Internet, such as law 12.965/2014 and law 13.709/2018, if they aren't enough to protect the user, the Consumer Defense Code should be used as an effective way to protect those people.

3. ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) is present in the everyday life of any society, and began to be developed in 1950 at Dartmouth Summer Research Project on Artificial Intelligence at Dartmouth College, Hanover, New Hampshire, USA. (SILVA, 2019, p. 13)

In the 20th century artificial intelligence received more attention by researchers, in which Alan Turing began research to establish a computational intelligence. In 1950 the author published his article dealing with the "imitation game". In this work, Turing proposes a game based on divination, analyzing if such premise could be applied to computers. In his article the author researched the nature of thought and verified whether machines are capable of gathering knowledge. (TURING, 1950, p. 433-460)

The test consists of questions and answers, in which a interrogator (human) asks the questions to two hidden entities. One is a computer and the other a human being. The communication between the players is performed indirectly, and the interrogator cannot directly see who the entities are. Through the answers obtained, the interrogator will try to find out which of them is human. (TURING, 1950, p. 433-460) In 2012 a computational engineer was able to prove the Turing test by convincing the judges of a game that artificial intelligence was human[4].

Artificial intelligence manipulates and stores data, but it also performs other functions that need more knowledge and deepening. The treatment of the data obtained includes the aptitude for "new knowledge or relationships about facts and concepts from the existing knowledge and use methods of representation and manipulation to solve complex problems". (SILVA, 2019)

The AI helps the human being in the execution of countless daily activities, besides allowing the optimization and acceleration of daily tasks. Thus, it can be conceptualized as follows:

> [...] is the set of logical routines that, applied in the field of computer science, allows computers to dispense with the need for human supervision in decision making and interpretation of analog and digital messages. This is possible given the system's ability to adapt itself to human needs, through the use of data from past experiences stored in memories, making decisions with a minimum of "free will". (TOMASEVICIUS FILHO, 2018)

Automation is not the same as artificial intelligence, despite using similar principles. However, automation does not have the capacity to adapt to new realities, not interacting with the new or the unexpected. (TOMASEVICIUS FILHO, 2018)

> One of the most useful ideas that emerged from research is that facts and rules (declarative knowledge) can be represented separately from decision algorithms (procedural knowledge), having a profound effect both on how scientists approached problems and on engineering techniques to produce intelligent systems. By adopting a particular procedure or the inference machine, the development of an artificial intelligence system is reduced to obtaining and coding rules and facts that are sufficient for a certain domain of the problem, whose process is called knowledge engineering. (SILVA, 2019,p.15)

While the computers were not linked by the Internet, each of the machines had limited processing capacity, according to the memory contained in the device. However, with the improvement of computer programs, applications and software, the capacity of data processing and artificial intelligence work has gained new horizons. (TOMASEVICIUS FILHO, 2018)

AI goes beyond the technology's concept, it is translated into the structural means of communication of today's society. This cyber intelligence is present in social relations, jobs, leisure, communication and relationships. In this way, it can be affirmed that society has become a network. (AZEVEDO, 2015)

Patrícia Peck Pinheiro explains that digital law was born from the evolution of law itself, here it covers fundamental principles and inserts new institutes in other branches of law, such as civil law, copyright, business, commercial law, among others. (PINHEIRO, 2014, p.56)

4 TERRA. 26.set.2012. Available at https://www.terra.com.br/noticias/tecnologia/robos/robo-confunde-humanos-e-passa-no-teste-de-turing-pela-1-vez,95188947c52ea310VgnCLD200000bbcceb0aRCRD.html. Acess in: 05 maio 2020

It is important to remember that there is currently a certain technological dependence that affects the whole society, from small companies to governments and large institutions. Consequently, business relationships migrate to the Internet, which can generate risks to those involved in relation to the security of the transaction that is carried out

> In this picture, the possibility of visibility of the current world also brings the risks inherent to accessibility, such as information security, unfair competition, plagiarism, sabotage by hacker, among others. Thus, at the same speed of the network's evolution, due to the relative anonymity provided by the Internet, there is an increase in crimes, complaints due to violations of the Consumer Defense Code, infringements to intellectual property, trademarks and patents, among others. (PINHEIRO, 2014, p.56)

Hence, it can be affirmed that artificial intelligence is constantly expanding, both in its initial concept and in its processing and knowledge capacity. In short, the engineering of artificial knowledge depends on the analysis of facts and rules, in order to create a pattern and consequently an intelligent system.

3.1 ALGORITHMS AND ANALYTICAL INTELLIGENCE

There are several forms of intelligence known as artificials and one of them is analytical intelligence that performs analysis of previously captured data and then elaborates a report transforming this data into standardized information.

Based on this captured data and standardized information this intelligence is able to use this information to return to the user, for example, advertisements for products and services that this user has previously shown interest in. "Analytical intelligence directs mental processes to problem solving and decision making".(MIRANDA, 2012)

Algorithms are used as a means of controlling human behavior in relation to the Internet. Thus, dealing with artificial intelligence is not only analyzing its basic concepts but also analyzing the premises of predictive intelligence analytical algorithms and data analysis and control. Wolfgang states that algorithms can contribute to the control of behavior by the law, complement the law or even contradict it.

It is noteworthy that in digital communication the use of algorithms is essential:

> For use in computers, the algorithms are written in a digital language, mechanically processable, and the task given respectively is executed by means of a finite and predefined number of individual stages. typical is the deterministic structure of programming. In general, which is also the case in the examples dealt with in this article, specific algorithms are parts of complex digital algorithm systems. Furthermore, the algorithm concept is often used as a synonym for the computer program used in the whole. (HOFFMANN-RIEM, 2019)

The system used through algorithms can be programmable to adapt autonomously to new problems and solve complex conflicts. And so this capability does not necessarily need to be programmed, but can be the result of computational learning through training based on the evaluation of experiences obtained through examples or even through data feed. "[...]Currently, we are working intensively to get these subjects to continue writing their own programs and be able to develop independently of human programming. (HOFFMANN-RIEM, 2019)

The algorithms modify the perception of the world and also act on social behavior influencing society in decision making, being thus an important source in the social order. To use data and expand its possibilities by artificial intelligence it is necessary to perform the analysis of data previously connected.

Several analytical procedures are performed and each one has a purpose. The first is the descriptive analysis that is used from data mining through study, in which the material is classified and prepared for evaluation.

Afterwards there is the predictive analysis that learns from previous experiences about the behavior of its users and recognizes trends and behavioral patterns. (HOFFMANN-RIEM, 2019)

In this aspect predictive analysis is able to predict future behaviors of consumers(on shopping sites and, also, on mobile application). This analysis aims to recommend behaviors to apply the knowledge collected descriptively and the predictive knowledge to achieve certain objectives.

4. APPLIED LEGISLATION

The “civil rights framework for the internet” (Law 12.965/2014)[5] , brings in its Article 5, item I the following definition:

Art. 5 I - Internet: the system consisting of a set of logical protocols, structured on a worldwide scale for public and unrestricted use, with the purpose of enabling data communication between terminals through different networks;

Therefore, it can be highlighted that the inappropriate use of the Internet can bring negative consequences for the whole society. Lawrence Lessig teaches that software codes can be compared to laws, as these codes have certain rules so that the user can access, for example, the insertion of a personal password to log in the application. Both the law and the software programming are “structures designed to control behavior. (PINHEIRO, 2014)

Today, the data disclosed on the Internet and the speed of its propagation allows companies to advertise their brands, products, services, among others, creating thus a virtual market that grows annually. (GASPARATTO, FREITAS, EFING,

The General Data Protection Law provides in its Article 2 for the protection of sensitive personal data, and is based on respect for privacy, inviolability of intimacy, honor and image, human rights, free development of personality, dignity and the exercise of citizenship by natural persons, among others provided for in the aforementioned article.[6]

5 BRAZIL. Law No. Lei 12.965 of 23 April 2014. Marco Civil da Internet. Available at << http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm >> Access in 30.abr.2020.

6 Art. 2 The discipline of personal data protection has as foundations:
I - the respect for privacy;
II - informative self-determination;
III - freedom of expression, information, communication and opinion;
IV - the inviolability of intimacy, honor and image;
V - economic and technological development and innovation;
VI - free enterprise, free competition and consumer protection; and
VII - human rights, free development of personality, dignity and the exercise of citizenship by natural persons

MERITUM LAW JOURNAL • v.15 • n.4 • p. 219-235 • 2020

In Article 5 of the aforementioned law, there is a classification of the data, in which personal information is related to an identified or identifiable natural person. In relation to sensitive personal data, there are personal elements about racial or ethnic origin, religious conviction, political opinion, union membership or religious, philosophical or political organization, concerning health or sexual life, genetic or biometric information, when linked to a natural person, besides other existing classifications.[7]

Article 5 of the General Data Protection law is similar to Article 9 of the General Data Protection Regulation (RGPD) which also provides for the right to genetic data, data relating to health, or data relating to a person's sexual life or sexual orientation. (FERREIRA, [et all...], 2018)

The Internet usage, as a means of social and electronic communication, must obey the principles foreseen in art. 221 of the Federal Constitution, such as the preference for educational, cultural and informative purposes, promote the national and regional culture, stimulate the independent production that aims at its disclosure, and respect the ethical and social values of the person and family. (FIORILLO, 2015, p.16)

The aspects of protection of personality rights in relation to artificial intelligence are: The right to personal data; such as the right to be forgotten; the right to portable data, data protection and the right to access data. (KAUFFMAN, NEGRI, 2020)

Therefore, the legislation that can be applied in relation to the protection of personality rights when violated by artificial intelligence, are numerous. Besides the Civil Framework of the Internet (Law 12.965/2014), and the General Law of Data Protection (Law 13.709/2018), there is the Consumer Defense Code, which has means for the protection of the user of sites and applications present in the world net of computers, as the possibility to hold responsible for the supplier of services or products when addiction occurs

Note that art. 4, item I provides for the recognition of consumer vulnerability, raising this recognition to a principle that should be respected in consumer law[8]. Thus, it is clear that the Consumer Defense Code can be invoked when analyzing these issues, in view of the consumer's vulnerability, and also the great possibility of being deceived, or even receive misleading and/or abusive advertising. Article 6, inc. V of the CDC also provides for the possibility of modifying contractual terms that establish disproportionate benefits or their revision due to supervening facts that make them excessively onerous.

The Civil Code also brings mechanisms for analyzing contracts that are not signed in person, which may culminate in contract revision actions, or even contract rescission actions, in addition to the protection of personality rights when the holder is injured, the possibility of action for moral and/or material damages (articles 186 and 927 of law 10.406/2002). The

7 Art. 5 For the purposes of this Law, it is considered:
I - personal data: information related to an identified or identifiable natural person;
II - sensitive personal data: personal data on racial or ethnic origin, religious conviction, political opinion, union membership or organization of religious, philosophical or political character, data related to health or sexual life, genetic or biometric data, when linked to a natural person;
III - anonymized data: data related to the holder that cannot be identified, considering the use of reasonable and available technical means at the time of its treatment;
IV - database: structured set of personal data, established in one or several locations, in electronic or physical support

8 The National Policy of Consumer Relations aims to meet the needs of consumers, respect their dignity, health and safety, the protection of their economic interests, the improvement of their quality of life, as well as the transparency and harmony of consumer relations, meeting the following principles: I - recognition of consumer vulnerability in the consumer market;

General Data Protection Law will bring greater security to the users of the world wide web, consequently protecting sensitive data and personal rights.

5. THE VIOLATION OF PERSONALITY RIGHTS

The personality's rights can be violated, injured, mitigated as a result of the misuse of artificial intelligence, the applications available free of charge on the Internet, the various social networks that offer the most varied types of services such as dating, photo sharing, videos, emojis, memes, games among friends, and others.

The rights that are constantly violated and are exposed to all kinds of misuse by third party are the rights to honor, privacy, intimacy, to the rights of freedom (of thought, expression, religious, among others), image, voice, life and physical integrity, copyright, among others.

The human being is in a situation of vulnerability in relation to artificial intelligence, given the immense data processing capacity it has, and the inadequate use of social networks by users.

> One can even, from a rhetorical point of view, ask whether artificial intelligence and personality rights represent a contradiction in terms, such is the vulnerability of the person due to the inadequate use of these technologies. (TOMASEVICIUS FILHO, 2018)

Users are increasingly induced to acquire new applications that make life easier, or that can bring moments of pleasure, such as games, applications that connect to other devices (internet of things), specific social networks for relationships, friendships, search for employment, sharing books and music, among others.

This induction is achieved by feeding the AI in which the user himself reveals his interests when performing his daily searches, or even by the pages he usually visits and the navigation time on each page. For example, Google runs a free course on ads, explaining to the interested person how important it is to measure the time a potential customer stays on your page, which item that customer clicks on, which other pages the customer browses at the same time, price comparison, etc,

Regarding data analysis of the right to privacy and the protection of personal data, there is a scarcity of studies, as we live in the era in which users of social networks are induced or seduced to exhibitionism, renouncing their freedom, intimacy and privacy, providing personal data in exchange for some free services such as social networks. (BOFF, FORTES, 2018)

As an example of personality rights violation resulting from the use of AI is the case where a company made available the marketing of a game called "Bolsomito2k18", which violated the rights of minorities and vulnerable groups, in addition to violating the rights of the President of the Republic himself.[9]

9 Electronic game and personality rights. Judgement Date: 02/06/2019. Publication Date: 02/08/2019 Court or Court: 14th Civil Court of Brasília - DF Type of Appeal/Action: Sentence
Case Number (Original/CNJ): 0735711-26.2018.8.07.0001 and 0722305-38.2018.8.07.0000
Name of rapporteur or Judge (case sentencing): Judge Luis Carlos de MirandaCâmara/Turma: -Articles of MCI mentioned: Article 15 Menu: "The Public Prosecution Service of the Federal District and Territories has filed a public civil action against VALVE CORPORATION LLC, in which it pleads, in close synthesis, for the condemnation of the defendant: (a) the obligation to

Another emblematic and much discussed case was that of the subway stations in the State of São Paulo and the use of users' biometric data, without their prior consent, which violates the right to image. In the case in question, the captured image was considered personal data, being then protected by the inviolability of intimacy. Another point discussed in the case file was the lack of information to the consumer that their data would be captured and what their destination was:

> [...] in view of the economic exploitation of the collected data, says that violated the right to image, [...] the technique already allows the identification of the person from the capture of facial elements of emotion, from the so-called anchorage points, and that there is no way to ensure what technology is used by the defendant. It maintains that facial expression should be considered personal data, protected by the inviolability of intimacy, and invokes an administrative decision, in an identical case, taken in the Netherlands [...] the indiscriminate collection of data on the facial expressions of adults and children violates the rights of children and adolescents, especially privacy, marked by the hypervulnerability of its holder. [...] the data collection takes place in a practically camouflaged way, without at least clear and express notice to the consumer that it is being filmed and that its image will be used for commercial purposes. [...]"[10]

The deterioration regarding personality rights is intertwined with the use of wearable technologies and the inadequate treatment of the information obtained by them.

It should be noted that the user's right to request his information, the protection of his data, and the portable data only exists because of the concern that they may be used inappropriately, or even against the user himself.

According to Kauffman and Negri, one of the challenges of wearable technologies is to identify who owns the user's data, such as the manufacturer, the software developer, the infrastructure provider or even the data analysis company. It is important to stress that the user has the right to all this data, because it comes from its use, its sensitive data, among others. The difficulty will be in identifying who is in effective possession of this data for legal purposes (KAUFFMAN, NEGRI, 2018).

An example to be mentioned is the case of the UBER Software System that has personal data of its users (drivers and passengers). In this case, the UBER Software System was consid-

abstain from the commercialization of the electronic game "Bolsomito 2k18"; (b) the obligation to provide all registration and financial data of the developer of the application "BS Studios".
The author argued, in brief summary: (i) that the game in question violates the right of the personality President-elect of the Federative Republic of Brazil, thus generating rebound damage to all Brazilians and exposing the country negatively on the international scenario; (ii) that the game violates the right of the personality of women, LGBTs, blacks, members of social movements, federal and state congressmen and promotes hatred towards minorities.
The author also formulated an urgent request for tutelage for the requested party: (a) suspend the commercialization of the Bolsomito 2k18 game; (b) provide all registration and financial data of the person responsible for creating the Bolsomito 2k18 game.
As narrated by Parquet in ID n. 28431458, the loss of the object of this action occurred, since "according to information from Valve Corporation (ID 28106284), the game "Bolsomito" is no longer commercialized by Steam at the request of the developer himself (BS Studios). Moreover, Valve Corporation informed the registration data of the responsible for creating the game. The procedural interest remains consubstantiated on the utility or on the necessity of the jurisdictional provision, and, in relation to the latter, must be examined in concrete".

10 BRASIL. TJSP. Tribunal ou Vara: 37ª Vara Cível Central - São Paulo – SP. Tipo de recurso/Ação: Antecipação de tutela. Número do Processo (Original/CNJ): 1090663-42.2018.8.26.0100. Nome do relator ou Juiz (caso sentença): Juíza Patrícia Martins Conceição. Data do Julgamento:14/09/2018. Data da Publicação: 18/09/2018

ered the owner of the passenger's personal data, being then obliged to pass it on to the driver for legal purposes, as can be extracted from the decision below:

> [...] Claims the author that he went to "quadra 201 norte" to pick up a passenger, when he was rudely received, refusing to transport the requester. In reaction, the said passenger would have damaged his vehicle. Therefore, he wants the data of such person to take the appropriate measures. In the case at hand, I have that it is true the reason that motivated the authorial request, behold, there was apparently an illicit act by the passenger, to be eventually ascertained. Thus, I understand that the acceptance of the authorial request is justified, precisely as a full exercise of the contractual good faith [...] GRANTED the authorial request to determine the defendant company to provide the author with the registration data of the user who requested the trip in question [...].[11]

Artificial intelligence plays an important role in the life of modern man, since technologies and devices that use artificial intelligence are essential for everyday life. As an example, Smartwatch can be mentioned, which receives all information from the subject's cell phone, besides monitoring the steps, heart rate, the frequency with which this person exercises, among others. The various artificial intelligence devices that are provided to users today make life easier and optimize time. On the other hand, these technologies store countless user data, and until then, there has been no effective control over the use of this information.

There is a growing use of wearable technologies. Data from 2019 shows that the use of these devices was 722 million users. The forecast for 2022 is that it will exceed 1 billion users:

> The number of connected wearable devices worldwide has more than doubled in the space of three years, increasing from 325 million in 2016 to 722 million in 2019. The number of devices is forecast to reach more than one billion by 2022.[12]

In the medical field there is already talk of technologies that are capable of monitoring all physical and/or mental activity of the patient so that the doctor can readjust a treatment or even withdraw the daily use of medicines that have not proven effective

> A new generation of wearable sensors enables physicians to capture long-term-patients' activity levels and exercise compliance, facilitating effective dispensing of medications for chronic patients and provide tools to assess their ability to perform specific motor activities, and propose rehabilitation solutions.[13]

Media Math, Interberry Group and Gartner conducted research in 2017 analyzing how marketing companies will carry out their campaigns for the future, and in this research it can be seen that 36.9% of professionals increased their investments in marketing and advertising through the study of data captured[14]

---

11 BRASIL. TJDF. Tribunal ou Vara: 4º Juizado Especial Cível de Brasília – DF. Tipo de recurso/Ação: Sentença. Número do Processo (Original/CNJ): 0744419-20.2018.8.07.0016.Data do Julgamento: 04/12/2018. Data da Publicação: 10.dez.2018. Juíza Simone Garcia

12 STATISTA. Available at https://www.statista.com/statistics/487291/global-connected-wearable-devices/ Access in 05.maio.2020

13 DOMB., Menachem. Wearable Devices and their Implementation in Various Domains. Available at https://www.intechopen.com/books/wearable-devices-the-big-wave-of-innovation/wearable-devices-and-their-implementation-in-various-domains Access in 13.abr.2020

14 GDMA. Winterberry Group. Análise Global de Marketing e Publicidade
Orientados por Dados de 2017
O cenário no Brasil. Available at <<https://info.mediamath.com/rs/824-LSO-662/images/GDMA_2017_PORT.pdf?aliId=eyJpIjoiUytURWdPd001cmtOK085aSIsInQiOiJaMnlBYjdtdWxDMVlMOEdjWnM5WnZRPT0ifQ%253D%253D >> Acesso 05.maio.2020

Obviously, companies use the personal data of their users to direct advertising and propaganda. However, the use of this data cannot be excessive, or even abusive to the user.

In order to reduce the attrition of personality rights in the face of technological innovations, Kauffman and Negri argue that “new technologies and innovations should be integral components of the legal system in the future”. (KAUFFMAN, NEGRI, 2018)

Therefore, the rights of the personality must be protected by the legislation, so that the user of the digital platforms does not have his data violated or misused. The protection of personal data is possible, however still unknown to the population.

6. CONCLUSION

Vulnerable groups are made up of the various minorities that need protection and representation in the country. Among these minorities are consumers who use artificial intelligence through social networks, applications, software, websites, among other devices available on the world wide web. The Consumer can be considered vulnerable, as provided in art.4, inc. I of the Consumer Defense Code, in which the presumption of vulnerability results from the absence of specific knowledge about the violation of their personal data, their consumption behavior, their lack of knowledge when entering their personal data into internet applications. There is a culture of excessive exposure on social networks in exchange for free access to applications. However, what several users do not know is that they are having their sensitive data available to them in order to have access to these platforms.

Artificial intelligence is broad and grows exponentially, always evolving and adapting to social changes. This means that, although AI does not yet have the capacity for autonomous creation, in the future this may happen.

It should be noted that artificial intelligence is already used to monitor the patient’s heart, to access the symptoms of sick people, to analyze the face through biometrics, to suggest places to visit based on cell displacement data, among others. Although AI is extremely useful for day-to-day activities, it can become a mean to monitoring personal acts.

In relation to consumption patterns, personal data are collected and later sold to companies that are dedicated to selling the products that the consumer is already interested in purchasing. This way, the artificial intelligence has the ability to predict which will be the next purchase of the user. It stands out for the cases in which the person receives numerous advertisements in his e-mail, social networks etc. about a specific product.

It is suggested that there is greater awareness of the population when using new technologies and new devices that use artificial intelligence, in addition to better monitoring of the use of this data, today it is not possible to quantify what data and how far each platform can interfere in the user’s life

Not all data inserted by the user in virtual platforms should be used to convert into advertising or information aimed at him, because the person is entitled to his privacy and intimacy. When a person is performing an internet search, he or she does not expect that this will be

stored in a database and that it will be used later. There is a violation of basic personality rights, such as intimacy and privacy, and in some cases, the violation of the right to voice, image and honor.

Consequently, with the abusive use of personal data for ads, the user can find himself in a system of extreme monitoring and follow-up of all his personal acts on the Internet, not feeling safe or comfortable when performing a transaction, or even when making calls by applications or exchanging information between colleagues.

REFERENCES

AZEVEDO, Jefferson Cabral; ISTOE, Rosalee Santos; SOUZA, Carlos Henrique Medeiros and MARQUES, Bruna Moraes. The Controversies Of Self – From (Info)Ethics To Cyber Terror. JISTEM J.Inf.Syst. Technol. Manag. [online]. 2015, vol.12, n.3 [cited 2020-04-30], pp.577-594. Available in http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1807-17752015000300577&lng=en&nrm=iso Access in 30. Abr.2020. >. ISSN 1807-1775. https://doi.org/10.4301/S1807-17752015000300005.

BESSA, Leonardo Roscoe. Relação de Consumo e Aplicação do Código de Defesa do Consumidor. Revista dos Tribunais. São Paulo: 2009.

BOFF, Salete Oro; FORTES, Vinícius Borges. A privacidade e a proteção dos dados pessoais no ciberespaço como um direito fundamental: perspectivas de construção de um marco regulatório para o Brasil. Sequência (Florianópolis), Florianópolis , n. 68, p. 109-127, Jun. 2014 . Available in <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2177-70552014000100006&lng=en&nrm=iso>. Access in 15 Abr. 2020. https://doi.org/10.5007/2177-7055.2013v35n68p109

BRANDI, Ana Carolina Dias; CAMARGO, Nilton Marcelo de. Minorias e Grupos Vulneráveis, multiculturalismo e Justiça Social: Compromisso da Constituição Federal de 1988. in "Minorias e Grupos Vulneráveis: Reflexões para uma tutela inclusiva", Dirceu Pereira Siqueira e Nilson Tadeu Reis Campos Silva (Orgs). 1. Ed. Birigui-SP: Boreal, 2013.

BRASIL. Lei No. Lei 12.965 de 23 de Abril de 2014. Marco Civil da Internet. Available in http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm . Access in 30.abr.2020.

BRASIL. TJDF. Data do Julgamento: 06/02/2019. Data da Publicação: 08/02/2019 Tribunal ou Vara: 14ª Vara Cível de Brasília – DF Tipo de recurso/Ação: Sentença Número do Processo (Original/CNJ): 0735711-26.2018.8.07.0001 e 0722305-38.2018.8.07.0000

BRASIL. TJDF. Tribunal ou Vara: 4º Juizado Especial Cível de Brasília – DF. Tipo de recurso/Ação: Sentença. Número do Processo (Original/CNJ): 0744419-20.2018.8.07.0016.Data do Julgamento: 04/12/2018. Data da Publicação: 10/12/2018. Nome do relator ou Juiz (caso sentença): Juíza Simone Garcia.

BRASIL. TJSP. Tribunal ou Vara: 37ª Vara Cível Central - São Paulo – SP. Tipo de recurso/Ação: Antecipação de tutela. Número do Processo (Original/CNJ): 1090663-42.2018.8.26.0100. Nome do relator ou Juiz (caso sentença): Juíza Patrícia Martins Conceição. Data do Julgamento:14/09/2018. Data da Publicação: 18/09/2018.

BRASIL: Juiz Luis Carlos de MirandaCâmara/Turma: -Artigos do MCI mencionados: Artigo 15 Ementa: "O Ministério Público do Distrito Federal e Territórios deduziu ação civil pública em face de VALVE CORPORATION LLC, em que pugna, em estreita síntese pela condenação da requerida: (a) à obrigação de abster-se da comercialização do jogo eletrônico "Bolsomito 2k18"; (b) à obrigação de fornecer todos os dados cadastrais e financeiros do desenvolvedor do aplicativo "BS Studios".

CHAVES, Luís de Gonzaga Mendes. Minorias e seu estudo no Brasil. Revista de Ciências Sociais, Fortaleza, v. 1, n. 1, p. 149-168, 1970.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 219-235 • 2020

COPETTI SANTOS, André Leonardo; COPETTI SANTOS, Evelyne Freistedt. Constituição, Direito Penal E Diferença. Sobre A Emergência De Uma Tutela Penal De Minorias E Vulneráveis Sociais Pós-Constituição De 1988. REVISTA DIREITO E JUSTIÇA: REFLEXÕES SOCIOJURÍDICAS, [S.l.], v. 12, n. 18, p. 251 - 270, fev. 2013. ISSN 21782466. Available in: http://srvapp2s.santoangelo.uri.br/seer/index.php/direito_e_justica/article/view/969/456. Access in: 14 Abr. 2020. doi:http://dx.doi.org/10.31512/rdj.v12i18.969.

DOMB., Menachem. Wearable Devices and their Implementation in Various Domains. Available in https://www.intechopen.com/books/wearable-devices-the-big-wave-of-innovation/wearable-devices-and-their-implementation-in-various-domains. Access in 13.abr.2020

FERREIRA, Ricardo Barretto. BRANCHER, Paulo. TALIBERTI, Camila.CUNHA, Vitor Koketu. Entra em vigor o Regulamento Geral de Proteção de Dados da União Europeia. 04.jun.2018. available in https://www.migalhas.com.br/depeso/281042/entra-em-vigor-o-regulamento-geral-de-protecao-de-dados-da-uniao-europeia. Access in 05.maio.2020.

FIORILLO, Celso Antonio Pacheco O Marco Civil da Internet e o meio ambiente digital na sociedade da informação: Comentários à Lei n. 12.965/2014. Saraiva: São Paulo, 2015.

GASPARATTO, Ana Paula Gilio. FREITAS, Cinthia Obladen de Almendra. EFING, Antônio Carlos. RESPONSABILIDADE CIVIL DOS INFLUENCIADORES DIGITAIS. Revista Jurídica Cesumar janeiro/abril 2019, v. 19, n. 1, p. 65-87DOI: 10.17765/2176-9184.2019v19n1p65-87. Available inhttps://periodicos.unicesumar.edu.br/index.php/revjuridica/article/view/6493/3396 Access in 22.nov.2019.

GDMA. Winterberry Group. Análise Global de Marketing e Publicidade

HOFFMANN-RIEM, Wolfgang. Controle do comportamento por meio de algoritmos: um desafio para o Direito. Direito Público, [S.l.], v. 16, dez. 2019. ISSN 2236-1766. Available in: https://portal.idp.emnuvens.com.br/direitopublico/article/view/3647. Access in: 13 abr. 2020.

Jogo eletrônico e direitos de personalidade. Data do Julgamento: 06/02/2019. Data da Publicação: 08/02/2019 Tribunal ou Vara: 14ª Vara Cível de Brasília – DF Tipo de recurso/Ação: Sentença

KAUFFMAN, Marcos. E. NEGRI, Marcelo. NEW TECHNOLOGIES AND DATA OWNERSHIP: WEARABLES AND THE EROSION OF PERSONALITY RIGHTS . Revista de Direitos Sociais e Políticas Públicas (Unifafibe). I S S N 2 3 1 8 - 5 7 3 2 – V OL. 6 , N . 1 , 2 0 1 8. Available in: http://www.unifafibe.com.br/revista/index.php/direitos-sociais-politicas-pub/issue/view/25. Access in 23.mar.2020.

KOTTOW, Michael H. Comentários sobre a Bioética, Vulnerabilidade e proteção.

GARRAFA, Volnei. PESSINI, Leo. (org.) Bioética: Poder e Injustiça. Loyola: São Paulo, 2013.

MARQUES, Claudia Lima. Campo de aplicação do CDC. In: Antônio Herman V. Benjamin, Claudia Lima Marques e Leonardo Roscoe Bessa. Manual de direito do consumidor. 3. ed. rev., atual. e ampl. São Paulo: Editora Revista dos Tribunais, 2010.

MARQUES, Claudia Lima. Contratos no Código de Defesa do Consumidor. São Paulo: Revista dos Tribunais, 2006.

DOMB, Menachem. Wearable Devices and their Implementation in Various Domains. Available in https://www.intechopen.com/books/wearable-devices-the-big-wave-of-innovation/wearable-devices-and-their-implementation-in-various-domains Access in 13.abr.2020

MIRANDA, Maria José. A inteligência humana: contornos da pesquisa. Paidéia (Ribeirão Preto), Ribeirão Preto , v. 12, n. 23, p. 19-29, 2002 . Available in http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-863X2002000200003&lng=en&nrm=iso. Access in 13. Abr.2020 https://doi.org/10.1590/S0103-863X2002000200003.

NUNES, Rizzato. Curso de Direito do Consumidor. São Paulo: Saraiva: 2013.

O cenário no Brasil. Available in https://info.mediamath.com/rs/824-LSO-662/images/GDMA_2017_PORT.pdf?aliId=eyJpIjoiUytURWdPd001cmtOK085aSIsInQiOiJaMnlBYjdtdWxDMVlMOEdjWnM5WnZRPT0ifQ%253D%253D Acesso 05.maio.2020

PEREIRA SIQUEIRA, D. Castro, Lorenna Roberta Barbosa. MINORIAS E GRUPOS VULNERÁVEIS: A QUESTÃO TERMINOLÓGICA COMO FATOR PREPONDERANTE PARA UMA REAL INCLUSÃO SOCIAl.Revista Direitos Sociais e Políti-

cas Públicas (UNIFAFIBE).ISSN 2318-5732. v. 5, n. 1 (2017). Available in http://www.unifafibe.com.br/revista/index.php/direitos-sociais-politicas-pub/article/view/219 Access in 14.br.2020

PINHEIRO, Patricia Peck. Direito Digital. Atlas. São Paulo:2014.

SARLET, Ingo Wolfgang. A Eficácia dos direitos fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado. 2012.

SÉGUIN,Elida. Minorias e Grupos vulneráveis: uma abordagem jurídica. Rio de Janeiro: Forense, 2002. p. 12. Apud. PEREIRA SIQUEIRA, D. Castro, Lorenna Roberta Barbosa. MINORIAS E GRUPOS VULNERÁVEIS: A QUESTÃO TERMINOLÓGICA COMO FATOR PREPONDERANTE PARA UMA REAL INCLUSÃO SOCIAl.Revista Direitos Sociais e Políticas Públicas (UNIFAFIBE).ISSN 2318-5732. v. 5, n. 1 (2017). Available in http://www.unifafibe.com.br/revista/index.php/direitos-sociais-politicas-pub/article/view/219 Access in 14.br.2020

SILVA, Fabrício Machado da. Et al. Inteligência artificial [recurso eletrônico]; [revisão técnica: Carine Webber]. – Porto Alegre: SAGAH, 2019.

STATISTA. Available in https://www.statista.com/statistics/487291/global-connected-wearable-devices/ Access in 05.maio.2020

TERRA. 26.set.2012. Available in https://www.terra.com.br/noticias/tecnologia/robos/robo-confunde-humanos-e-passa-no-teste-de-turing-pela-1-vez,95188947c52ea310VgnCLD200000bbcceb0aRCRD.html>> Access in 05.maio.2020

TOMASEVICIUS FILHO, E. Inteligência artificial e direitos da personalidade. Revista da Faculdade de Direito, Universidade de São Paulo. v. 113,.

TURING, Alan. ‘Computing machinery and intelligence’. In: Mind. n. 49.

Received/*Recebido:* 01.06.2020.

Approved/*Aprovado:* 12.10.2020.

INFORMATION AND INFORMATION SOCIETY CONCEPTS AND ITS RELEVANCE

CONCEITOS DE INFORMAÇÃO E SOCIEDADE DA INFORMAÇÃO E SUA IMPORTÂNCIA

Beatriz Martins de Oliveira[1]
Ricardo Libel Waldman[2]

ABSTRACT

In spite of the terminology becoming popular, Information Society still is an unexplored concept for many. The inaccuracy of the term for some, among other situational problems, stems from the uncertainty that hangs over the concept of “information”. Therefore, this paper aims, in an not exhaustively way, considering the depth of the matter to be approached, study and establish what is the concept of “information” to Information Society, through a multidisciplinary view and bibliography research, so we are able to concept also Information Society and demonstrate the study’s relevance to current society.

Keywords: Information; Information Society; Concept.

1. INTRODUCTION

The fluidity of modernity is a problem that affects even the concepts. Commonly, words are used almost as if they have lost their etymology, adapting to different discourses. This fluidity, perhaps due to inaccuracy or even conceptual ignorance, is a problem that plagues several areas of scientific knowledge, and it is not different with the study of “information”.

In spite of referring to something that has content, the word “information”, paradoxically, has increasingly lost its meaning, leading researchers to dedicate themselves to its conceptualization. But, even as a logical consequence, more uncertainty looms when we look at it in the term “Information Society”.

1 Master's student in Information Society Law at the University Center of Faculdades Metropolitanas Unidas, specialist in Civil Procedural Law and a Bachelor of Laws from the same institution. Attorney. ORCID iD: https://orcid.org/0000-0003-2314-1562. E-mail: beatriz.moliveira@outlook.com.

2 PhD in Law from UFRGS. Coordinator and professor of the Master in Law of the Information Society at Faculdades Metropolitanas Unidas and Professor at the School of Law at PUC-RS. Member of the IUCN Environmental Law Commission. Lattes: http://lattes.cnpq.br/5138875442525636. E-mail: ricardo.waldman@fmu.br.

How to cite this article/Como citar esse artigo:
OLIVEIRA, Beatriz Martins de; WALDMAN, Ricardo Libel. Conceitos de informação e sociedade da informação e sua importância. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 236-248, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.7965.

In this context of research, we often find books or scientific articles that go beyond the conceptualization of themes, almost assuming that the reader knows what the Information Society is or what "information" this name refers to. Such research starts without addressing basic questions, leaving the reader new to the theme adrift in deeper content and only allowing its real understanding to the reader who was previously familiar with the theme.

Aware of this issue, we propose in this work to bring together multidisciplinary studies with the purpose of conceptualizing "information", also subsidizing the conceptualization of the Information Society, which, as a moment we experience and area of study, with its own characteristics and results, deserves attention. At the end, we highlight the importance of research for current and future society.

The research is divided into three chapters. The first analyzes concepts of "information" through the prisms of Information Science and the targeted study of the Information Society, when we have studies in the areas of sociology, economics, history and philosophy. The second is dedicated to the concept of the Information Society, considering the entire framework addressed in the previous chapter. The third points out some situations that allow us to realize the importance of the studies in the previous chapters. This article uses the bibliographic research methodology.

2. INFORMATION CONCEPTS

The inaccuracy of the concept of "information" is a concern in some fields of knowledge, which has led several researchers to try to define it. Michael Buckland Keeble, for example, said that "An exploration of' information 'faces immediate difficulties. As information relates to becoming informed, reducing ignorance and uncertainty, it is ironic that the term 'information' itself is ambiguous and used in different ways."[3] (BUCKLAND, 1991, p. 351).

Likewise, more specifically in the field of study of the Information Society, Mattelart (2006, p. 64) states that "As for the notion of 'information', it will soon become a black box, a master word, a true 'Proteu da semantics' out of the 'Pandora's box of imprecise concepts' ", showing equal concern about the different ways in which the word has been applied, ways that are even surprising, which is why the concept deserves attention.

Thus, considering our final objective of establishing the concept of "information" for the Information Society through a multidisciplinary view, this first chapter will be dedicated to analyzing the information concept from the perspective of Information Science, as well as from the study of Society of Information.

3 An exploration of 'information' runs into immediate difficulties. Since information has to do with become informed, with the reduction of ignorance and of uncertainty, it is ironic that the term "information" is itself ambiguous and used in different ways." - Tradução livre.

2.1 INFORMATION CONCEPT FOR INFORMATION SCIENCE

Information Science is a field of study that goes very close to the study of the Information Society[4], and which aims to analyze informational problems, resulting from the important social responsibility of transmitting knowledge (SARACEVIC, 1996, p. 43). Buckland, in an article devoted exclusively to analyzing the concept of information, establishes the existence of three main meanings for the word: information as a process, information as knowledge and information as a thing (BUCKLAND, 1991, p. 351), analyzing it those from two perspectives: first, if the information is tangible or intangible, and second, if it is an entity or process (BUCKLAND, 1991, p. 352).

For the author, information as a process is that which causes transformation in the person's knowledge, it is the receipt of new content. It is an intangible process, independent of physical support. Information as knowledge, on the other hand, is the object of the informational process, and it needs to be expressed through communicational processes in order to make it known. In this configuration, the information is an intangible entity. On the other hand, information as a thing refers to the manipulable document that contains information as knowledge, which is, for this reason, a tangible entity (BUCKLAND, 1991, p. 351). In this sense:

> The intention may be that users become informed (information as a process) and that a transmission of knowledge occurs (information as knowledge). But the means provided, what is handled and operated, what stores and retrieves it, is physical information (information as a thing). (BUCKLAND, 1991, p. 352).[5]

Therefore, the author lists three possible meanings for the word "information" in the study of Information Science. However, there is another possible approach, equally important and complementary to this analysis, still in this area of studies. Rowley (2006, p. 163-180), whose research comprises the so-called Hierarchy of Wisdom (or *DKIW hierarchy*[6]), which allocates data, information, knowledge and wisdom, will also serve as a basis for supporting the concept of "information".

According to the author (ROWLEY, 2006, p. 166), the first record of the hierarchical ideal would have appeared in a poem by TS Eliot, called The Rock, in 1934, in which the lyrical self questions: "Where is the wisdom we lost in knowledge? Where is the knowledge we lost in information?"[7]. However, the hierarchy containing all its current objects (data, information,

---

4 " Three are the general characteristics that constitute the reason for the existence and evolution of IC; other fields share them. First, CI is, by its nature, interdisciplinary, although its relations with other disciplines are changing. The interdisciplinary evolution is far from being completed. Second, CI is inexorably linked to information technology. The technological imperative determines IC, as it also occurs in other fields. In a broad sense, the technological imperative is imposing the transformation of modern society into an information society, an information age or a post-industrial society. Third, CI is, along with many other disciplines, an active and deliberate participant in the evolution of the information society. CI had and has an important role to play due to its strong social and human dimension, which surpasses technology. These three characteristics or reasons are the model for understanding the past, present and future of CI and the problems and issues it faces. " Source: SARACEVIC, Tefko. Information science: origin, evolution and relationships. In Ci. Inf., Belo Horizonte, Vol. 1, n. 1, p. 42, Jan./Jun. 1996. Available at: http://portaldeperiodicos.eci.ufmg.br/index.php/pci/article/view/235/22 Accessed on: April 9, 2020.

5 "The intention may be that users will become informed (information-as-process) and that there will be an imparting of knowledge (information-as-knowledge). But the means provided, what is handled and operated upon, what is stored and retrieved, is physical information (information-as-thing)." - Tradução livre.

6 Cunha para a hierarquia da sabedoria que alude às iniciais de dados, conhecimento, informação e sabedoria em inglês *(data, knowlegde, informatione wisdom).*

7 "Where is the wisdom that we have lost in knowledge? Where is the knowledge that we have lost in information?" - Tradução livre.

knowledge and wisdom), in addition to one more (the understanding, not often used), would be attributed to Ackoff in his text From data to wisdom, dated 1989.

Analyzing Ackoff (1999, p. 170), we find that he starts his work by stating that "One gram of information is worth a kilo of data. A gram of knowledge is worth a kilo of information. An ounce of understanding is worth a pound of knowledge."[8] and conceptualizes data as symbols that represent qualities of objects, while information would be the processed data, improved to ensure its greatest utility. The author adds that, therefore, the difference between data and information is functional, not structural.

Although Ackoff (1999, p. 170) still differentiates information from knowledge and understanding, stating that information answers questions such as "who", "what" or "when" (descriptions), while knowledge answers questions of "how" (instructions) and understanding the "why" questions (explanations), he says that all of these act in the same way, increasing efficiency. Wisdom, in turn, for the author, is linked to an evaluative judgment.Rowley (2006, p. 176), analyzing Ackoff and other scholars about the concept of information, he concludes that the latter is constantly related to the concept of data, which rekindles our discussion in this article. The considerations in this chapter, specifically focused on Information Science, will serve our next analysis, which will be restricted to the concept of information for the study of the Information Society.

2.2 INFORMATION FOR THE INFORMATION SOCIETY

Before conceptualizing the Information Society, we will observe the semantic extension of "information" for this concept, in order to better subsidize the studies. Thus, despite the constant use of the term "Information Society", we will focus only on the definitions that we find in this field for information, which will corroborate the subsequent study on the Information Society.

Mattelart, in a historical analysis of the Information Society and from different authors, brings possible definitions for information. In a mathematical sense, he quotes the Mathematical Theory of Communication, by Claude Elwood Shannon, stating that the "definition of information is strictly physical, quantitative, statistical. It is mainly about 'amount of information'. " (MATTELART, 2006, p. 63). And, contrasting this idea, from Machlup he argues that, linguistically, to inform is to transmit knowledge (MATTELART, 2006, p. 69). He complements, from Bernard Stiegler's philosophical point of view, that the value of information is linked to the time of its dissemination, that is, "information is a commodity of perishable memory by definition; it opens up a new form of temporality that forms a contrast with that of the time when knowledge is developed "(MATTELART, 2006, p. 71). The author relates the value of information to its time of diffusion, because, over time, it becomes obsolete, loses its value.

In turn, Amaral (2008, p. 126), in a study with the economic focus of the Information Society, clarifies that information is "a message, usually in the form of a document or in an audible and / or visible communication in a enriched version of data, since it includes something about the context that allows to remove some meaning".

8 "An ounce of information is worth a pound of data. An ounce of knowledge is worth a pound of information. An ounce of understanding is worth a pound of knowledge." - Tradução livre.

For Castells (2016, p. 135), from a sociological perspective, “The emergence of a new technological paradigm organized around new information technologies, more flexible and powerful, makes it possible for information itself to become the product of the production process.” , that is, the author understands information as a product in the Information Society.

Specifically at the Brazilian level, the Green Book of the Information Society, in its presentation (TAKAHASHI, 2000, p. V), despite the use of the term “knowledge” (which is often confused with “information”), directs the context for the understanding of the Book, which deals with the Information Society in Brazil, stating that “Knowledge has become, today more than in the past, one of the main factors of overcoming inequalities, adding value, creating qualified jobs and the spread of well-being. ” The adopted concept carries many characteristics in which we perceive the common fund of adding knowledge to the recipient of the message, because that is how we will find most of these highlighted points. Another factor that deserves to be highlighted in the concept is the added value, which leads us to a contributory view of information as a qualifier that brings value.

Sampaio, analyzing questions about the use (disguise) of personal data by large companies and governments, deals, from a legal point of view, about the need for a more effective data protection system, which sees this interest as meta-individual, since the consequences of its use go beyond the sphere of the individual, reaching the collectivity. The author states that::

> [...] information consists of economically appreciable data, which can serve as a resource or product, and can improve the performance of a given agent according to its treatment or supply to others, so that it is not limited to closed, complete information. Its importance, therefore, is more associated with its use and purpose than itself and necessarily with its holder [...]. (emphasis added) (SAMPAIO, 2019, p. 37).

The author speaks of “economically appreciable data”. About this, we can highlight Harari, who analyzes the value of the data. The author explains that by gathering information, the data giants will be able to manipulate us, work with the reengineering of organic life and the creation of inorganic life forms, highlighting that, although advertising keeps them financially in the short term, their value is evaluated through data they own and collect. And he concludes his thought, in order to lead us to the fact that, yes, information consists of economically appreciable data (now or in potential), stating that:

> Even if you don’t know how to make money from data today, it is worth having it because it can be the key to controlling and shaping life in the future. I’m not sure that the data giants think explicitly in those terms, but their actions indicate that they value the accumulated data more than mere dollars and cents. (HARARI, 2018, p. 108).

Facing each of the studies and concepts presented, we can attribute information to a complex concept for the Information Society. Although we sometimes search for a universal concept, applicable to a certain word in any context, as a rule, this will not happen, so that we will not conceptualize “information” in a colloquial, ordinary or general context, but specifically for the study of Information Society.

The studies raised lead us to the conclusion that “information” for the Information Society, in a broad sense:

- it is “information as knowledge”, an intangible entity, because, according to Buckland (1991, p. 351), it is effectively the knowledge that is transmitted, the object of the communication;
- references data, information, knowledge and understanding, since, according to Ackoff (1999, p. 170), the difference between these definitions is in its function and not in its structure. Insofar as data, information, etc. it is worked on, acquires new functions, even though its structure is shared;
- it is a resource, as Sampaio (2019, p. 37) highlights, because the information is used to generate more information;
- it is a product of the productive process, as Castells (2016, p. 135) clarifies, because, at the same time as it is a resource, it is the final marketing objective, that is, it is the target of negotiations;
- adds and has value. In the presentation of the Green Paper on the Information Society (TAKAHASHI, 2000, p. V) it is stated that knowledge adds value, without informing to whom or to whom it would be added. Information, in a complementary way, can add value to products and services, and for this reason, individually, it will be assigned a value;
- its value is directly influenced by the time of its propagation, because with the passage of time, information can become obsolete, uninteresting, mistaken, therefore suffering direct influence from the temporal factor (MATTELART, 2006, p. 71). In addition to this characteristic, we must also add the factor of new technologies that attribute a new temporal sensation, different from physical time, and that provides new information at all times.
- it has an uncertain future value, potentially, due to the great power it can grant to its holders, as Harari (2018, p. 108) explains.

And with this overview we conceptualize. Information is for the Information Society an intangible entity, the object of an informational, communicative process, which, in a broad sense, welcomes data, information, knowledge and understanding, as each of these terms has the same structure, despite its different functions. Information is a resource and a final product in the production process, considering that it is used to produce more information, as much as it is the result of that production. It has market and financial value, independently, due to its ability to assign value to products and services, which can be measured in different ways depending on its diffusion time. And it has a potential value, due to its future use, still uncertain in form, but certain in power.

3. INFORMATION SOCIETY

Having conceptualized information, we turn our concern to the Information Society, which, likewise, often suffers from the indeterminacy of its concept. In this regard, Matellart (2006, p. 71) states that “The inaccuracy that surrounds the notion of information will crown that of the ‘information society’.” And yet, Webster (2006, p. 08) questions:

> What is striking in reading the literature on the information society is that many authors work with undeveloped definitions of their object. It seems so obvious to them that we live in an information society that they happily assume that it is not necessary to clarify precisely what they mean by the concept.[9]

Bearing in mind this other problem, we will work with the previously established concept of "information" and with the definitions of some authors to conceptualize the Information Society. To this end, we will start with a succinct historical analysis, according to the study by Crawford (1983, p. 380), which establishes the beginning of research on the Information Society in the West in 1962, with the economist Fritz Machlup, who studied the production of knowledge in the United States of America as an important component for the Gross Domestic Product.

In spite of that moment, we still do not observe the use of the expression "Information Society" - Machlup uses the knowledge industry -, it is from this that the study on the characteristics of information is verified according to our current concept. And soon after, in the 1970s, the term Information Society is now used (CRAWFORD, 1983, p. 381).

In addition to the term used by Machlup, we can highlight many others that were used to refer to the society that would leave the material industry behind as the basis of its economy. Masi (2003, p. 32), who prefers the term "post-industrial society", attributes this great variety to the uncertainty that hovered at a certain moment about which characteristic would prevail in the society that was established next, about what would replace the industry of material capital:

> The labels attributed to the current society, the evolutionary stages of the transition and the supported societies are more than three hundred and range from "society at a standstill" (M. Crozier) and "unprepared society" (D. Michael), the "age of balance" (L. Mumford), "conscience III" (C. Reich), "casual century" (M. Harrington), "state of entropy" (H. Henderson), "narcissistic society" (Ch. Lasch) , the "programmed society" (A. Touraine and Z. Hegedus), the "post-modern society" (JF Lyotard), the "pre-figurative culture" (M. Mead), the "post-civil society" (K Boulding). And then we have R. Dahrendorf's "post-capitalist society", C. Offe's "mature capitalism society", K. Galbraith's "advanced capitalism society", E. Fromm's "healthy society", A. Etzioni's "active society", R. Inglehart's "post-materialist society", Z. Brzezinski's "technotronic society", Toffler's "third wave", J. Gershuny's "service society" and WR Rosengren, Drucker's "age of discontinuity". (MASI, 2003, p. 33)

On the other hand, in the East, the term Information Society appeared a little earlier. According to Karvalics (2007, p. 05), in 1961, the term would have been used during a conversation between the architect Kisho Kurokawa and the historian and anthropologist Tudao Umesao, in Japan. And, in writing, it would have appeared for the first time in a study published by Jiro Kamishima in January 1964, entitled by editor Michiko Igarashi as Sociology in Information Societies. Not much later, in the years 1968 and 1969, there were already books in the country that worked on the theme using this term specifically.

In view of this historical panorama contextualizing our analysis, which demonstrates that the studies of the Information Society in the West arose from an economic study of knowledge, we highlight some concepts that demonstrate this relationship of information with the economy and that allow us to understand that we are experiencing the historical moment

9 "What strikes one in reading the literature on the information society is that so many writers operate with undeveloped definitions of their subject. It seems so obvious to them that we live in an information society that they blithely presume it is not necessary to clarify precisely what they mean by the concept". - Tradução livre.

where the material industrialist economic base was left behind, giving way to a new intangible economic base: information.

It should be clarified, according to Mattelart, that, considering the technological advancement, there is a concern with the limited view of "information" as a concept dependent on technology, because, in this way, the concept of the Information Society would become purely instrumental. Although new technologies have brought great changes to the Information Society, we must be sure that one concept is independent of the other

> The tendency to assimilate information to a term derived from statistics (data / data) and to see information only where there are technical devices will be accentuated. Thus, a purely instrumental concept of the information society will be installed. With the social atopy of the concept, the socio-political implications of an expression that supposedly designates the new destiny of the world will become attached. (MATTELART, 2006, p. 71)

Having made this reservation, we move forward in the search for the concept of the Information Society, referring to some authors. Loveluck states that "The information society would therefore correspond to a 'knowledge economy' or 'knowledge economy', which would be the sequence of 'industrial capitalism'" (LOVELUCK, 2018, p. 112), indicating - as well as others authors prefer to refer - a post industrial society (MASI, 2003, p. 93). Deepening the vision beyond economic issues, Amaral understands that the Information Society implies social and economic changes:

> From a technological point of view, the Information Society constitutes a deepening of the technologies of electronic technologies and the digital revolution of the 3rd Industrial Revolution, but from a socio-economic point of view it is much more than that. The Information Society brings a new model of economic development while causing profound and extensive changes in the behaviors, attitudes and values of the social and political structures of our time. (AMARAL, 2008, p. 41)

Bioni, on the other hand, understands this society as having the nuclear element of information:

> At the current stage, society is hampered by a new form of organization in which information is the core element for the development of the economy, replacing the resources that formerly structured agricultural, industrial and post-industrial societies. (BIONI, 2019, p. 02)

On the other hand, we must consider the global character that the Information Society has. As Branco analyzes, there must be cooperation between countries so that we can, in fact, reach the Information Society at a global level, whereas, in the author's conception, a relationship between countries that does not allow the exchange of information characterizes a "Disinformation society". (BRANCO, 2005, p. 234).

Regarding the broad meaning of the Information Society, Himanen points out that "From a theoretical perspective, the key concept includes a network organization[10] and growth based

10 "In addition, network communication transcends borders, the network society is global, it is based on global networks. Then, its logic reaches countries all over the planet and diffuses itself through the power integrated in the global networks of capital, goods, services, communication, information, science and technology. What we call globalization is another way of referring to the network society, albeit in a more descriptive and less analytical way than the concept of a network society implies. However, as networks are selective according to their specific programs, and because they are able to communicate and not communicate at the same time, the network society diffuses throughout the world, but does not include all people. In fact, at the beginning of this century, it excludes most of humanity, although the whole of humanity is affected by its logic, and by the

on innovation. The information economy is based on productivity growth based on innovation, as opposed to the so-called "new economy"." (HIMANEN, 2005, p. 347).

Based on these theoretical frameworks, we have, therefore, that the Information Society is the historical moment, of global character, organized in a network, which has information as its core and in which the economy and social relations were restructured based on information., and such a moment, despite not depending on new technologies, has its characteristics enhanced by them, currently resting its operational base in them.

Adding to this analysis our previous concept of information, we conceptualize the Information Society as being the historical economic-social moment in which the intangible entity that is the object of the communicational process, that is, information as knowledge, is the means and the end of market relations, as it presents itself as a resource and as a product. In this period, information is capable of assigning value, which will be compared in different ways in different temporal contexts, and the relationships (organized in a network), as well as the economy, become global, whose bases rest on the new technologies of information. information.

4. THE RELEVANCE OF CONCEPT: SOME USES OF INFORMATION IN THE INFORMATION SOCIETY

The conceptualization of terms may seem only interesting from an academic point of view, but it proves to be very important in a practical aspect. The concepts allow us to analyze issues of daily life with new perspectives, being exactly what this last chapter seeks to demonstrate in a brushstroke way, since its study in a detailed way would provide an exclusive and more extensive research.

Considering the concept of information for the study of the Information Society, which contemplates it as a final product and resource in the production process, having real and potential market value, the conclusion (not yet expressly adopted in this study, but still resulting from it) is that the holder of this mass information has a lot of power, be it current, in the form of financial resources, or potential, in ways to reveal itself.

Harari (2018, p. 108) works this relationship very well. The author makes considerations about the data giants - the big companies that hold countless data, about countless people -, considering that their current support, made through advertising (selling information about consumers to add value to advertising practices, which originates the consumer of glass (BIONI, 2019, p. 19)), little can be compared to the power they have accumulated with this data for the future, which today are used for a lesser and more temporary purpose.

Even when we think about the use of this information in this "innocent" context (close to the other practices that we will point out) of manipulation, it itself becomes threatening beyond consumerism. Turning to the democratic system, Harari (2018, p. 110) recalls the Cambridge

power relations that interact in the global networks of social organization." Source: CASTELLS, Manuel. The Network Society: From Knowledge to Politics. In The Network Society From Knowledge to Political Action. Portugal, National Press - Casa da Moeda, 2005, p. 18.

MERITUM MAGAZINE • v.15 • n.4 • p. 236-248 • 2020

Analytica[11] scandal, demonstrating that, in addition to mere speculation, democracy suffers a real threat due to this power achieved by those who have information. Targeted advertising, fake news, all the ways used to manipulate people through information end up manipulating the "democratic" system.

For the author, still, these data in a future period may propitiate the manipulation of organic life or the creation of inorganic life, in addition to other possibilities that we cannot even imagine. This power - which in our research we call the potential value of information -, which seems even divine, says Harari, is monopolized in the hands of the data giants. And he asks: would it be better to grant these (divine) powers to private or public organizations? to companies or to the government? His conclusion: none of them. Private ownership, of the data subject, would be more appropriate (HARARI, 2018, p. 109-110). In other words, for the author, the so-called informational self-determination would be a better option.

We then take up another idea referenced at the beginning of this research. Even private property, as an expression of informational self-determination, seems inadequate for the protection of information (in its concept discussed here), seeming more adequate, as Sampaio's research (2019) leads us to understand, its protection as a meta-individual interest, because its improper use, its mass allocation in the hands of one or the other, will affect the entire community, and it is no longer enough to entrust its individual protection to its total protection. Otherwise, the current Information Society (supported by technologies) may put an end to democracy and initiate a period of monopoly of power (political, scientific, genetic, financial, etc.) for information giants.

The theme was also addressed by other jurists, but the doctrine is still beginning to pioneer it. Pinho and Marca (2017, p. 287), when addressing the insufficiency of individual tutelage for data protection today, justify the need for this collective look, a priori, on issues related to consumption, exemplifying data theft or profiling for manipulation consumption (practice previously referred to here as "glass consumer"). But the truth is that, as Harari's thoughts indicate, the problems go far beyond that.

Moving a little further, Zanatta (2019, p. 202) deals with the "collectivization of personal data protection" (as he calls it), clarifying that it is impossible to demand from the data subject the knowledge of all the signed commercial relations, because "the most of the data that drives the digital economy is not yielded". For the author, most of the data is taken from the devices or inferred from patterns.

In addition, the author highlights four basic elements for such collectivization. The first considers the possibility of observing a violation of society's values, that is, beyond the individual. The second, the way in which protection should take place, pointing public civil actions as the main means. The third element is aimed at protecting the informational environment, imposing on companies and public sector bodies that deal with data the obligation to assess the impact of their activities and adopt measures to avoid or minimize possible damage. The last element pointed out by the author is to regard the protection of personal data as a collective issue of consumer protection (ZANATTA, 2019, p. 203).

11 "In March 2018, a report from The Observer revealed that the company stole the data from 87 million people on the social network to influence election results in the country [United States of America]." Source: ROMANI, Bruno. 'People were tricked into giving something valuable: their data,' says Brittany Kaiser. Available at: https://link.estadao.com.br/noticias/cultura-digital,as-pessoas-foram-enganadas-para-dar-algo-valioso-seus-dados-diz-brittany-kaiser,70003275070 Access at : May 15, 2020.

In addition to the basic elements, Zanatta (2019, p. 2014) highlights a specificity of data protection in Brazil and points out a fifth element. According to him, the collectivization of data protection in our legal system must be intensely marked by the work of the Public Ministry.

Zanatta considers possible threats to social values, in addition to addressing consumer relations, allowing us to get a little closer to the protection that the scenario calls for, but still does not consider the total picture. Sampaio (2019, p. 50) deals with the use of information, emphasizing that it can even influence electoral results. The author demonstrates that the profiling used in marketing practices can also be used to manipulate electoral choices, leading us, at a national level, to perhaps the biggest problem to be faced by the data protection system today, as some scandals already demonstrate.

It should be clarified, in this sense, that this statement, even though it may be catastrophic, can also be an encouragement in the face of even darker risks. This is because this threat to democracy, although serious, is not directly the biggest problem to be tackled in relation to the use of information. Sampaio speaks of the use of information during the Nazi period, in which “positive eugenics” (“racially superior” fertility) was supported by data collected by the government, in addition to other equally worrying examples, notably regarding the persecution of minorities and violation of human rights (SAMPAIO, 2019, p. 25). Even if the threat to democracy is manifest and imminent, already lacking in clashes, the hope is that it will not go beyond that, that we will not violate human rights as they once did and that this will be the biggest fight to be fought. May we at least maintain our humanity, to the detriment of the incessant technological dawn that we see every day.

Thus, it is essential that we understand the value of information in today’s society so that we can reach conclusions such as those adopted by Harari and Sampaio. The concept of “information” and “Information Society” is necessary to reveal this scenario more clearly, but it is only the starting point. The use of information has become increasingly controversial, taking into account personal and business agendas, violating individual and meta-individual human rights, raising the need for sufficient norms to safeguard such a standard of rights.

5. CONCLUSION

This study aimed to analyze and establish, through bibliographic research, the concept for “information” in the context of the Information Society and, considering this, to reach a concept for the “Information Society” itself, in view of the inaccuracy that plagues these terms even in the academic community, which makes it difficult to study this field. The research proposes a non-exhaustive analysis and a succinct note of the importance of this matter, in view of its necessary brevity.

Thus, a theoretical framework was analyzed about the concept of “information”, which allowed us to know the classification of three main meanings attributed to that word, namely: “information as a process”, “information as knowledge” and “information as a thing”, with each of the characteristics that differentiate them. In addition, we studied the so-called Hierarchy

of Wisdom, which clarifies the functional difference of the concepts of “data”, “information”, “knowledge” and “wisdom”, as well as the attribution of value to each one of them.

In an analysis of the literature on the Information Society, we found that information is a resource and product for industry, adding real economic value to products and services. And that value, which is attributed to it, depends on the time factor. In addition, we establish that the information has a potential value, that is, yet to be revealed.

In view of this referential base, we established a complex concept of information for the Information Society and, now, we transcribe it so that, in order to summarize the information, we do not lose relevant factors pointed out in it: Information is an intangible entity for the Information Society, object of an informational, communicative process, which, in a broad sense, welcomes data, information, knowledge and understanding, as each of these terms has the same structure, despite its different functions. Information is a resource and a final product in the production process, considering that it is used to produce more information, as much as it is the result of that production. It has market and financial value, independently, due to its ability to assign value to products and services, which can be measured in different ways depending on the time of diffusion. And it has a potential value, due to its future use, still uncertain in form, but certain in power.

In view of this, we move on to the specific bibliographic analysis of the Information Society, with the same aim of reaching a term concept. Initially, we analyzed a brief historical context that allowed us to establish that “Information Society” initially refers to the society that has information as a producer of economic value.

Considering other more characteristics that the doctrine recognizes to the Information Society, we conclude (and here we transcribe again): Information Society as the historical economic-social moment in which the intangible entity that is the object of the communicational process, that is, information as knowledge, it is the means and the end of market relations, as it presents itself as a resource and as a product. In this period, information is capable of assigning value, which will be compared in different ways in different temporal contexts, and the relationships (organized in a network), as well as the economy, become global, whose bases rest on the new technologies of information. information.

Finally, we establish the importance of its study, which is revealed by the countless shady uses that information can and has found in our society, concluding that a new regulatory framework for the Information Society is needed, supra-individual, so that it does not involve steps about which, in spite of regret, society can never go back.

REFERENCES

AMARAL, Luís Mira. **Economia tech: da indústria à sociedade da informação e do conhecimento.** Lisboa, Booknomics, 2008.

ACKOFF, Russel. From Data to Wisdom. In **Ackoff's Best,** New York, John Wiley & Sons, 1999, p. 170 – 172. Disponível em: http://faculty.ung.edu/kmelton/Documents/DataWisdom.pdf Acesso em 08 de abril de 2020.

BIONI, Bruno Ricardo. **Proteção de dados pessoais: a função e os limites do consentimento.** Rio de Janeiro, Forense, 2019.

BRANCO, Marcelo. Software Livre e Desenvolvimento Social e Económico. In**A Sociedade em Rede Do Conhecimento à Acção Política.** Portugal, Imprensa Nacional - Casa da Moeda, 2005, p. 227-236.

BUCKLAND, Michael K. Information as Thing. In **Journal of the American Society for Information Science**. Jun 1991; 42, 5, p. 351-360. Disponível em: https://cmapspublic.ihmc.us/rid=1KR7TY2LF-B4K41P-5SWT/BUCKLAND(1991)-informationasthing.pdf Acesso em: 07 de abril de 2020.

CASTELLS, Manuel. **A Sociedade em Rede.** São Paulo, Paz&Terra, 2016.

CASTELLS, Manuel. A Sociedade em Rede: do Conhecimento à Política. In **A Sociedade em Rede Do Conhecimento à Acção Política.** Portugal, Imprensa Nacional - Casa da Moeda, 2005, p. 17-30.

CRAWFORD, Susan. The Origin and development of a concept: The Information Society. *In* **Bulletin of the Medical Library Association**, oct 1983, p. 380–385. Disponível em: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC227258/?page=1Acesso em 09 de abril de 2020.

HARARI, Yuval Noah. **21 lições para o século 21.** São Paulo, Companhia das Letras, 2018.

HIMANEN, Pekka. Desafios Globais da Sociedade de Informação. In**A Sociedade em Rede Do Conhecimento à Acção Política.** Portugal, Imprensa Nacional - Casa da Moeda, 2005, p. 347-370.

KARVALICS, László Z. **Information Society – what is it exactly? (The meaning, history and conceptual framework of an expression).** Budapest, 2007, p. 05. Disponível em: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.575.6057&rep=rep1&type=pdf Acesso em: 15 de maio de 2020.

LOVELUCK, Benjamin. **Redes, liberdades e controle.** Petrópolis, Vozes, 2018.

MASI, Domenico. **A Sociedade Pós Industrial**. 4 Ed., Senac São Paulo, São Paulo, 2003.

MATTELART, Armand. **História da sociedade da informação**. 2 ed. São Paulo: Edições Loyola, 2006.

PINHO, Humberto Dalla Bernardina; MARCA, Luiz Augusto Castello Branco de Lacerda. Possibilidades e limites para a tutela da intimidade e da privacidade enquanto direitos meta-individuais. *In* **Revista Eletrônica de Direito Processual**, n. Ano 11. Volume 18. Número 1. Janeiro a Abril de 2017, p. 278-301. Disponível em: https://www.e-publicacoes.uerj.br/index.php/redp/article/view/28492/20280 Acesso em 25 de maio de 2020.

ROMANI, Bruno. **'As pessoas foram enganadas para dar algo valioso: seus dados', diz Brittany Kaiser.** Disponível em: https://link.estadao.com.br/noticias/cultura-digital,as-pessoas-foram-enganadas-para-dar-algo-valioso-seus-dados-diz-brittany-kaiser,70003275070 Acesso em: 15 de maio de 2020.

ROWLEY, Jennifer. The wisdom hierarchy: representations of the DIKW hierarchy. **Jornal ofInformation Science**, v.33, n.2, p. 163-180, 2006. Disponível em: https://journals.sagepub.com/doi/abs/10.1177/0165551506070706 Acesso em: 08 de abril de 2020.

SAMPAIO, Vinícius Garcia Ribeiro. **Proteção de dados pessoais: da privacidade à tutela de interesses metaindividuais.** Dissertação (mestrado em Direito). Centro Universitário das Faculdades Metropolitanas Unidas, São Paulo, 2019.

SARACEVIC, Tefko. Ciência da informação: origem, evolução e relações. In **Ci. Inf.**, Belo Horizonte, v. 1, n. 1, p. 41-62, jan./jun. 1996. Disponível em: http://portaldeperiodicos.eci.ufmg.br/index.php/pci/article/view/235/22 Acesso em: 09 de abril de 2020.

TAKAHASHI, Tadao (org.). **Sociedade da informação no Brasil: livro verde. Brasília: Ministério da Ciência e Tecnologia**, 2000. Disponível em: https://www.ufmg.br/proex/cpinfo/cidadania/wp-content/uploads/2014/04/Livro-verde.pdf Acesso em: 09 de abril de 2020.

WEBSTER, Frank. **Theories of the information society**. 3 ed. Nova York: Routledge, 2006.

ZANATTA, Rafael A. F. A tutela coletiva na proteção de dados pessoais. **Revista do Advogado: Lei Geral de Proteção de Dados Pessoais**, n. 144, São Paulo: Associação dos Advogados de São Paulo, nov. 2019, p. 201-208.

Received/*Recebido:* 03.06.2020.

Approved/*Aprovado:* 12.10.2020.

THE ROLE OF NEW INFORMATION AND COMMUNICATION TECHNOLOGIES IN THE DEMOCRACY CRISIS

O PAPEL DAS NOVAS TECNOLOGIAS DE INFORMAÇÃO E COMUNICAÇÃO NA CRISE DA DEMOCRACIA

Elísio Augusto Velloso Bastos[1]
Cristina Pires Teixeira de Miranda[2]
Daniela Rodrigues De Nardi[3]

ABSTRACT

The present study has the general objective of investigating the role to be played by the New Information and Communication Technologies (NICTs) in relation to the crisis that Democracy is currently going through in some parts of the world, including Brazil. Will they have a positive or negative influence? What ideas can be implemented to motivate a healthy relationship between NICTs and Democracy? The research now developed has a theoretical-descriptive character and qualitative bias, which is proposed within a critical and reflective perspective. The deductive method, of historical-comparative procedure and the bibliographic research technique specialized in the researched subject are used.

Keywords: Democracy; Crisis; New Information and Communication Technologies; Importance.

RESUMO

O presente estudo tem por objetivo geral investigar qual o papel a ser exercido pelas Novas Tecnologias de Informação e Comunicação (NTIC´s) em relação à crise pela qual atravessa a Democracia atualmente em alguns lugares do mundo, inclusive no Brasil. Terão elas influência positiva ou negativa? Que ideias podem

1 Doctor in State Law from the Law School of the University of São Paulo (USP). Professor in Human Rights and in General Theory of the Constitution (Graduation) and in Constitution Theory at the University Center of the State of Pará - CESUPA. Coordinator of the Artificial Intelligence, Democracy and Fundamental Rights Research Group. Attorney of the State of Pará. Attorney at Law. ORCID iD: https://orcid.org/0000-0001-8183-5920. E-mail: elisio.bastos@uol.com.br.

2 Master's student at the Stricto Senso Postgraduate Program in Law, Public Policies and Human Rights at the Centro Universitário do Pará - CESUPA. Member of the Artificial Intelligence, Democracy and Fundamental Rights Research Group. Lawyer for Banco do Estado do Pará - BANPARÁ. ORCID iD: https://orcid.org/0000-0001-7884-2687. E-mail: cristinamrodriguesadv@gmail.com.

3 Communicologist - Publicist and Advertiser from the Centro Universitário do Estado do Pará - CESUPA. Law student at the Centro Universitário do Estado do Pará - CESUPA. Member of the Artificial Intelligence, Democracy and Fundamental Rights Research Group. ORCID iD: https://orcid.org/0000-0002-6891-9561. E-mail: danydnard@gmail.com.

How to cite this article/Como citar esse artigo:
BASTOS, Elísio Augusto Velloso; MIRANDA, Cristina Teixeira de; NARDI, Daniela Rodrigues de. The role of new information and communication technologies in the crisis of democracy. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 249-269, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.7968.

ser implementadas para motivar uma relação saudável entre as NTIC´s e a Democracia? Ao Direito, na qualidade de fonte garantidora dos Direitos Fundamentais, caberá papel relevante nessa indagação, eis que deverá atuar sobre as NTIC's para orientar suas práticas em busca de que possam atuar junto à redução do déficit democrático. A pesquisa ora desenvolvida tem caráter teórico-descritivo e viés qualitativo, que é proposto dentro de uma perspectiva crítica e reflexiva. Utiliza-se o método dedutivo, de procedimento histórico-comparativo e a técnica de pesquisa bibliográfica especializada no assunto pesquisado.

Palavras-chave: *Democracia; Crise; Novas Tecnologias de Informação e Comunicação; Importância.*

MERITUM MAGAZINE • v.15 • n.4 • p. 249-269 • 2020

1. INTRODUCTION

Political democracy is currently going through a worrying crisis. It runs the risk of ceasing to be, without ever, in fact, having been. It runs the risk of being, itself, one of the promises it has not been able to keep. It is known that political democracy, beyond representation, has always been in crisis, since deliberative mechanisms have not yet achieved a reasonable effectiveness, especially in countries like Brazil, but not only here. This article will not deal with this crisis, although it is quite relevant.

It is also known that beyond the political field the democratic deficit is even greater, so that democratic values, as a rule, enjoy reduced influence in other fields of human relations, such as social, economic, gender relations, etc. It is not about this relevant deficit that we will speak either. As a matter of fact, as Boris Fausto well notes, in this aspect and in the aspect mentioned in the previous paragraph it is preferable to use the expression deficit, instead of democratic crisis, because the latter expression could give the idea of a "goal that has been reached, in times past, which is not certain. One of the central elements of the deficit concerns the quality of the democratic regime, its participatory content [...]" (FAUSTO, 2004, p. A3).

The crisis addressed here will be different. It is a crisis that threatens to deconstruct democracy, even, and above all, in fields where it was thought to be reasonably consolidated. The usefulness of democracy in achieving the promises it repeatedly fails to keep is currently under discussion.

Indeed, because in several places where this political regime enjoyed a certain level of health, it is already possible to identify signs of weakness. Its relevant conceptual elements are shaped so that any system of mediation between the unity of the State and the multiplicity of social actors can fit into them. People, more often and less shyly, justify notably despotic practices as necessary for the protection of democratic ideals. Hate speech is regularly used for the same purpose. Not by chance, moreover, some relevant surveys show that people have never been less committed to democracy or more receptive to authoritarian alternatives than they would be today, so that, effectively, democracy is losing space and prestige.

Thus, it remains relevant to know if these New Technologies can be used as instruments to overcome the crisis through which Democracy is going through, or, who knows, to worsen this crisis. In this aspect, it is important to investigate whether, in the current scenario of the crisis of Democracy and the extensive flow of data and the use of the so-called new technologies or information and communication tools, to what extent can Democracy be influenced? Moreover, as the present work assumes its commitment to democratic values, it is urgent

that alternatives be discussed so that such relationship may be profoundly positive and fruitful, so that the NICTs may be used as instruments capable of reducing the referred crisis and strengthening the political-democratic structures. It is urgent to ask what role the Law should play in this regard.

It is evident that the fight should be not only for the rescue of political democracy to its status quo ante bellum, but to rebuild it, reducing its deficit, since a good deal of the current crisis is planted in the promises that Democracy has not been able to keep, and is rooted in such deficit, therefore. A deficit that is political, regarding the mechanisms of direct citizen participation, but is also juridical, social, cultural, economic, gender, racial, etc.

Well then, the first step necessary to carry out this study is precisely to define the essential theoretical frameworks about democracy and the crisis it is going through. This will be the subject of the first chapter, which will have the works of Robert Dahl and Yascha Mounk as its main sources of research.

Next, the second chapter will seek to establish the conceptual foundations necessary to understand the effects that NICTs may cause in the exercise of the democratic game. To this end, the study supported by ideas coined by important authors who have elaborated serious and well grounded studies on this theme, such as Larry Diamond, Thomas Friedman, Farhad Manjoo, Cass Sunstein, and Cathy O'Neil, will be fundamental.

At the end, it will be time and place to analyze some suggestions so that the NICTs may, in the light of Law, effectively serve as an instrument to reduce the crisis and, why not, the democratic deficit. The most relevant doctrinal frameworks for the construction of such suggestions are those launched by Eduardo Magrani and Helbing et al. Some experiences adopted in the European Union are also used.

Thus, recognizing the importance of Democracy as one of the pillars of the Rule of Law and its necessity in a socio-political context, which has been remodeling itself based on the changes perceived within these contexts, it should be kept in mind that in a globalized scenario new changes are emerging, rapidly and significantly altering the way people interact with each other and share their lives with the world.

The relevance of knowledge about such changes is an extremely important way to recognize the way in which technology has impacted the private sphere of individuals, considerably affecting their autonomy.

2. POLITICAL DEMOCRACY: THE CONCEPTUAL PREMISES THAT ARE BEING LOST ALONG THE WAY AND THE CRISIS OF DEMOCRACY

At the outset, it is important to clarify that the present article will deal with political democracy as a political regime (despite its necessary social, economic, cultural, gender, etc. implications), thus conceiving it, lato sensu, as an instrument of mediation between the unity of the State and the multiplicity of social actors (TOURAINE, 1996).

MERITUM MAGAZINE • v.15 • n.4 • p. 249-269 • 2020

It is also important to clarify, in light of the need to establish conceptual premises, that the present work adopts the classificatory and descriptive line drawn by Lijphart, who identifies two great global models of political democracy the majoritarian one (where it is governed according to the majority and its interest is sought without worrying about maximizing the size of such majority) and the consensual one (where the majority is, only, a minimum requirement for Democracy, and, thus, it seeks to expand the participation in the government as well as the necessary consensus in political decisions that will be taken through instruments that enhance inclusion, negotiation and compromise) (LIJPHART, 2019). The reflection proposed by the present article serves both models.

Democracy, also for the purposes of this study, is a regime based on the recognition of certain Fundamental Rights that serve as a support for its effective exercise (DALH, 2001, p. 61/62). In this sense, for example, for the expression of plurality, a right that guarantees citizens freedom of speech is necessary; so that individuals can be properly enlightened, the Right to access to information and education is fundamental and so on, successively.

Autonomy and freedom reveal themselves, on the one hand, as basic presuppositions of the democratic model, and on the other, as the desired result of such model. This means that the free will of the citizen reveals itself as an indispensable condition for the true exercise of democracy, but, at the same time, the exercise of democracy should provide a strengthening of freedom and autonomy of individuals, in an inexhaustible relationship of feedback or strengthening between democracy, freedom and autonomy.

Precisely by understanding Democracy, for the purposes of the present study, remember, within the aspects revealed above, is that the same objective elements (conceptual premises) for a democratic process that Dahl deals with are identified and adopted. These are [a] effective participation, which consists in the possibility of every political participant being able to present his or her opinion on a given policy before its implementation; [b] equality of the vote, whereby everyone's vote should have equal weight; [c] enlightened understanding, that is, having knowledge regarding other possible policies and their consequences; [d] control of the planning program, which consists in deciding which issues should be the subject of planning; and [e] inclusion of adults, which guarantees the observance of the first criterion, but in relation to citizens (DALH, 2001, p. 50).

Remember that respect for these criteria is important to ensure political equality, so any violation would result in an inequality that would distort the political-democratic process. Thus, in summary, Democracy has as its main precepts: the guarantee of fundamental rights; individual valorization; respect for the diversity of ideas (GARCIA, 1997, p. 43), as well as equality, autonomy and freedom to decide. Such precepts guarantee the model the necessary cohesion to sustain its organizational structure and a real possibility of success in achieving its main objective: mediation (free, plural and equal) between the State and the multiplicity of social actors.

Thus, in the view of the authors of this study, democracy emerges as a practice that, in the existence of favorable conditions, will, in fact, allow individuals to participate freely and directly in the political decisions made in a society. Otherwise, democracy needs to feed back into the system, reinforcing and amplifying such favorable conditions. In other words, within a society, the individuals inserted in that context will be able to participate, opine, and even

oppose, effectively, the political issues put on the agenda. They will be able to establish their own individual organization to enforce their participation.

Well, not only in Brazil but also in other parts of the world, this is the model intended by the Constitutions of several countries around the globe. This was the model that, until recently, was seen as the ideal model, to be pursued by National States truly committed to ideals of freedom, autonomy, and equality.

It turns out that, as identified by some important authors, including Yascha Mounk (2019), individuals have never been less committed to Democracy or more receptive to authoritarian alternatives than they would be today. Thus, Democracy has been losing allies. It is true that there are other equally relevant analyses about this crisis faced by democracy, however, Mounk's analysis was chosen as representative of the issue since it registers a correct analysis about the setback movement that the consolidation of democracy has been suffering in recent years throughout important countries where, until then, it seemed to have no legitimate opponents.

It is thus clearly perceived that something has changed considerably since Norberto Bobbio stated, even if with a certain fear, that Democracy would not be subject to the internal dangers from which right-wing and left-wing extremisms could derive (BOBBIO, 2000, p. 49/50). After all, the author recalled, even unfulfilled promises or unforeseen obstacles would not have been enough to turn democratic regimes into autocratic ones, so the minimum content of the democratic state would not have shrunk.

This analysis no longer holds. According to Mounk, democracy is becoming increasingly deconsolidated and, over the decades, the number of citizens who distrust their politicians has increased considerably, while confidence in political institutions is increasingly low (MOUNK, 2019, p.125).

This is, as Krastev detects well, a true paradox, since Democracy would have reached its existential crisis at the exact moment of its global triumph (KRASTEV, 2020). Yes, because while Democracy is perceived as the best form of government by most people in the world, opinion polls indicate that people living in authoritarian regimes are more likely to believe that their voice matters in the decision-making process than people living in democracies.

Not only in North America, but also in Western Europe, voters' expectations about the fate of democracy are worrisome, as the population finds itself in a scenario of unpredictability about government actions. But it must be emphasized that this popular disillusionment did not occur in an inconsistent or even fortuitous manner. Yascha Mounk, for example, cites that in the United States, for example, the "Saturday Night Massacre" episode of the Watergate scandal, and which mobilized the impeachment of President Richard Nixon, significantly shook the confidence of Americans in their political representatives (MOUNK, 2019, p. 125).

Unfortunately, political scandals have become more and more frequent around the globe, notably those linked to episodes of corruption, embezzlement of public resources, violation of citizens' rights by the state, and the unpredictable possibilities of wars between countries. Corruption, social moralization, social securitization, emergence of the fight against terror, generalized surveillance are important elements (BOLZAN DE MORAIS, 2018, p.876-903) that begin to compose and define the state and social relations.

MERITUM MAGAZINE • v.15 • n.4 • p. 249-269 • 2020

MERITUM MAGAZINE • v.15 • n.4 • p. 249-269 • 2020

All this has motivated the growing democratic crisis, showing that people are less and less optimistic about this political regime, becoming more open to authoritarian regimes.

There is also a loss, and thus a conceptual weakening of the fundamental elements that characterize a democratic regime. In this sense, for example, there are several manifestations that proclaim themselves "in favor of democracy", but that, in truth, are founded on the absolute fragility or disregard of one, some or even all of the objective elements that characterize the democratic process, as, for example, in the manifestations that support the use of the Armed Forces or the closing of the Constitutional Courts as measures to be adopted to protect democracy.

But why is this happening? Why are young people especially surrendering to anti-democratic ideologies rather than advocating for the revitalization of political institutions as pillars of democracy? Mounk (2019) explains that much of this stems from a lack of knowledge about the consequences that the absence of Democracy brings to individuals and what it would be like to live in a political system without Constitutional guarantees.

If we observe what history shows us, the social struggles for the conquest of Public Freedoms were a very important step to limit the power of the State over people's lives and, consequently, avoid the tyranny of rulers, in order to protect people from the State itself. However, since this is a generation that did not experience fascism and does not know the turbulence of being inserted in a threatening political scenario, it somehow makes these individuals favor the relativization of authoritarian regimes, making real the possibility of political experimentation, since democracy no longer seems to be the only option. They are unaware of the smell of gunpowder because they have never been to war.

Be that as it may, it is certain that for Mounk (2019) a growing portion of citizens have been presenting negative views about Democracy or believe that it is not particularly important. As can also be seen in the current Brazilian scenario, a smaller but rapidly growing portion is open to authoritarian alternatives, with despots or military in power, in a clear demonstration of the crisis in Democracy, its assumptions and its institutions, which until recently were considered stable.

Democracy, thus, is in crisis, and this crisis, above all, is a crisis linked to a deep crisis of performance (MOUNK, 2019) arising from several unfulfilled promises, and this crisis, of course, is exploited by various sectors.

Bobbio rightly points out six of such promises, namely: 1) The empowerment of the individual; 2) The prohibition of the imperative mandate; 3) The defeat of oligarchies; 4) The exercise beyond the political frontier, with its action in non-political spaces in which power is exercised that makes binding decisions for an entire social group; 5) of eliminating Invisible Power, such as the power exercised by the mafia, militia, organized crime, etc. and, finally, 6) education for citizenship, which would enable the exercise of an eminently active citizenship (BOBBIO, 2000, p. 34/45).

In this context, other ways of thinking about collective organization seem to gain strength and the democratic regime and, what is worse, its values, are threatened. Many people ask themselves why insist on Democracy if it no longer (or definitively?) meets society's wishes, if political agents do not represent, and do not materialize, the interests of those who elected them? The current crisis of Democracy is, thus, the crisis (or the giving up) of the values that it

represents and intends to strengthen, among which are Fundamental Rights, freedom, autonomy, and equality.

Well then, during this crisis of democratic legitimacy, is it possible for Democracy to be re-dressed using NICTs to transform it into a new digital Democracy? In the current scenario of the crisis of Democracy and the extensive flow of data and the use of the so-called NICTs, to what extent can Democracy be influenced? This is what will be answered below.

3. NEW INFORMATION AND COMMUNICATION TECHNOLOGIES AND DEMOCRACY: WHERE WILL THE PENDULUM SWING?

For Castells, the core of the transformation experienced in the current scenario refers to information processing and communication technologies. According to the author:

> [...] information technology is to this revolution what new sources of energy were to successive industrial revolutions, from the steam engine to electricity, fossil fuels and even nuclear power, since the generation and distribution of energy were the main element in the basis of industrial society (CASTELLS, 2019, p. 88).

Well then, the evolution of information and communication technologies, from the printing press, the telephone, the television, and, finally, the computer, culminated, until this moment, with the so-called New Information and Communication Technologies - NICTs, which were driven by the expansion of the use of the internet. NICTs are, then, all the digital electronic devices that allow communication between individuals in real time, at high speed, and with a high flow of information.

In this sense, it is common to identify conflicting positions about the role (to be) played by such NICTs in the democratic system. From an optimistic to a gloomy perspective, the authors diverge on the possibility of using such technologies for the benefit of democratic instruments.

Runciman clarifies that at first it was believed that with the advent of a single network in which people, objects, ideas and information could be connected, Democracy would gain strength, and the great constant flow of information would become a powerful ally of democratic dictates. This is indeed possible, but it is far from an inexorable effect (RUNCIMAN, 2018, p. 154).

Larry Diamond (2012) goes so far as to call these new technologies "liberation technologies" (comprised of any form of Information and Communication Technology (ICTs) that can expand economic, political, and social freedom, which would currently involve the digital forms of ICTs - computer, internet, cell phones, Social Media...), in light of the empowerment they would give citizens and civil society to facilitate independent communication, expose opinions, mobilize protests, monitor elections, oversee government, and other ways of achieving freedom. Important samples of such liberation movements can be found in the "Green Revolution" in Iran, the "Arab Spring" in the Middle East and North Africa, Occupy Wall Street, Black Lives Matter in the US, and, in Brazil, the mobilization in favor of the half-pass and demonstrate

that, indeed, NICTs enjoy relevant potential to reduce the communicational gap between insiders and outsiders.

Friedman (2014), for his part, came to imagine that the democratization and diffusion of the revolution and universalization of new technologies, which left the Elites' computers for people's Smartphones, would give birth to a new global political force, bigger and more important than the "Men of Davos". In this sense, it should be clarified that the expression "Davos Men" was coined by Huntington (2004) to identify a global "superclass" emerging from the Davos World Economic Forum, a cosmopolitan and transnational elite, formed by high-tech, finance, multinationals, academics and NGOs and that had "little need for national loyalty" and more in common with each other than their fellow citizens.

Well, this larger and more important force than the "Men of Davos," Friedman (2014) called the "Square People." These square people would represent a diversity of politics and would demand a new kind of social contract. They would fight for their voice to be increasingly heard. They would fight for better schools, better roads, and better rule of law. They would demand the possibility of a better future and to have their voices amplified.

In a more skeptical view Runciman predicts that dependence on this new technology would make us an easy target for exploitation. The ones who would enslave us would not be killer robots, but unscrupulous individuals capable of using such technology to their advantage. He finishes by warning that in a land of technology dependents, those who navigate smartly would be king, as fake news and the micro-targeting of messages to voters would demonstrate (RUNCIMAN, 2018, p. 134).

Krastev (2020), for his part, correctly points out that NICTs have the power to dramatically increase governments' capacity for social control, so big data authoritarianism would be able to compensate for one of the main deficiencies of old-fashioned authoritarian regimes: the lack of relevant information about what is happening in society.

Also concerned, Manjoo (2016) suggests that before we get excited about such changes, we should get nervous about it, because the Internet has loosened our collective understanding of truth, which turns out to be a discouraging trend, suggesting that social media has become an increasingly powerful cultural and political force, to the point that its effects are beginning to alter the course of global events.

The author identifies, as a possible circumstance to favor political instability through the weakening of political institutions, the advent of the internet and social media, since they have enabled the spread of new sources of information, significantly weakening the pillar of the hypodermic theory of communication: the mass media (MANJOO, 2016).

In this sense, the transformation in communication is such that, currently, newspapers, radios and televisions (pillars of the hypodermic theory of communication) now also use internet-based communication in their production or dissemination, in a true revolution also incident on the reading patterns of such information, that not only make the mainstream media less and less relevant as hostages of the Technology Giants (especially Google, Facebook and Amazon) that, thus, now assume the role once played by the mainstream media, i.e. as true gatekeepers of information, but, what may be more worrying, make them (us) hostages of the values of such giants (FOER, 2018, p. 137).

To get an idea, it is estimated that among Americans, 62% read news from social media, notably Facebook, and not from the main page of the major media outlets, with one-third of the traffic arriving at the sites of such media outlets coming from Google (FOER, 2018, p. 25/16).

Be that as it may, with the advent of the Internet in a new communicational landscape, it has become increasingly possible to insert the ordinary individual in a leading role in front of the elaboration of digital content.

The individual, thus, would have ceased to be a mere receiver and started to be the sender of the message, producing contents that are capable of influencing thousands of other people, and thus, no longer occupying only the passive pole in the communication process. Communication is no longer from one to a few or even one to many (as in mass communication media), to become many to many (MOUNK, 2019, p.172/173), that is, several individuals who produce information and at the same time receive information and, thus, much of their ability to control the dissemination of ideas or messages that resonate among ordinary people is lost.

There is no longer a monopoly of informational content by traditional media, although it can (and should) be said, as mentioned above, that a considerable part of this power has passed into the hands of large technology companies. Yes, because all this informational content will necessarily (and this is far from unimportant for the purposes of informational autonomy) go through some sifting or control by the new gatekeepers, but they (individuals) will be given the power to produce the very content they want to see disseminated. Now, any individual can produce content and disseminate it to an infinite number of people, anywhere in the world, including the politicians themselves.

In this sense, it is increasingly common for parliaments to be occupied by the so-called digital influencers or Youtubers, where the culture of sharing "in real time", the supposed informality and the alleged proximity, seeks to transform voters into followers, making them loyal. This direct relationship between politicians and voters-followers, for example, makes some time-honored political institutes or practices anachronistic, as is the case of the Right to Broadcast and the maxim, applied in many parliaments, that states that the opposition would be the audience and the government, the scoreboard: today, almost everyone plays to seduce or charm, in a very performative way, their audiences.

This new possibility (the power to produce one's own content) generated by the NICTs, this control carried out by the new gatekeepers, this lack of digital literacy, this control carried out by Big Brother, in short, all the new challenges (which reside in old problems) bring an environment still weakly protected and regulated, being the stage for conflicts regarding Fundamental Rights and Democracy, the two main measures used to assess the legitimacy of Political Power. Thus, NTIC's will have a direct influence on Law and its attempt to regulate social and political relations.

Another important factor caused by NICTs is the "changing Overton window" Clay Shirky tells us about, as Manjoo (2016) points out. This window is an expression coined by Joseph Overton to describe the variety of subjects that the mainstream media considers publicly acceptable to discuss. Well, from the early 1980s of the twentieth century until the very recent past it was considered unwise for politicians to espouse views considered, by most, to be outside the mainstream, things like explicit appeals to racial prejudice.

Precisely because of this, Shirky points out, as Manjoo (2016) points out, white ethnonationalism was kept in check. Thus, pluralistic ignorance would have caused groups of people holding offensive views, to be restrained by not knowing how many others shared their views. Thanks to NICT's they could see that they were not alone. They were able to express their thoughts online reinforcing their distorted worldview and then enter the mainstream.

In this sense, reaching such groups (and their enthusiasm and energy) also became the goal of several figures, considered outsiders, who suddenly left irrelevance or inexpressiveness (Trump, Bolsonaro, Jörg Haider, Geert Wilders, etc.) to reach relevant and expressive political positions, recognizing and making use of the energy and enthusiasm of such groups. Here, we cannot help but recall Krastev's (2020) correct and accurate observation to the effect that the new authoritarians ended up being the biggest beneficiaries of the wave of protests of the last decade, and also contributed to the declining influence of NGOs as an agent of social and political change.

But that's not all. The fragility of the blind belief in the democratizing power of NICTs is even greater. yes, because the relationship between NICTs and Democracy is influenced by the phenomenon of information curation. Nicholas Negroponte, quoted by Sustein had predicted that a few years after 1995, it would be possible for people to gain access to extremely personalized news, so that they would only receive what they considered important (SUNSTEIN, 2017, p. 1). Such a personalized newspaper would be a "Daily Me," a personal and unique newspaper. Such a prediction, in a sense, is already present in today's internet architecture.

The Daily Me that social media can promote is not set up by the user. The algorithms know a lot about people's lives through their browsing history and patterns. By analyzing the correlation between what people have done before, quite accurately, they can predict what people will like to do (or what they will do or what they will be prone to do if given the right incentive) next (O'NEIL, 2016, p. 77) and thus show such people, on social media or search engines, data that matches their opinions, or the opinions that prove convenient for sales purposes (of products or people) (O'NEIL, 2016, p. 188/191).

This phenomenon is called by Sunstein the "Architecture of control" (SUNSTEIN, 2017, p. 1). After all, this selectivity of what can or should be seen by someone, which conditions people in an "echo chamber" and to the Daily Me, is far from natural, because it is the result of a thorough and millimetrically personalized control.

Noteworthy, also, as HELBING et al. (2017) warn, some software platforms are moving toward "persuasive computing," so in the near future (or present?), using sophisticated manipulation technologies, these platforms will be able to guide us through entire courses of action, so the trend would no longer be programming computers, but programming people.

In the same vein, he warns, moreover, that perhaps even more significant is the fact that manipulative methods change the way we make our decisions, so the large-scale use of such methods could cause serious social harm, since such manipulative technologies would restrict freedom of choice, which would be slowly but surely disappearing - slowly enough, in fact, that there has been little resistance from the population so far (HELBING, et all., 2017).

Incidentally, the "echo chamber" and polarization are also revealed as important phenomena stemming from (or incredibly enhanced by) NICTs. The phenomenon of the "echo chamber" is not even perceived due to a supposed freedom in data circulation, but it is marked by

the advent of the insertion of the citizen in a false reality in his “virtual bubble,” believing that his conceptions of the world are universal. As a result, the “other” is reduced to a stereotype and is easily characterized as the enemy - a true polarization.

This conjuncture is harmful to Democracy insofar as the individual is directed to maintain his understanding and not to rethink, maintaining a passive posture and directed to reject those who have any disagreement with his ideals - without any possibility of admission for integration, without exercising tolerance and alterity.

The issue is even more complex in face of the following paradox: on the one hand, the need to protect the citizen from the undue appropriation of his data flow by private companies; and on the other hand, the excessive protection of privacy may result in the injury or mitigation of the public interests of security and effectiveness, as well as the economic development of society. Here, as will be seen, the Law must choose a side.

The complexity can also be identified in the fact that technology has developed at an important speed in recent years. Electronic devices such as smartphones are interconnected to personal digital devices with the intention of making human life more practical, and, in fact, they do.

Examples of this include GPS mobility applications, Facebook friend suggestions (about people we might possibly know), and advertisements that recognize our interests and invade our computer screen. All this seems obvious when looked at from a day-to-day perspective. However, what is little recognized about these examples is that they are mechanisms with an incredible potential for persuasion.

The drastic changes perceived as technological advances develop, demonstrate the insertion of these means in the daily lives of individuals in a way that has become practically impossible to disengage from them. Society is increasingly more dependent on digital means of communication, since being inserted in this environment is no longer optional to the individual. In this way, NICTs have become not only a work tool, but have also significantly changed interpersonal relationships.

An example of this is the emergence of direct messaging applications, such as WhatsApp, which became an indispensable source of communication, making human life more practical. Thus, the advent of new techniques that allow greater convenience and practicality is easily accepted by the postmodern society, characterized by living in a globalized world, where information is passed on at great speed around the world (HALL, 2011).

Even public policies are already being implemented based on these digital resources to manage and drive behavior in society. These are the so-called nudges that, according to Sunstein (2017) would be, in theory, subtle incentives or discouragements (which may also take the form of permissions and prohibitions, depending on the case) by the Public Administration to guide people in certain directions, without preventing them (in theory), however, from following another path.

For the author, nudges are not normative rules that force people to shape their behavior through coercion, but strategies that direct people through incentives, allowing them freedom of choice to decide whether to comply with that guidance or not. Sunstein demonstrates practical examples of how nudges surround our daily lives:

> In everyday life, a GPS is an example of a nudge; likewise is an app that informs the user how many calories have been ingested over the previous day; likewise is it with the text message, which informs customers that a bill is due or a doctor's appointment is scheduled for the next day; so is an alarm clock; so is automatic enrollment for pension and retirement plans; with default settings on computers and cell phones; so is the system for automatic payment of credit card and mortgage bills (SUNSTEIN, 2017, p. 1026).

MERITUM MAGAZINE • v.15 • n.4 • p. 249-269 • 2020

When we talk about interventions within cyberspace, the implementation of marketing communication strategies has no limits. That is, increasingly, the frequent access of NICT users has left traces of their activities, interests and needs, which serves quite properly, for example, to companies that want to sell their products (or people) reaching the ideal consumer. Advertising itself has followed the peculiarities of new technologies, adapting itself to the formats that allow it to send messages increasingly targeted to individuals who are seen not only as users on the network, but also as potential consumers.

According to Magrani, we are facing a techno-regulated world, that is, a world in which the rules of technology, as well as its internal architecture and design, will condition human actions to previously programmed codes (MAGRANI, 2019, p. 251/259). Thus, although there may be the feeling that users are fully exercising their freedom when "surfing the web", there is a great chance that we are, in fact, totally limited to the commercial purposes of these devices. This is a scenario of commercialization of personal data.

Imperceptibly, we make available the register of our activities and personal data to the platform's own system, which uses this data for advertising and commercial purposes of companies that are also in that environment in order to sell products, people and services.

For example, if a Facebook user decides to perform a search on Google about a very specific type of accessory that he intends to buy in the future, immediately numerous advertisements referring to the object in question will surround him on his other social media, such as Facebook and Instagram.

Sometimes we may ignore or even not rethink the issues that exist behind a simple advertisement. However, the interconnectivity between digital platforms (Google, Facebook, Instagram, and even Whatsapp), has presented a system of commodification, regarding the use of users' personal data, for entirely commercial purposes. Elections around the world have already been (and probably still are) decided based on such data, one strongly suspects.

> This shows how much we are hostages of the algorithms that make up the architecture (or design) of these digital platforms, since it was not necessary for the user of the previous example to request the suggestions of ads on his own, but simply, he was conditioned to receive all this content from the moment he joined that network, agreeing to the terms of use and privacy policy of the media in question. Thus, techno-regulation by design carries a great risk of authoritarianism and paternalism, according to Pagallo, because they remove autonomy on the part of people, by making it virtually impossible to conduct infringing the behavior desired by the rule (PAGALLO, 2015, p. 161-177; FLORIDI, 2015, p. 173).

Thus, to what extent can one ignore these measures imposed by technology, since the routine use of social media has become a practice that can no longer be considered optional? Should individuals abide by these rules as a preponderant condition for the use of these means

of communication, even if this directly violates their constitutional rights? Where is the intervention of the Rule of Law as a means of guaranteeing citizens' rights?

Well, as we have seen, the movement of NICT's on Democracy is pendular, and it can oscillate between positive action and action that weakens democratic structures. There is potential for tilting to both sides, therefore. It is necessary to choose, therefore.

Thus, if the democratization of the media has entailed a potential empowerment of individuals with regard to the possibility of receiving and propagating ideas opposing the government and the mainstream media, transforming "fundamentally the structural conditions of communication" (MOUNK, 2019, p.172). If, every day, thousands of polls, comments and "likes" are registered among users on the networks, not only as a form of practical interaction in cyberspace, but as a virtual movement that allows construction and development of debates on social and political issues, capable of mobilizing people almost instantaneously in favor of a common interest.

If, for example, during the Brazilian presidential elections that took place in 2018, the explicit possibility of then-candidate Jair Bolsonaro being elected mobilized several voters to protest against some of the positions adopted by him, generating a movement that managed to mobilize more than 1 million members in less than 2 weeks, enabling demonstrations throughout Brazil through #ELENÃO![4], considered by some as the largest women's political act in the history of Brazil.

If such episode reinforces the thesis exposed by Mounk (2019) in the sense that social networks have enabled the insertion of individuals in leadership positions when it comes to social and political issues, which has considerably attenuated the old limitations established by the mass media, so ordinary individuals have become content producers with the potential to become influencers on a large scale, without the need to bet on a high investment for the use of these platforms.

Despite all this, it is also true that NICT's can be captured by antidemocratic forces and, thus, serve to weaken Democracy, as seen above. It is necessary, therefore, to have responsible and careful analyses to support ethical practices committed to democratic values. It is necessary, moreover, to adopt and promote a set of actions that can swing the pendulum in favor of Democracy. Below we will look at some of them.

4. HOW CAN THE LAW SWING THE PENDULUM IN FAVOR OF DEMOCRACY?

As seen above, the emergence of the Internet has enabled the insertion of individuals in networks, democratizing the use of digital platforms. However, as we have also seen, although the great technological advance as a tool for the development of society itself is remarkable, there are central problems that can be observed about the processes of use of these media by

4 EXAME. "Women United Against Bolsonaro" has 1 million members on Facebook. 2018. Available at: https://exame.abril.com.br/brasil/mulheres-unidas-contra-bolsonaro-tem-1-milhao-de-membros-no-facebook/. Accessed on: 15 Dec. 2019.

civil society. Therefore, while the new means of communication have enabled popular inclusion for a significantly smaller investment than the mass media, the State and society will need to develop mechanisms to force the NICTs to act in a democratic way, or to offer means that enable the individual-lector to develop his own defense and protection mechanisms against the improper use of such New Technologies.

In this sense, according to what has been exposed, we can identify a contemporary paradox: the NICTs have brought the possibility of information and communication democratization by means of digital platforms, at the same time that they have violated Fundamental Rights referring, among others, to freedom, privacy, ownership of personal data, notably sensitive data and information self-determination.

The delicacy of the issue is also emphasized by Magrani, when he affirms that we are facing a world regulated by non-regulatory techniques resulting from technology. Therefore, understanding that digital architecture subtly imposes the naturalization of abusive practices within digital platforms, such as the commodification of personal data and illegal censorship, one realizes that it has its own regulation, which not only acts in an arbitrary way to Law, but competes directly with it (MAGRANI, 2019, p.252).

Magrani draws on Binghan's conceptions in his work Rule of Law, about the role of the rule of law in a technoregulated world, and states:

> [...] there is today a discrepancy between the role that the Rule of Law should represent in contemporary societies, and the upsurge in the practice of technoregulation of citizens carried out on digital platforms, encompassing their products and services to users (MAGRANI, 2019, p.253).

Therefore, relevant question regarding the above, is given by the fact that the new Gatekeepers of Communication and Information are creating regulations that follow their own commercial interests, foster their own values, limiting and conditioning users to their structure and values. In other words, we are increasingly prone to the rules of technology as something that is overriding law itself, which considerably diminishes the potential of the public sphere and the rule of law within cyberspace. It is almost as if there is no legitimacy for Law to interfere with the rules of technology. It is an imaginary line that separates Law (of humans) from the technological universe (of machines).

> In a techno-regulatory scenario, the rules are simply dictated by the code imperatively. In a context where non-normative technological tools dominate the regulatory environment, we seem to be subject to the rule of technology rather than the rule of law. Technoregulation signals the disappearance of our capacity to argue and resist, and thus may result in an even greater deviation from the values that make us "human," when thinking about power relations and contestations; as well as the sphere of truth and justice governed by the rule of law (MAGRANI, 2019, p.254).

Thus, Magrani states that the Rule of Law as a source guarantor of Fundamental Rights should intervene in these techniques in order to guide the practices of technology, having as a basis the Law itself, and not the opposite (MAGRANI, 2019, p.255). Law should be the major model of normative regulation, since, in contradiction to this, we will be facing constant instabilities regarding the protection of citizens' rights, as well as, we will be increasingly distant from establishing legal certainty and avoiding arbitrariness. This will generate more and more difficult cases in the judiciary. It is true that the Law can act through its primary sources, espe-

cially through the edition of normative acts that can guide the democratic role to be played by NTICs. However, secondary sources also play a relevant role, either as a motivational factor for normative change, or as a consolidating element of such change. Both sources are of interest to the present work.

Thus, it is necessary that there be an ethical-legal balance in the practices arising from cyberspace, through an analysis focused on the effects of the actions of non-human agents, within the private or sensitive sphere of individuals. Technological advance must be faced as a reality that tends to develop faster, perhaps, than Law's capacity to keep up with it. However, it is the Law's fundamental role in overseeing these practices, protecting and safeguarding individuals from violations that interfere with the exercise of their autonomy.

> The Law, supported by an adequate ethical foundation, will serve as a channel for data processing and other technological materialities, avoiding a techno-regulation that is harmful to humanity. In this new role, it is important that Law guides the production and development of Things (technical artifacts) so as to be sensitive to values, for example, regulating privacy, security, and ethics by design. (MAGRANI, 2019, p.257).

After all, the right to individual self-development can only be exercised by those who have control over their lives, which presupposes informational self-determination, which in turn requires a model of education and conduct geared towards these new problems and fragilities. Discussing ideas for better citizen protection in the face of new technologies, Helbing et all. (2017) make an important warning in the sense of requiring that any and all advertisements be properly identified as such, and should not be misleading, or use certain psychological tricks, such as subliminal stimuli.

Helbing et all. (2017) make an important comparison when they warn that in the academic world, even harmless decision experiments are considered experiments on human beings, which would have to be approved by an ethics committee with public accountability, so a code of conduct like the Hippocratic Oath is entirely appropriate to move the conduct of large companies in the virtual environment. They make Helbing et all. (2017), a disturbing inquiry, to know if our thinking, our freedom and democracy have been invaded?

Recent facts show that they have, so it is urgent to reverse this situation.

To this end, Helbing et all. (2017) rightly advocate the establishment of the following principles to guide the relationship with new technologies: 1. Decentralize more and more the function of information systems; 2. Support self-determination and participation of information; 3. Improve transparency in order to achieve greater trust; 4. Reduce distortion and pollution of information; 5. Enable user-controlled information filters; 6. Support social and economic diversity; 7. Improve interoperability and collaboration opportunities; 8. Create digital assistants and coordination tools; 9. Support collective intelligence, and 10. Promote responsible citizen behavior in the digital world through digital literacy and enlightenment.

It is evident that, for these principles to be able to act, it is first necessary to make a choice, which is not only the individual's choice, but the State's choice when it exercises the art of defining and executing public policies, behold, the issue can never be faced correctly without the institution and development of central public policies that choose and trace the path to be taken, either in the light of digital literacy, informative self-determination, protection

of democratic values, or in the light of media anaphalbitism, circulation of information, fake news, disinformation, etc..

Some, certainly, will ponder that it would not be necessary to choose which path to follow, but to try to make them compatible, in an attempt to proceed to a practical concordance between such equally fundamental values. For such optimistically minded people it is important to remember the correct and precise lessons of Villey (2007, p. 8) in the sense that each one of the Human Rights "is the negation of other human rights". Continuing in acute and forceful observation about the flexible, modular and contradictory nature intrinsic to the notion of Human Rights, he states:

> "Oh admirable medicine - capable of curing everything, even the diseases it has itself produced. (...) A tool of a thousand uses. It has been used for the benefit of the working classes or the bourgeoisie - of the evildoers against the judges - of the victims against the evildoers. But beware! You have to choose: either for the good of some or for the good of others. Never in history have human rights been exercised for the benefit of all. The trouble with human rights is that no one could take advantage of them except to the detriment of some men." (VILLEY, 2007, p. 162).

Thus, the struggle for the effectiveness of any Fundamental Right is, in essence, a tragic choice, so it is important to choose which side to follow, it is also important that the choice is clear and precise on the part of the State, providing public policies and appropriate regulatory framework to ensure that technologies are designed and used in ways that are compatible with the hyposufficiency present, to a large extent, in the relations of the individual, notably the voter, with the companies that collect and process data, in the struggle to keep their understanding free and clear.

About the importance of clarity about the choices made, Krastev (2020) when analyzing the relationship between hyper-globalization, democracy, and self-determination, based on the trilemma proposed by Rodrik, states that one can even restrict democracy in order to minimize international transaction costs, disregarding the economic and social whiplash that the global economy occasionally produces. One can even limit globalization in the hope of building democratic legitimacy at home, or even globalize Democracy at the expense of national sovereignty, but what we cannot have is hyper-globalization, democracy, and self-determination simultaneously, which is precisely what most governments (and people) want.

For the same reason we cannot have Democracy supported or enabled by Military Government, informational self-determination and hate speech or fake news, secrecy of public documents and reduction in corruption, free circulation of data and protection of personal data, and so on. It is necessary to choose. Or rather, the choice has already been made, has it been made for you or, in some way, represents you?

It should be noted, in this respect, that the European Union is in the vanguard of some relevant choices in the attempt to swing the pendulum in favor of Democracy. We speak not only of the General Regulation on Data Protection, of 2018, but especially of the various movements practiced there that indicate that the right choices are being made, unlike Brazil, as we shall see below.

In this sense it is registered that in 2018 the Action Plan against Disinformation[5] was launched, which intends to carry out some bold goals to combat disinformation that generated relevant episodes in some countries, such as in Spain, after the probable interference of Russian "bots" during the referendum in Catalonia and as in the United Kingdom, because of the wave of disinformation about Brexit.

It is intended, for example, to ensure more effective detection of disinformation media, on the assumption that the state needs to invest an important amount of public resources for this purpose, especially in combating disinformation and raising awareness of its adverse impact.

Now, it is known that the realization of a certain right is not exhausted by its mere provision in the legal system. The intervention of a political authority, in this case the State, is necessary for the rights to come to be realized, since in the absence of such an authority willing to act to guarantee a given right, it will be nothing more than an unfulfilled promise. The absence of the State will mean the absence of Rights, since a Right will only exist if and when it receives support from State Institutions, including the public budget (HOLMES; SUNSTEIN, 2011, p. 38). It is precisely for this reason that the realization of Fundamental Rights, whatever they may be, demands, imperiously, the allocation of public resources. Thus, it is certain that rights depend on the government, so it will remain impossible to protect them without funds and state support (HOLMES; SUNSTEIN, 2011, p. 33). It is precisely for this reason that one cannot seriously speak of protecting the Right to informational self-determination without the existence of public policies and significant public resources allocated to this area.

Returning to the aforementioned Action Plan prepared by the EU, it is worth noting that it also intends to formulate a coordinated response among the various EU members, through the creation of a specific early warning system between the EU institutions and its member states, in order to facilitate data sharing and analysis of disinformation campaigns, alerting to disinformation threats in real time.

The Plan also covers the duty to implement quickly and effectively the commitments made, focusing on urgent measures such as ensuring transparency of political propaganda, increasing efforts to close down active fake accounts, identifying non-human interactions (messages propagated automatically by "bots"), and cooperating with fact-checkers and academic researchers to identify disinformation campaigns and make the content of verified facts more visible and widespread.

Finally, the Plan seeks to raise awareness and empower citizens to shield themselves from the effects of disinformation campaigns, promoting the so-called media literacy through specific programs, where national multidisciplinary teams of independent verifiers and investigators will be supported to identify and denounce disinformation campaigns on social networks.

Something quite different occurs in Brazil, where an important level of slowness, improvisation and disjointed actions can be found in relation to the protection of the individual-voter's right to informational self-determination. Such slowness, of course, is incompatible with the speed and scope of the damage that NICTs can cause to Democracy. At the end of 2017, the Superior Electoral Court took the initial step in the attempt to protect the free manifestation of the voter's will, by creating the Advisory Council on Internet and Elections, with the purpose of

5 European Union. Action Plan against Disinformation. December/2018; Available at https://eeas.europa.eu/sites/eeas/files/action_plan_against_disinformation.pdf/. Accessed May 25, 2020.

developing research and studies to be implemented in the elections that took place in October of the following year. Already in the resolutions referring to those elections, the Court included some rules aiming to discourage the spread of false news, for example, without much success.

Another important step taken by the TSE was the elaboration of the Countering Disinformation Program, launched in August 2019, whose object is focused on the 2020 election and has the adhesion of civil society, notably Google, Facebook, Twitter and WhatsApp, which have signed commitments to actively discourage the spread of false information and to improve methods of identifying possible practices for disseminating false content.

The Electoral Justice has also produced some normative acts in order to protect the informational self-determination of the individual. In this sense, we highlight TSE Resolution no. 23.610, of December 18, 2019, intended to regulate the electoral propaganda for the 2020 election, which intends to punish candidates who disseminate false news or make mass content shooting on the Internet during the electoral campaign.

According to this Resolution, the electoral propaganda can be carried out on the websites and social networks of the candidates and political parties, always respecting, especially in the case of the use of messaging applications, the terms of Law No. 13.709/2018 (General Law of Protection of Personal Data - LGPD) regarding the consent of the receiver, and not counting with mechanisms for boosting or triggering of mass content that may alter the content of the electoral propaganda or distort its identity.

This Resolution establishes that candidates will have the obligation to confirm the veracity of the information used in their electoral propaganda, including those disseminated by third parties, under penalty of imposition of fine or criminal sanction, being also assured the right of reply to those who feel harmed by the use of false news. This normative act takes care of only part of the problem, since the informational self-determination can be damaged in other ways, such as by the creation of bubble filters or by the sharing of citizens' personal data with companies that can, from the mining and analysis of such data, build an important profile of the electorate for fixing approach and persuasion strategies, like the case involving Cambridge Analytica in the USA.

Thus, considering that the companies that control technology and, consequently, the data of the vast majority of citizens, will have more and more control over individuals and their freedom, it will be important to set limits that can act outside the specific sphere of Electoral Justice, beyond the necessary fight against disinformation.

In Brazil, Law No. 12.965/2014 (Marco Civil da Internet) and Law No. 13.709/2018 (Lei Geral de Proteção de Dados Pessoais - LGPD) were edited from an intention to strengthen the protection of the rights of users of new information and communication technologies.

The legislative intention is and should be valued, however, it is not yet adequate to the new conception of the right to privacy as a right to informative self-determination, where the control of personal data should be entirely of the individual-user of digital platforms and applications. All the more so if we observe the content of Decree No. 10.046, of October 9, 2019, which provides for the governance of data sharing within the Federal Public Administration and establishes the Citizen's Base Register and the Central Data Governance Committee, which in several aspects contradicts provisions of the LGPD, especially by not necessarily making clear what destination will be given to all information gathered on behalf of the CPFs of Brazilian citizens.

The legislation in effect lacks the provision of technological mechanisms that allow the control to be, in fact, of the citizen and owner of personal data, and not of the government or the companies that collect and analyze such data. There is also a lack of technological mechanisms that guarantee transparency and the necessary clear information to citizens about the composition of the algorithms that make up the devices used to collect their data.

Thus, one notices in Brazil, as of 2014 with the edition of the so-called Marco Civil da Internet, a greater concern about the negative effects that the misuse of NTIC's can cause in people's lives. In 2017 this movement reaches the Electoral Justice that, then, is effectively concerned with the informational self-determination of the individual both in the development of institutional campaigns and in the edition of normative acts intending to combat misinformation in electoral propaganda.

In 2018, in line with other countries, Brazil established an important legal framework for the protection of personal data, notably sensitive data. It is the aforementioned LGPD, which, in addition to the deficiencies already pointed out, has had its effectiveness postponed, prejudicially and constantly, by various normative acts, the most recent being MP 959/2020, which, when dealing with the operationalization of the payment of the Emergency Benefit for Preservation of Employment and Income, took the opportunity to postpone the effectiveness of this rule, which will now only be in force in May 2021, and the PL 5762/19 is already in Congress, which intends to extend this deadline even further to August 2022.

As can be seen, the regulation in Brazil still does not reveal itself adequate to substantially move the pendulum that currently lies on the negative side of the relationship between NTIC's and Democracy. It does not reveal itself sufficient to implement the necessary guiding principles of the relationship of the individual with the new technologies that Helbing et all. (2017).

This is the reason that underlies the reflection that this article intended to make: to reinforce the idea that Democracy is at risk and that we should not worry about war only when we smell gunpowder: it may be too late.

5. FINAL CONSIDERATIONS

Democracy has been losing its defenders, in a slow but remarkable process of erosion and discredit, to the point that we can already perceive an effective risk to its existence. On the other hand, the NICTs have become a milestone of the post-modern period, which have modified, on a global scale, the interpersonal relationships of individuals.

It is evident that, within this new scenario, it becomes impossible to disassociate oneself from such interactions, since communication in the digital world has become not only a practice, but an imposing reality that permeates a relevant part of the lives of a large number of people.

Emerging as a means of civil empowerment, the NICTs have become an instrument of practical and political interaction, which allows individuals to obtain greater autonomy of information and greater power of mobilization, facts that the historical protests throughout the Globe could prove. This has enabled the construction of new sources of information and has

the considerable potential to contribute to the strengthening of citizens' struggle for their individual, social, and political rights. Inherent to the NICT's is, therefore, its capacity to interrupt the crisis through which Democracy is going through.

However, several cases recently experienced in several countries have made it necessary to revise the optimistic vision about the role of NICTs as a factor for overcoming the democratic crisis, generating a distrust in users about this instrument that had offered autonomy and reach that enabled them to obtain a voice and insertion in political contexts.

It is precisely for this reason that there is an urgent need for the formation of an informational pact that not only improves access to public data and makes possible an effective and transparent rendering of accounts by public agents, but that also allows the individual to develop his media literacy and, based on it, his right to informational autonomy. Legal science has a preponderant role in the conception of this pact.

Finally, we point out that the health of democracy depends directly on the existence of a serious, open, free and fair public debate, and it is up to us to fight for such a space so that, more and more, NICTs may serve democracy and not the opposite. This is what we have tried to do through this study.

MERITUM MAGAZINE • v.15 • n.4 • p. 249-269 • 2020

REFERENCES

BOBBIO, Norbberto. **The future of democracy**. Translation by Marco Aurélio Nogueira - São Paulo: Editora Paz e Terra. 2000.

BOLZAN DE MORAIS, José Luis. The Rule of Law "confronted" by the "Internet Revolution"! **UFSM Law School Electronic Magazine**, v. 13, n. 3 / 2018 p.876-903, sep-dez 2018.

BRAZIL. law no. 12,965, of April 23, 2014. Establishes principles, guarantees, rights and duties for the use of the Internet in Brazil. Official Journal of the Union, Brasília, 24 Apr. 2014. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Accessed on: 17 May 2020.

BRAZIL. law no. 13.709, of August 14, 2018. General Law of Protection of Personal Data. Brazil. Official Journal of the Union, Brasília, 15 Aug. 2018. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13709.htm. Accessed on: 17 May. 2020.

CASTELLS, Manuel. **The information age, economy, society and culture**: the network society. Translation by Roneide Venâncio Majer. São Paulo. Paz e Terra, 2019.

DALH, Robert A. **On democracy**. Translation by Beatriz Sidou. Brasília: Editora Universidade de Brasília. 2001.

DIAMOND, Larry. Liberation vs. Control in Cyberspace. In Liberation Technology: social media and struggle for democracy. In: DIAMOND, Larry; PLATTNER, Marc F. Editors. Baltimore: The Johns Hopkins University Press, 2012.

EXAME. "Women United Against Bolsonaro" has 1 million members on Facebook. 2018. Available at: https://exame.abril.com.br/brasil/mulheres-unidas-contra-bolsonaro-tem-1-milhao-de-membros-no-facebook/. Accessed on: 15 Dec. 2019.

FAUSTO, Boris. State and civil society. **Folha de S. Paulo**, São Paulo, 4 jun. 2004. Opinion, trends/debates, p. A3.

FOER, Franklin. **The world that does not think**. Rio de Janeiro: LeYa, 2018.

FRIEDMAN, Thomas. **The Square People**, Part 1. The New York Times: May 13, 2014.

GARCIA, Maria. Democracy and the representative model. In: GARCIA, Maria (Org.). **Democracy, today**: A political model for Brazil. São Paulo: Celso Bastos Editor, 1997.

HALL, Stuart. **Cultural identity in post-modernity**. Translation Tomaz Tadeu da Silva, Guaracira Lopes Louro. Rio de Janeiro: DP&A, 2011.

HELBING, Dirk; FREY, Bruno S.; GIGERENZER, Gerd; et all. **Will Democracy Survive Big Data and Artificial Intelligence**. Policy & Ethics. February/2017; Available at: https://www.scientificamerican.com/article/will-democracy-survive-big-data-and-artificial-intelligence/. Accessed 31 Jul. 2019.

HOLMES, Stephen; SUNSTEIN, Cass R. **El costo de los derechos**: por qué la libertad depende de los impuestos. Buenos Aires: Siglo Veintiuno Editores, 2011.

HUNTINGTON, Samuel. Dead Souls: The Denationalization of the American Elite. **The National Interest** - March 1, 2004. Available at: https://nationalinterest.org/article/dead-souls-the-denationalization-of-the-american-elite-620. Accessed on: 22 May 2020.

KRASTEV, Ivan. **Bertesmann Foundation**. The Square People. Available at: https://www.bfna.org/research/the-square-people/. Accessed on: 28 Feb. 2020.

LIJPHART, Arend. **Models of Democracy**: performance and patterns of government in 36 countries. Translation by Vera Caputo. Rio de Janeiro: Civilização Brasileira, 2019.

MAGRANI, Eduardo. **Between data and robots**: ethics and privacy in the age of hyperconnectivity. Porto Alegre: Arquipélago Editorial, 2019.

MANJOO, Farhad. Social Media’s Globe-Shaking Power. **The New York Times**: Nov. 16, 2016. Available at https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html. Accessed May 22, 2020.

MOUNK, Yascha. **The people against democracy: why our freedom is in danger and how to save it**. translation by Cássio de Arantes Leite, Débora Landsberg. São Paulo: Companhia das Letras, 2019.

O’NEIL, Cathy. **Weapons of Math Destruction**: how big data increases inequality and threatens democracy. New York: Crown Publishing Group, 2016.

PAGALLO, Ugo. Good Onlife Governance: On Law, Spontaneous Orders, and Design. In: FLORIDI, Luciano. (Org.). **The Onlife Manifesto**: Being Human in a Hyperconnected Era. Oxford: Springer, 2015.

RUNCIMAN, David. **How Democracy Comes to an End**. São Paulo: Todavia, 2018.

SUNSTEIN, Cass R. Nudging: A (Very) Short Guide. Translated by Maíra Almeida and revised by Antonio Guimarães Sepúlveda. **Institutional Studies Journal**, vol. 3, 2, 2017.

SUNSTEIN, Cass R. # **Republic**: Divided Democracy in the age of social media. Princeton: Princeton University Press, 2017.

TOURAINE, Alain. **What is Democracy?** Translation by Guilherme João de Freitas Teixeira. Petrópolis: Vozes, 1996.

European Union. **Action Plan against Disinformation**. December/2018; Available at https://eeas.europa.eu/sites/eeas/files/action_plan_against_disinformation.pdf/. Accessed May 25, 2020.

VILLEY, Michel. **The Law and Human Rights**. São Paulo: Martins Fontes, 2007.

WOLF, Mauro. **Mass media**: Contexts and paradigms. New trends. Long-term effects. The newsmaking. Available at: http://www.jornalismoufma.xpg.com.br/arquivos/mauro_wolf_teorias_da_comunicacao.pdf. Accessed 15 Dec. 2019.

Received/*Recebido:* 03.06.2020.

Approved/*Aprovado:* 26.07.2020.

DIGITAL DIVIDE AND PARTICIPATORY CITIZENSHIP IN THE NETWORK SOCIETY

A EXCLUSÃO DIGITAL E A CIDADANIA PARTICIPATIVA NA SOCIEDADE EM REDE

André Afonso Tavares[1]
Reginaldo de Souza Vieira[2]

ABSTRACT

Society is changing more and more with the innovations brought by new technologies, implying the rethinking of ways people act, interact, inform and transform the way they live on a local, regional, national, and global scale. Based on this reality, which Castells describes as a network society, it is essential to reflect on the new form of social exclusion inherent to it, that is, the digital divide. This paper's investigation problem revolves around how is the digital divide related to the exercise of participatory citizenship, especially in the electronic sphere, in the networked society. The deductive method was used in this investigation based on the technique of bibliographic research and indirect documentation. Throughout the investigation, it was possible to conclude that the aspects that involve the digital divide go beyond internet access or the matter of having computers or cell phones since this issue combines several technical, social, and geographical aspects. In this sense, overcoming the digital divide is fundamental for the use of digital citizenship as an instrument to strengthen political participation, especially in the scope of participatory citizenship. That may be possible through the expansion and creation of public policies to subvert social inequalities and technical, generational, ethnic, cultural, social, and geographical limitations, and also the development of electronic citizenship tools.

Keywords: Participatory citizenship. Electronic citizenship. Digital divide. Internet. Network society.

RESUMO

A sociedade se transforma cada vez com mais intensidade a partir das inovações trazidas pelo uso de novas tecnologias, que implicam no repensar as formas de agir, interagir e informar e transformar o modo como se vive em escala local, regional, nacional e mundial. A partir da formatação dessa realidade, a qual Castells denomina sociedade em rede, há que se refletir acerca de uma nova forma de exclusão social a ela inerente, isto é, a exclusão digital ou, no termo mais conhecido em inglês, digital divide. Dessa forma, o presente trabalho

1 Master's student of the Graduate / Master's Program in Law at UNESC. Member of the Center for Studies in State, Politics and Law (NUPED / UNESC) Specialist in Public Law and Government Auditing. Graduated in Law and Accounting Sciences. Graduating in Software Engineering. Attorney. Counter. ORCID iD: https://orcid.org/0000-0002-9549-8096. E-mail: afonsotavares.andre@gmail.com.

2 Doctor (2013) and Master (2002) in Law by the Postgraduate Program in Law - Master and Doctorate, from the Federal University of Santa Catarina. Professor, researcher, and Deputy Coordinator of the Postgraduate Program in Law (PPGD / UNESC). Professor and researcher at the Graduate Program in Socioeconomic Development (PPGDS / UNESC). Full professor at the University of the Extreme South of Santa Catarina. Coordinator of the Center for Studies in State, Politics and Law (NUPED / UNESC) and the Laboratory of Sanitary Law and Public Health (LADSSC / UNESC). Member of the Ibero-American Health Law Network. Member and Coordinator of the Brazilian Human Rights Legal Research Network. ORCID iD: http://orcid.org/0000-0001-6733-5321. E-mail: prof.reginaldovieira@gmail.com.

How to cite this article/Como citar esse artigo:
TAVARES, André Afonso; VIEIRA, Reginaldo de Souza. The digital divide and participatory citizenship in the network society. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p.270-285, 2020. DOI: https://doi.org/10.46560/meritum.v15i4.8065.

girou em torno da seguinte problemática: de que forma a exclusão digital está relacionada com o exercício da cidadania participativa, sobretudo no âmbito eletrônico, na sociedade em rede? Para a realização da pesquisa, adotou-se o método dedutivo, a partir da técnica de pesquisa bibliográfica e documentação indireta. A partir da pesquisa realizada, foi possível concluir que os aspectos que envolvem a exclusão digital vão além do mero acesso à internet ou aos tradicionais mecanismos eletrônicos, tais como computador ou celular, visto que eles abarcam diversos fatores de ordem técnica, social e geográfica. Nesse sentido, superar a exclusão digital por meio da ampliação e criação de políticas públicas que combatam as desigualdades sociais e as limitações técnicas, geracionais, étnicas, culturais, sociais e geográficas, bem como a partir do desenvolvimento de ferramentas eletrônicas de cidadania, é fundamental para o aumento da utilização da cidadania digital como instrumento para o fortalecimento da participação política, em especial, no âmbito da cidadania participativa.

Palavras-chave: *Cidadania participativa. Cidadania eletrônica. Exclusão digital. Internet. Sociedade em rede.*

1. INTRODUCTION

Society transforms itself more and more with the innovations brought about by the use of new technologies, to enable different ways of thinking, acting, interacting, and informing, as well as transforming the way we live and live on a local, regional scale, national and worldwide.

These changes break with previous paradigmatic models, requiring the State and society to incorporate complexity (MORIN, 2011) which permeates the social fabric and which, due to the project (CAPELLA, 2002) or myth (GROSSI, 2007) of modernity bourgeois, was disregarded, to allow a broader and more efficient reproduction of the capitalist economic model (VIEIRA, 2013).

In this context, the information age, which emerged beyond the industrial period, incorporates these elements of complexity and also of a speed of data that were not known at any other time in the history of mankind, surpassing the barriers of State sovereignty traditional.

In this way, we are experiencing a context in which different paradigms cohabit the same social reality (KUHN, 1997; MORIN, 2011; PILATI, 2012), and this is a challenge that Law and other branches of knowledge need to face.

However, based on the formatting of this new society, which Castells (2005) calls a network society, it is necessary to reflect on the emergence of a form of social exclusion inherent to it, that is, the digital exclusion, or, in its term better known in English, digital divide, and not only from the point of view of immediate access to internet services or electronic devices, such as a computer or cell phone but also to the enjoyment and handling of these means to generate communication, participation, and interactivity, especially in the context of citizenship.

Citizenship here understood as participatory, which recognized a new paradigm arising from the Participative Republic instituted by the Constitution of the Federative Republic of Brazil of 1988, which incorporated the elements of complexity, diversity, multiculturality/interculturality. This new landmark of citizenship in the constitutional text does not negate the assumptions of represented citizenship but coexists with them to complement each other in terms of the Social and Democratic State of Law (VIEIRA, 2013).

In this way, the present work will seek to reflect on the problem related to digital exclusion and its impact on participatory citizenship in the digital age, considering the use of new technologies and the new format of the network society.

Thus, the following question will be sought to elucidate the research: how is the digital divide related to the exercise of participatory citizenship, especially in the electronic sphere, in the networked society?

Based on the problem that leads to the reflections of this research, the study was guided mainly by the analysis of the use of new technologies for the exercise and the expansion of participatory citizenship within the scope of the relationship between State and society, without demeriting the initiatives carried out by organized civil society and private initiative, to break down barriers to technological access and expand the use of its tools.

In the development of the article, the deductive approach method is used, adopting the monographic procedure and the techniques of indirect bibliographic and documentary research.

As a general objective, it will be investigated how the digital divide is related to the exercise of electronic citizenship in the network society.

In the first moment, the aspects that involve the formation of the network society will be studied, especially from the advent of technologies, computers, and the internet.

Afterward, the concepts and elements that involve the digital exclusion, also known as *digital divides* in English, will be investigated. Finally, we will seek to detail the definition of participatory citizenship in the digital age and, thus, analyze the problem involving the impacts of the digital divide for its exercise in the context of the network society.

2. THE NETWORK SOCIETY AND DIGITAL DIVIDE IN BRAZIL

The transformations arising from technology and, in particular, from the invention of the internet have revolutionized the way of living in society, now called network society.

Society, previously disconnected and isolated, started to live globally and interconnected by network systems, the understanding of which will be better explored in the next topic.

It is important to emphasize, however, that the network society, although directly or indirectly intertwining all people, does not bring with it the complete resolution of social exclusion, but more clarity to the other form of exclusion, the digital one.

Social exclusion brings with it deeper roots that must be analyzed in more detail to understand them, while the digital divide, derived from digital life, although intertwined with social life, has its characteristics that deserve specific details.

2.1 THE EMERGENCE OF COMPUTERS, INTERNET AND NETWORK SOCIETY

Since the advent of information technology, society has been gradually transformed in several areas, such as communication, transportation, education, security, housing, health, relationships, government organization, etc.

Castells (2005) argues that although these technologies could already be observed years before the 1940s, such as in the invention of the telephone by Bell, in 1876; the radio by Marconi, in 1898; and the vacuum valve by De Forest, in 1906; it was in the Second World War and the following period, with the invention of the first programmable computer and the transistor, source of microelectronics, the real heart of the Information Technology Revolution in the 20th century and, still, only from the 1970s onwards, in fact, the wide diffusion of new information technologies.

Besides, another important historical event that deserves attention for the emergence of the so-called network society was, without a doubt, the creation and development of the Internet.

The invention of the Internet is attributed to the work of the US Department of Defense's Advanced Research Projects Agency (ARPA), from a unique fusion of military strategy, great scientific cooperation, technological initiative, and countercultural innovation, which, after launch from the first Sputnik, he decided to create a communication system invulnerable to nuclear attacks, which can be seen as a precedent for the arrival of the Information Age on a large scale (CASTELLS, 2005).

The first computer network was called ARPANET and came into operation on September 1st, 1969, and it was only during the 1980s that the network of networks was formed. Initially, it was called ARPA-INTERNET, then it was known only as INTERNET, a name still supported by the US Department of Defense and operated by the *National Science Foundation* (CASTELLS, 2005).

Only in 1990, in Europe, due to the difficulties in still using the Internet, the limited capacity to transmit graphics, the difficult location, and the setbacks in receiving information, which, after research carried out by a group of researchers headed by Tim Berners Lee and Robert Cailliau, at the *Centre Européen pour Recherche Nucleaire* (CERN), in Geneva, the well-known *World Wide Web* (WWW) was developed, which organized the content of Internet sites by information and not by location, offering users an easy search system to search for the desired information, with the creation of a format for the hypertext documents to which they named the hypertext markup language (HTML), added to the TCP-IP protocol and, also, with a configuration of a hypertext transfer protocol (HTTP) and the creation of a standardized format of addresses, the uniform locator of resources (URL) (CASTELLS, 2005).

The Information Age, therefore, can be considered, in a way, recent, with precedents that date back to the 1970s, with the creation of the operating system for computers, and the 1990s, with the emergence of the www network for internet access, which unimaginably revolutionized society.

Indeed, technology is not able to determine the direction of a society on its own nor can it dictate the paths of technological transformations in that many aspects, from creativity to entrepreneurial initiative, influence this technological-scientific process, of a novation and social applications, the result is the result of a complex interactive pattern (CASTELLS, 2005).

However, the complexity existing in the design of the modern state is undeniable, with factors that impede the participation of individuals in decision-making, due to the bureaucracy and hierarchy existing in its administrative structure. Besides, society also remains increasingly complex, to the point of being called the information or knowledge society, since information is revealed as the driving force of transformations and the most important fuel in modern production systems, as well as how the intense use of information technology in digital form has led to the overcoming of hierarchical and verticalized administrative structures towards horizontalized power relations, which was created by a network society (ROVER, 2009).

Thus, the emergence of information technologies has certainly influenced this new social format, now called network society. Name that is justified from the notion that networks constitute the new social morphology of our societies, and the diffusion of the logic of networks substantially transforms the operation and results of productive processes and experience, power, and culture, although, although the form of social organization in networks has existed in other times and spaces, we are faced with a new paradigm arising from the resources of information technology, which provided a material basis for its expansion throughout the social structure (CASTELLS, 2005).

2.2 THE DIGITAL DIVIDE IN BRAZIL

In this topic, based on the reflections previously made about the emergence of ICTs and the network society, we seek to bring up the issue of the digital divide in Brazil to reflect on the common complaint when dealing with the potentialities linked to the use of technologies information and communication on democracy and citizenship.

It is necessary to point out, initially, from the terminological point of view, the existence of different labels to denote the access and unequal use of digital resources, among which, the most common terms are digital exclusion, digital apartheid, digital fissure, digital fracture, or, more regularly in Anglo-Saxon literature, digital divides, or, in Portuguese, *digital division* (MARQUES, 2014).

For Elisabeth Gomes (2002), Brazil was wrong about the path to reach the digital age, as it prioritized computer manufacturers, which highlighted social exclusion in the country.

In fact, regarding the issue of the delay in digital and social development in the Brazilian context, it is worth mentioning the exhibition by Jessé Souza, in her well-known work "The elite of the delay" (2017), when she pointed out that capital played a deterministic role in our economy and historically conducted, even if indirectly, the country's social and political discussions, regarding the interests of the economic elite.

In this sense, digital divide or inequality adds to the existing inequality and social exclusion, in a more complex interaction, which leaves the impression of distancing the promise of the Information Age, in an obscure reality for many worldwide (CASTELLS, 2015).

In the Brazilian case, more broadly than in other countries, the digital divide is more strongly linked to the discussion of social exclusion, since it derives from socioeconomic and cultural inequalities, such as illiteracy, unemployment, low income, and education, in a relationship cause and effect. The factors that lead to social exclusion fall into the digital divide and this contributes to the deepening of that (ALMEIDA et al., 2005).

For Randolph and Lima (2012), the theme of digital exclusion involves reflecting on the diffusion and use of information management and transmission technologies, which allow mutual (interactive) communication between its different users.

The digital divide, in short, can be understood as "[...] unequal access to resources related to information and communication technology between or within continents, countries, regions or even neighborhoods" (ARAUJO, 2015, p. 16).

In this regard, according to a survey carried out by the Brazilian Institute of Geography and Statistics - IBGE (2020), during the National Household Sample Survey - Continuous PNAD, in 2017, the Internet was used in 74.9% of households in the country and this percentage rose to 79.1% in 2018.

Still, it was found that the main means of accessing the internet at home was the mobile cell phone, which, in 2018, reached 99.2% of the households where the internet was used, with the microcomputer being in second place, one since it was used to access the Internet by 48.1% of households where this network was used.

In a different survey carried out by the Internet Steering Committee in Brazil - CGI (2019), during the ICT Household survey, it was found, in 2018, that 67% of Brazilian households had internet access, 70% of which correspond to the urban area and 30 % to the rural area, as well as concentrating the highest percentage of access in the Southeast (73%) and South (69%) regions.

Castells (2015) tried to discuss this issue and argues that it is not surprising when, when proclaiming the potential of the internet as a means of freedom, productivity, and communication, there is a criticism regarding the digital divide caused by the inequality associated with it, since the centrality of the internet in many areas of social, economic and political activity is equivalent to marginality for those who do not have access to it, or have only limited access, or do not know how to use it effectively.

Social inequality in democratic practices, of course, is a common issue in discussions in political theory, whether from the perspective of participation or the perspective of liberal literature. However, in addition to social issues and inequality in opportunities linked to the absence or little political involvement of citizens, there are personal issues involved, related to personality, diverse experiences, preferences and motivations, and other factors that rule out the idea that perfect equality is a plausible political objective (MARQUES, 2014).

Well, similarly to inequality or social exclusion, we seek to reflect on the digital divide, not only from the perspective of personal characteristics of access but also about the lack of basic opportunities that enable the enjoyment of the services offered by the State or taking up space in consultations regularly offered at different government levels (MARQUES, 2014).

Roberto, Fidalgo, and Buckingham (2015, p. 51), in their conclusions of research carried out with university students in Portugal, claim that,

> Concerning the social groups most affected by info-exclusion, digital natives show, in general, ease in identifying young people and the elderly as those who have greater and lesser access, respectively. They also refer to the importance of socioeconomic status and education as determining factors to ensure easy access to ICT. Considering the identification of these groups and the factors that enhance info-exclusion, digital natives show a stereotyped and reducing view of the elderly that supports the social devaluation of old age.

It is here that one of the reflections of this article is found, which intends to discuss whether the use of technologies makes society more efficient, or with more opportunities for participation in public decision-making, or whether social exclusion and inequality increases it already exists in its various meanings.

It is important to emphasize, first of all, that it is considered insufficient to analyze the digital divide only by the statistics considered in the possession or access to the means of communication, since, although necessary, there are other elements in this process, such as the individual peculiarities of who accesses or those associated with the geographical position (MARQUES, 2014).

On this point, the diagnosis made by Pippa Norris (2001) is relevant, which cataloged the problem in three faces: the first referring to the global division and the differences in access to digital technology and the infrastructure of telematic networks in different countries; the second, regarding the social division and the internal disparities of a society, cataloging as to the access to the equipment and the necessary skills for the handling of the information and communication technologies; and, finally, the existence of a digital exclusion in democracy *(democratic digital divide)*, whose focus is on the use of digital resources and political mobilization.

Still, on the subject of digital exclusion, it is important to present the inventoried aspects that involve *digital divides* and collaborate for their understanding and proposition of solutions.

According to Marques (2014, p. 101-102), these aspects can be classified into three categories:

a) **technical aspects:**
- connection speed,
- hardware and software of the machines, which allow different experiences for users,
- backbone and backhaul structure in each location (technical devices that allow the physical connection between computer networks and, therefore, enable data exchange),
- IP numbers;

b) **individual and social aspects:**
- age,
- genre,
- income (to purchase communication devices, hire Internet connection services, or gain access to paid information),
- level of schooling
- ability to use the language (English as a universal language),
- ethnicity,
- cultural differences (between natives and immigrants, for example),
- skills to operate digital communication resources,
- motivation to employ the devices,
- external pressure to use digital communication networks (work, family or school),
- autonomy for consumption and content production,
- quality of the information to which they have access,

- stage of life in which digital communication technologies were accessed (having access to the Internet as a child or only after being an adult),
- daily connection time,
- behavioral aspects of each individual (degree of inhibition, for example);

c) **geographical aspects:**

- countries (a greater influence capacity is said to depend on the user's place of origin),
- regions of the same city or state (urban areas or rural areas),
- usual place where the user accesses the Internet (home, work, lan house).

Sorj and Guedes (2005) write that addressing the issue of the digital divide must occur from a systemic view of the Brazilian reality, so that, alongside the promotion of policies for the universalization of internet access, we seek to promote universalization of other social assets, such as education, sanitation, security, health, and legal services.

In the same sense, Adriane Matos de Araujo (2016) points out that education is a fundamental role in combating the digital divide and, therefore, it is necessary to reflect on literacy and digital literacy as mechanisms of appropriation of digital technologies and, more broadly, of digital education, considering the collective social construction linked to digital cultures and social identities active in collective intelligence.

Therefore, it is clear that the aspects that involve the digital divide go beyond access to the internet or electronic components, such as computers or cell phones, since they encompass several factors, such as technical, individual or social, and geographic factors, which the expansion of its instrumental use in democratic participation can be seen as an obstacle.

3. TECHNOLOGICAL INNOVATIONS APPLIED TO PARTICIPATIVE CITIZENSHIP

3.1 PARTICIPATIVE CITIZENSHIP: THEORETICAL AND CONCEPTUAL NOTES

Initially, before the theoretical development regarding the application of ICTs to participatory citizenship, it is necessary to contextualize what the term citizenship means. Such an objective is not easy, given that citizenship does not have a uniform concept.

For Gohn (2005, p. 18), "[...] among the concepts used by intellectuals, politicians, public administrators, and the media, citizenship is probably the one that has had the greatest use (and abuse) of meanings and re-signified".

Etymologically, it comes from Latin and had the meaning of the one who inhabited the city, having a correlation to the concept of people (GORCZEVSKI; MARTIN, 2011). It should be noted that while it has a sense of inclusion/belonging it also brings with it the exclusion of those who are not its holders (VIEIRA, 2013).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 270-285 • 2020

It manifests itself in various ways and receives the most diverse classifications: representative citizenship, semi-direct citizenship, electoral citizenship, participatory citizenship, electronic citizenship, liberal citizenship, social citizenship, republican citizenship, etc.

Concerning participatory citizenship, the 1988 Constitution of the Federative Republic of Brazil represented a milestone in its recognition in Brazil, since, in addition to the classic instruments of representative democracy, the need for citizen participation as holders of democracy was emphasized. popular sovereignty, which can also be brought as a new paradigm that presupposes the existence of citizenship that is not merely formal, but effectively participatory (VIEIRA, 2013).

As Vieira (2013) writes, the 1988 Constitution of the Federative Republic of Brazil represented a real turning point in terms of the recognition of rights and the inclusion of participatory citizenship alongside representative in a national constitutional text, since, before it, in terms of citizenship, there were no significant spaces for participation, as well as limitations for the exercise of representative democracy.

But what, in fact, is participatory citizenship? What kind of democracy does it best fit into?

It can be said that effectively participatory citizenship must encompass spaces in which citizens can collaborate to make decisions that involve the direction of society, through dialogue, opinion, consultation, voting and criticism.

In this line of reasoning, the Brazilian constitutional text tried to consecrate participatory spaces, such as public hearings, participatory public planning and budget, the forums of the State of the City, as well as the Conferences and Rights Councils (VIEIRA, 2013).

Such participation scenario is verified by the democratic logic of the well-called participatory democracy, which is intertwined with the meaning and existence of participatory citizenship worked on here.

There is a glimpse of a crisis in the liberal democratic paradigm based on the idea of representing citizenship and legal monism. A crisis that permeates all its institutions and that cannot be solved only with the instruments of bourgeois modernity, built from its mythologies and abstractions which removed the complexity of society, leaving the simplicity that the capitalist model needs for its development and reproduction (CAPELLA, 2002; GROSSI, 2007; PILATI, 2012; VIEIRA, 2013).

Thus, participatory democracy seems to occupy more attention, insofar as it tries to rescue the notion of the people as a true holder of sovereignty and protagonist of the public interest.

Participatory democracy has tried to find an answer to the promises not fulfilled by representative democracy, consisting in restoring "[...] subjects to a political initiative and an influence in the decision-making process that today seem to be compromised by the formalism of the representative system and elitism. of the parties" (COSTA, 2012, p. 300).

According to Pateman (1992, p. 60-61), participatory democracy

> [...] it is built around the central statement that individuals and their institutions cannot be considered in isolation. The existence of representative institutions at the national level is not enough for democracy; because the maximum participation of all people, socialization or 'social training', needs to occur in other spheres so that the necessary psychological attitudes and

> qualities can develop. [...] The main function of participation in the theory of participatory democracy is, therefore, educational; educational in the broadest sense of the word, both in the psychological aspect and in the acquisition of democratic skills and procedures. [...] Participation promotes and develops the very qualities that are necessary for it; the more individuals participate, the better able they become to do so.

Therefore, democracy participation was not intended to replace representative democracy entirely. Despite this, representative democracy has rejected the legitimacy of participatory democracy, which has caused a certain conflict, which will only be resolved insofar as this refusal is left aside to be absorbed as a form of complementarity between the two forms of democracy, of to contribute to the deepening of both (SANTOS, 2002).

In this context of complementarity, in Brazil, as from the 1988 Constitution, the paradigm of the need for society's participation as the holder of popular sovereignty was established, thus transcending the traditional representative democracy exercised through political parties, with mechanisms established semi-direct exercise of power: popular initiative, plebiscite, and referendum. However, despite their importance, their exercises are limited within the formalist and monist view of the legal system (VIEIRA, 2013).

Although there were such formal limits to the mechanisms of popular initiative, the plebiscite and the referendum, other spaces of citizenship were also recognized, such as the participation of the community in the area of health and other areas of public policies (rights councils or management councils of public policies), the right of assembly and association, the right to information in public bodies, the right to petition and obtain certificates in public bodies for the defense of rights, popular action, municipal popular initiative, holding hearings in the National Congress with the participation of society, the possibility for a citizen to file complaints before the Court of Auditors, the receipt of complaints from society against organs of the Judiciary before the Council of Justice, the receipt of complaints from society against bodies of the Ministry Público before the National Council of the Public Prosecution (VIEIRA, 2013).

Among the spaces of citizenship, social control (of society about the State) also stands out, which differs from social participation due to the way decisions interact in public matters. Control is the mechanism that allows the possibility of decisions to be replaced, while participation is reflected in the existence of channels, institutions of interaction between the government and society, with the presence of collective subjects in the decision-making processes in public choices (BITENCOURT, 2019).

And it is in the space of social control, in line with the exercise of participatory citizenship, that the use of ICTs and electronic citizenship is configured as a necessary element for the expansion of participation and the inspection of the public good.

3.2 THE DIGITAL DIVIDE PROBLEM AND THE SEARCH FOR EFFECTIVELY PARTICIPATORY CITIZENSHIP

Electronic or digital democracy can be understood "[...] as the set of resources, tools, projects, experiments, experiences and initiatives in which technologies are used to produce more democracy and better democracies" (GOMES, 2018, p. 1832).

In this line, the notion of citizenship is also understood from the technological increase in its most varied forms of manifestation. This model is referred to by Perez Luño (2004) as a less formal process of citizenship, which he calls cyber citizenship or citizenship.com. It can be said, then, that the discussion of popular digital participation gains an additional element in relation to traditional forms of participation: the digital one.

Thus, in addition to the traditional difficulties for popular participation, which involve the citizen's ability to present, in a persuasive way, their own arguments or claims, it should be assessed, in the digital context, whether citizens have equal conditions of resources for the access to data and arguments under discussion (FERREIRA, 2011).

As Araujo (2015) well mentions, the debate about the digital divide, when related to the theme of citizenship, must consider access and critical use of information, since access is linked to the technological infrastructure for internet connection and availability information, while critical use involves how individuals use the internet.

It is important to highlight, in the same way, some criticisms listed by Wilson Gomes (2018) from scientific works published about the arrival of digital or electronic democracy, which will be the subject of reflection below.

The first says that digital democracy cannot, through the use of information and communication technologies, solve the problems of democracy (GOMES, 2018).

Such criticism does not seem to make much sense, since healthy, up-to-date, abundant and publicly available government data are fundamental for democracy, for improving people's lives, and even for the progress of society. Still, digital democracy aims to aggregate and not replace, with nothing being automatic in democracy, nor the existence of the best technological means available (GOMES, 2018).

The second states that the democracy that would emerge from electronic democracy would be a low and poor version, consisting of a mere device for registering preference (GOMES, 2018).

Again, such criticism is shallow and does not comprehend the totality of digital democracy, since it mixes a minimal function that a given technology can provide and a general judgment on democracy as a result only of fulfilling that function (GOMES, 2018).

Along these lines, Lévy (2003) points out that the use of the Internet, combined with democracy, constitutes one of the foundations of cyberdemocracy, and, unlike the media of media democracy in the second half of the 20th century, such as the press, radio, and television, all citizens navigators of the world wide web are allowed the opportunity to express their opinions and intentions without having to pass through the power of the journalist, to expand, diversify and even complicate the public sphere, that is, conferring greater freedom of speech.

A third criticism tries to maintain that electronic democracy can produce anti-democratic asymmetries since it would produce greater social exclusion in the face of technological exclusion (GOMES, 2018).

The development of technological resources aimed at digital democracy without observing the issues of digital inclusion can further deepen social exclusion. However, if we consider the issues of the digital divide, we have that digital inclusion can reduce social exclusion, contributing to the process of improving the ways of exercising democracy and citizenship.

Thus, the technology associated with participatory citizenship, in what can be called digital participatory citizenship, alongside the traditional mechanisms, when thought in conjunction with the factors of digital inclusion, provides expansion and not a reduction of spaces for participation and the exercise of citizenship.

Finally, a fourth critic tries to make it believe that digital democracy is not capable of producing better conditions for civil participation and public deliberation, so it cannot help to improve democracy (GOMES, 2018).

Along these lines, Ferreira (2011) points out that it is necessary to differentiate inequalities in offline and online participation, since it must be verified whether, if the barriers to access online participation are overcome, there will be an impact on factors of offline inequality, since recent studies demonstrated that the main obstacles to carrying out public deliberations stem from political apathy and not from obstacles to the possibility of expression or communication.

However, it should be noted that obstacles to the exercise of citizenship can increase this political apathy by making it difficult and indirectly to discourage democratic participation.

Furthermore, regarding the relationship between the use of the Internet and the exercise of citizenship, Lévy (2003) mentions that those who enjoy this technology tend to vote more, have more information, feel better ability to act on the world and have more confidence in the democratic process.

Digital democracy is not only about generating more civil participation and public deliberation, but also about providing information that promotes transparency, openness and accountability of government agencies at national and international level, as well as strengthening the channels of interactive communication between citizens and intermediate institutions (GOMES, 2018).

Sorj and Guedes (2005) emphasize the importance that schools assume as instruments to socialize new generations for the use of the Internet. The authors point out that one should seek to implement policies to encourage the use of software and electronic equipment by students to enable them to learn about basic programs and motivate them to use these different technological resources.

In this sense, with the gradual breaking of these obstacles to access and use of new technologies, it is possible, in the context of digital democracy, to allow a larger space for dialogue, interaction and citizen participation to be built in political decisions, eventually substantiating itself in an instrument that can, in a complementary way, contribute to a greater instrumentalization and the reach of participatory democracy (PICANYOL, 2008).

4. CONCLUSIONS

The present work sought to reflect on the impasse inherent in the *digital divide* and its impact on participatory citizenship in the context of the network society.

As seen, the transformations arising from technology and, in particular, from the invention of the internet have revolutionized the way of living in society, now called network society.

Society, previously disconnected and isolated, started to live globally and interconnected by network systems.

This new format of the network society, although intertwining, directly or indirectly, all people, did not bring with it the resolution of social exclusion (which would not be able to do so, given the complexity of factors that involve such exclusion), but more clearly to the other form of exclusion, the digital one, which must be faced by the State and by society.

Social exclusion has deeper roots, which impact people's lives with public goods and services, including access to the fundamental rights to information and knowledge.

The *digital divide* (digital exclusion), originating from digital life, which is also affected by social exclusion, with emphasis on Brazil, a country marked by social inequality, has its characteristics that were detailed in the development of this study.

Overcoming the digital divide is fundamental for the expansion of the use of digital citizenship or cyber-citizenship as an instrument for the expansion and strengthening of political participation, especially in the scope of participatory citizenship.

This participatory citizenship, inscribed in the body of the 1988 constitutional text, does not refute the importance of represented citizenship and parties but coexists with it to expand the exercise of democratic participation in the wake of the advocated by the Social and Democratic State of Law.

Therefore, real participatory citizenship must encompass spaces in which citizens can collaborate to make decisions that involve the direction of society, through dialogue, opinion, consultation, voting, and criticism.

Furthermore, the theoretical construction of this research publication that the aspects that involve the digital exclusion go beyond the access to the internet or electronic components, such as a computer or cell phone, since they encompass several factors, such as those of a technical, individual or individual social nature and geographic.

In this sense, it is worth emphasizing the role of education in this process from the schools, but not only through them, because of the need to think about the inclusion of those who are no longer in the school environment or who have had little contact with this environment, which also deserve attention regarding the theme of the digital divide, since they have a socializing role for new generations on the internet. Therefore, a challenge that arises is the need to create conditions for the implementation of digital education in Brazilian schools (which, in the case of public schools, can contribute to the reduction of social exclusion), aimed both at the labor market and economy, as well as for the exercise of citizenship.

Thus, for access to information and knowledge to occur through the use of ICTs and, consequently, the dissemination of digital participatory citizenship, it is necessary to expand/create public policies to combat social inequalities and create instruments that make it possible to include those excluded digitally, including for their cultural, ethnic, generational, technical or geographical aspects.

There is a need for public investment in the development of solutions aimed at citizenship, through *software* engineering techniques and the use of information and communication technologies.

Within the scope of popular participation, the development of electronic instruments, not only informative but with effective citizen interaction, regarding the discussions held in the Legislative Branch, through internet access, could contribute to the reduction of the digital divide and allow greater interaction society in the legislative process.

In terms of public transparency, the improvement of electronic portals to expand the information and documents available in addition to what the legislation proposes, in a concept of digital Public Administration, also has the power to contribute to the improvement of citizenship, at least in terms of access, as to the digital divide.

Finally, concerning participatory citizenship within the scope of public policies, the development of interactive digital channels for rights councils, especially municipal councils, would also represent a digitally inclusive measure, which would give more visibility and strengthen these spaces of participatory democracy, supported by the paradigm of the Social and Democratic State of Law, which was recognized in the text of the 1988 Constitution of the Federative Republic of Brazil.

The truth is that there is not only one solution for the elimination of the digital divide, such as social exclusion, but there are several bridges that can lead to the most inclusive scenario possible, and any measure of digital inclusion will contribute to social improvement and vice-versa.

In this context, a final reflection is necessary: one cannot blame technological resources as causing social inequality, as this is something that cannot be sustained. The problem associated with social exclusion is something more profound, rooted in historical elements of an exclusive political and economic process, which have marked and continue to deeply mark Brazilian society and the other countries of Latin America.

REFERENCES

ALMEIDA, Lília Bilati de *et al*. O retrato da exclusão digital na sociedade brasileira. **JISTEM J. Inf. Syst. Technol. Manag.**, [*Online*], São Paulo, v. 2, n. 1, p. 55-67, 2005. Available from: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1807-17752005000100005&lng=en&nrm=iso. Access on: 26 aug. 2020.

ARAUJO, Adriane Matos de. **Exclusão digital em educação no Brasil:** um estudo bibliográfico. 2016. Dissertação (Mestrado em Educação) - Universidade do Estado do Rio de Janeiro, Rio de Janeiro, 2016.

ARAUJO, Lucimar Goulart da Costa. **O projeto de inclusão digital no Brasil:** avanços e lacunas. 2015. Dissertação (Mestrado em Estudos Populacionais e Pesquisas Sociais) - Escola Nacional de Ciências Estatísticas, Rio de Janeiro, 2015.

BITENCOURT, Caroline Müller. **Acesso à informação para o exercício do controle social:** desafios à construção da cultura da transparência no Brasil e diretrizes operacionais e legais para os portais no âmbito municipal. Relatório de Pesquisa Pós-Doutoral. Curitiba: PPGD-PUCPR, 2019.

CAPELLA, Juan Ramón. **Fruto proibido**: uma aproximação histórico-teórica ao estudo do Direito e do Estado. Tradução de Gresiela Nunes Rosa e Lédio Rosa de Andrade. Porto Alegre: Livraria do Advogado, 2002.

CASTELLS, Manuel. **A Sociedade em rede**. 8. ed. rev. e amp. São Paulo: Paz e Terra, 2005.

CASTELLS, Manuel. **A Galáxia da Internet:** reflexões sobre a internet, os negócios e a sociedade [recurso eletrônico]. Rio de Janeiro: Jorge Zahar Ed., 2015.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 270-285 • 2020

CÔMITE GESTOR DA INTERNET NO BRASIL – CGI. **Pesquisa sobre o uso das tecnologias de informação e comunicação dos domicílios brasileiros:** TIC domicílios 2018 [livro eletrônico]. São Paulo: Núcleo de Informação e Coordenação do Ponto BR, 2019.

COSTA, Pietro. **Poucos, muitos, todos:** lições da história da democracia. Curitiba: Editora UFPR, 2012.

FERREIRA, Gil Baptista. Democracia digital e participação política: o acesso e a igualdade na deliberação *online*. **Media & Jornalismo**, Instituto Politécnico de Coimbra, n. 18, v. 10, n. 1, pp. 46-61, 2011.

GOHN, Maria da Glória. **O protagonismo da sociedade civil:** movimentos sociais, ONGs e redes solidárias. São Paulo: Cortez, 2005.

GOMES, Elisabeth. Exclusão digital: um problema tecnológico ou social? **Trabalho e Sociedade**, Rio de Janeiro, ano 2, n. especial, dez. 2002. 8 p. Disponível em: http://www.radio.faced.ufba.br/twiki/pub/GEC/RefID/Elisabeth_Gomes_ED.pdf. Acesso em: 26 ago. 2020.

GOMES, Wilson. **A democracia no mundo digital:** história, problemas e temas. São Paulo: Edições Sesc, 2018.

GORCZEVSKI, Clovis; MARTÍN, Nuria Belloso. **A necessária revisão do conceito de cidadania**: movimentos sociais e novos protagonistas na esfera pública democrática [recurso eletrônico]. Santa Cruz do Sul: Edunisc, 2011. Disponível em: www.unisc.br/edunisc. Acesso em: 20 jul. 2019.

GROSSI, Paolo. **Mitologias jurídicas da modernidade.** Tradução de Arno Dal Ri Jr. 2. ed., rev. e atual. Florianópolis: Fundação Boiteux, 2007.

INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA – IBGE. Diretoria de Pesquisas, Coordenação de Trabalho e Rendimento. **Pesquisa Nacional por Amostra de Domicílios Contínua 2017-2018**. Brasília, DF: IBGE, 2020.

KUHN, Thomas S. **A estrutura das revoluções científicas**. Tradução de Beatriz Vianna Boeira e Nelson Boeira. 5. ed. São Paulo: Perspectiva, 1997.

LÉVY, Pierre. **Ciberdemocracia**. 1. ed. Porto Alegre: Instituto Piaget, 2003.

MARQUES, Francisco Paulo Jamil Almeida. Democracia on-line e o problema da exclusão digital. **Intexto**, Porto Alegre, n. 30, p. 93-113, jul. 2014.

MORIN, Edgar. **O método 4**: as ideais: habitat, vida e costumes. Tradução de Juremir Machado da Silva. 5. ed. Porto Alegre: Sulina, 2011.

NORRIS, Pippa. **Digital Divide**: Civic Engagement, Information Poverty, and the Internet Worldwide. New York (EUA): Cambridge University Press, 2001.

PATEMAN, Carole. **Participação e teoria democrática.** Tradução de Luiz Paulo Rouanet. Rio de Janeiro: Paz e Terra, 1992.

PÉREZ-LUNO, Antonio Henrique. **Ciberciudadaní@ociudadanía.com?** Barcelona: Gedisa, 2004.

PICANYOL, Jordi Sanches i. **La democracia electrónica**. Barcelona: UOC, 2008.

PILATI, José Isaac. **A propriedade e função social na pós-modernidade**. 2. ed. Rio de Janeiro: Lumen Juris, 2012.

RANDOLPH, Rainer; LIMA, Mário Hélio Trindade de. Novas formas de exclusão social? Reflexões sobre o digital divide. **Cadernos Metrópole**, [*S.l.*], n. 4, p. 93-117, maio 2012. ISSN 2236-9996. Disponível em: http://revistas.pucsp.br/metropole/article/view/9303. Acesso em: 26 ago. 2020.

ROBERTO, Magda Sofia; FIDALGO, António; BUCKINGHAM, David. De que falamos quando falamos de infoexclusão e literacia digital? Perspectivas dos nativos digitais. **OBS***, Lisboa, v. 9, n. 1, p. 43-54, jan. 2015. Disponível em: http://www.scielo.mec.pt/scielo.php?script=sci_arttext&pid=S1646-59542015000100003&lng=pt&nrm=iso. Acesso em: 30 abr. 2020.

ROVER, Aires José. **Governo eletrônico e inclusão digital**. Florianópolis: Fundação Boiteux, 2009.

SANTOS, Boaventura de Sousa. **Democratizar a democracia:** os caminhos da democracia participativa. Rio de Janeiro: Civilização Brasileira, 2002.

SORJ, Bernardo; GUEDES, Luís Eduardo. Exclusão digital: problemas conceituais, evidências empíricas e políticas públicas. **Novos estud. - CEBRAP**, São Paulo, n. 72, p. 101-117, jul. 2005. Disponível em: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-33002005000200006&lng=en&nrm=iso. Acesso em: 26 ago. 2020.

SOUZA, Jessé. **A elite do atraso**: da escravidão à Lava Jato. Rio de Janeiro: Leya, 2017.

VIEIRA, Reginaldo de Souza. **A cidadania na república federativa:** pressupostos para a articulação de um novo paradigma jurídico e político para os conselhos de saúde. 2013. 540 f. Tese (Doutorado em Direito) - Universidade Federal de Santa Catarina, Florianópolis, 2013.

Received/*Recebido:* 29.06.2020.

Approved/*Aprovado:* 26.12.2020.

FOURTH INDUSTRIAL REVOLUTION, ARTIFICIAL INTELLIGENCE AND THE PROTECTION OF MAN IN BRAZILIAN LAW

QUARTA REVOLUÇÃO INDUSTRIAL, INTELIGÊNCIA ARTIFICIAL E A PROTEÇÃO DO HOMEM NO DIREITO BRASILEIRO

Dirceu Pereira Siqueira[1]
Fernanda Corrêa Pavesi Lara[2]

ABSTRACT

The research aims to draw an approximation between the context of profound transformation characterized by the Fourth Industrial Revolution and the Law, investigating the (in) existence of legal rules for the protection of man in his individuality, the (in) sufficiency of individual rights and guarantees and the challenges for establishing new legislative frameworks. For this purpose, following the hypothetical-deductive method and the bibliographic review in books and periodicals on the topic as investigative procedures, the research is divide into three sections. First it decide to outline the context of the Fourth Industrial Revolution and its characteristic milestones, then the man / machine relationship and the challenges of using artificial intelligence, and in the last section, the legislative outlines related to the protection of man will be presented. As results, it is considered that the role of law in the context addressed will not necessarily be to establish new legislative frameworks, but, above all, to seek guarantees for the fulfillment of existing legislative precepts which should be reinterpreted in the light of the fourth industrial revolution.

Keywords: Personal data; Artificial intelligence; Fourth Industrial Revolution; Fundamental rights.

1 Coordinator and Permanent Professor of the Doctoral and Master's Program in Law at Centro Universitário Cesumar (UniCesumar); Post-doctor in Law from the Faculty of Law of the University of Coimbra (Portugal), Doctor and Master in Constitutional Law from the Toledo Educational Institution - ITE / Bauru, Lato Sensu Specialist in Civil and Civil Procedural Law from the University Center of Rio Preto, Researcher Scholarship - Research Productivity for PhD - PPD - from the Cesumar Institute of Science, Technology and Innovation (ICETI), Professor in law courses at the University of Araraquara (UNIARA) and at the Unifafibe University Center (UNIFAFIBE), Guest Professor at Master's Program University Missouri State - USA, Editor of the magazine Social Rights and Public Policies (Qualis B1), Legal Consultant, Opinionist, Lawyer. ORCID iD: https://orcid.org/0000-0001-9073-7759. Email: dpsiqueira@uol.com.br

2 PhD student PROSUP / CAPES (fee module) by the Post-Graduation Program in Legal Sciences at the University Center of Maringá - Unicesumar, having as research line instruments for the enforcement of personality rights. Master in Business Law from the State University of Londrina - UEL. Adjunct Coordinating Professor of the Law Course at the Pontifical Catholic University of Paraná, Campus Maringá. ID Lattes: 7388198291636030. ORCID iD: https://orcid.org/0000-0002-3121-7996. Email: fernandapavesi@hotmail.com

How to cite this article/Como citar esse artigo:
SIQUEIRA, Dirceu Pereira; LARA, Fernanda Corrêa Pavesi. Quarta revolução industrial, inteligência artificial e a proteção do homem no direito brasileiro. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 286-296, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.8223.

RESUMO

A pesquisa tem por objetivo traçar uma aproximação entre o contexto de profunda transformação caracterizado pela Quarta Revolução Industrial e o Direito, investigando a (in)existência de regramentos legais para proteção do homem em sua individualidade, a (in)suficiência dos direitos e garantias individuais e os desafios para o estabelecimento de novos marcos legislativos. Para tanto, seguindo o método hipotético-dedutivo e como procedimentos investigativos a revisão bibliográfica em livros e periódicos sobre o tema, o trabalho apresenta-se dividido em três seções, primeiramente optou-se por delinear o contexto da Quarta Revolução Industrial e seus marcos característicos, na sequência a relação homem/máquina e os desafios do uso da inteligência artificial e na última seção são apresentados os contornos legislativos atinentes a proteção do homem. Como resultados pondera-se que o papel do Direito no contexto abordado não necessariamente será o de estabelecer novos marcos legislativos, mas, sobretudo, buscar garantias para o cumprimento dos preceitos legislativos já existentes que deverão ser reinterpretados à luz da quarta revolução industrial.

Palavras-chave: *Dados pessoais; Inteligência artificial; Quarta Revolução Industrial; Direitos Fundamentais.*

MERITUM MAGAZINE • v.15 • n.4 • p. 286-296 • 2020

1. INTRODUCTION

Technology has permeated society's way of life, it is inserted in people's daily lives and sooner or later it will promote the transformation of humanity, whether in interpersonal relationships, at work, in everyday needs, what once sounded like prophecy every day it has come to fruition and technology has appropriated social relations, revolutionizing various spheres of human life.

Against of the dynamics of the transformations caused by the impact of technology, it is not yet possible to establish the breadth, depth and speed with which what will demand, with regard to the Science of Law, special attention to fundamental rights and guarantees.

Thus, with the objective of drawing an approximation between the context of profound transformation characterized by the Fourth Industrial Revolution and the Law, the research proposes to investigate the (in) existence of legal rules for the protection of man in his individuality, the (in)) sufficiency of individual rights and guarantees and the challenges for the establishment of new legislative frameworks.

Therefore, following the hypothetical-deductive method and adopting bibliographic review in books and periodicals on the topic as investigative procedures, it was decided to systematize the work in three sections.

First, the context of the profound technological transformations called the Fourth Industrial Revolution will be developed, adopting Klaus Schab's (2016; 2019) understanding as a theoretical framework, correlating the disruptive milestones in human existence with fundamental rights and the right to the free development of the personality.

In the second movement, the contours will be presented of artificial intelligence and the relevance of the availability of abundant data for its advances, highlighting, therefore, the man / machine relationship. Finally, in the last section, an attempt will be made to construct an overview of the convergent national legislation on the protection of man in his individuality, keeping the focus in the context of the profound technological transformations now investigated.

Thus, it is intended unveil paths for scientific deepening in the theme, in particular, analyzing predictive actions in the legal field and the importance of the scientific opening of the Law for dialogue with other sources.

2. ON THE CONTEXT OF TECHNOLOGICAL TRANSFORMATIONS: THE FOURTH INDUSTRIAL REVOLUTION

In the last 250 years, three Industrial Revolutions have changed the world and the basis of the transformations was based on technical and scientific advances. “In each of them, technologies, political systems and social institutions have evolved together, changing not only industries, but also the way people saw themselves in their relationships with each other and the natural world” (SCHWAB, 2019).

For approximation from the context of the fourth industrial revolution, we will seek to investigate the term exposed by Klaus Schwab (2016, p. 16), which points to the social transformations promoted by technology as profound, disruptive and capable of promoting a paradigm shift in the man’s way of life, this revolution is called by the author the “Fourth Industrial Revolution”, marked by the “fusion of these technologies and the interaction between the physical, digital and biological domains ”.

> In this revolution, emerging technologies and widespread innovations are spreading much faster and more widely than in previous ones, which continue to unfold in some parts of the world. The second industrial revolution has yet to be fully experienced by 17% of the world population, as almost 1.3 billion people still do not have access to electricity. This is also true for the third industrial revolution, since more than half of the world’s population, 4 billion people, live in developing countries without access to the internet. The mechanized loom (the hallmark of the first industrial revolution) took almost 120 years to spread outside Europe. In contrast, the internet spread across the globe in less than a decade (SCHWAB, 2016, p. 17).

The impacts of the fourth industrial revolution are narrated by the author as being of the most varied order, in the economy, in business, in governments, countries, regions, cities, in society as a whole and in the individual, an inflection point of the research. Especially in business, the so-called industry 4.0 is inserted in the transformation processes of the fourth industrial revolution and is in line with this context, given the advances in industrialization methods.

> They need to be dealt within order to fully realize the potential of this fourth industrial revolution. Industry 4.0 will continue to embrace cuttingedge technology and techniques, and will open up new applications that will impact industrial sectors and tomorrow’s complex industrial ecosystems. Advanced ICT can and will contribute to the success of Industry 4.0 (XU; XU; LI, 2018).

Within the scope of the individual, the impacts are multiple and strongly affect identity and aspects related to it, such as the sense of privacy, the notion of ownership, consumption patterns, time devoted to work, leisure, professional career development. , the cultivation of

professional skills, relationships and the way we interact with each other, are described by Klaus Schwab (2016, p. 99).

> The extraordinary innovations brought about by the fourth industrial revolution, from biotechnology to those of AI, are redefining what it means to be human. They are raising the current limits on life expectancy, health, cognition and competence in ways that previously belonged only to the world of science fiction. With the advancement of knowledge and discoveries underway in these fields, it is essential that our focus and commitment are focused on permanent ethical and moral discussions. Because we are human beings and social animals, we need to think individually and collectively about how to respond to topics such as life extension, projected babies, memory extraction and much more (SCHWAB, 2016, p. 100).

Predicting the consequences caused by the fourth industrial revolution in the individuality that surrounds human life is something that intrigues researchers around the world, sometimes leading them to utopias and dystopias that make the question even more intriguing. Fact that, the transformations tend to modify the space of life, initially marked by the relation man / nature, with the technological increments they tend to be marked by the man / machine relationship, not just any machine, but one capable of developing paths compared to human intelligence.

In the investigated context, the human right to the free development of the personality stands out, which finds its roots in the Universal Declaration of Human Rights, provided, in particular, in art. XXII and art. XXIX. Recognized for decades and aligned with construction history of Rights related to the human condition, the right to the free development of personality takes on a resized space, since the environment conducive to developing as a human being can be unique and complete, takes on contours that society will need to reconstruct, in particular, the understanding of security social, national, economic and cultural effort to promote a favorable space for the free development of the personality.

Regarding the right to the free development of personality, Lixinski (2006, s / p) considers that its birthplace in the Declaration of Human Rights enshrines the right to self-development, analyzed both by the privatistic aspect and the public aspect aligned with the position of the guarantor State of Rights.

On the same path as the right to dignity the right to free personality development is outlined by Moreira and Alves (2015, s / p) as being right,

> Linked to the dignity of the human person, the free development of the personality expresses the idea of the person deciding his own life plan. The notions of freedom, autonomy and self-determination constitute the essence of the moral personality and the free development of the personality precisely portrays a dynamic and evolutionary conception of the human personality that develops freely through of acts, relations and legal business. This right protects and promotes the existential choices of each person, aiming at their own training and thus preserving their individuality and dignity in what the human being is, and in what he can be (MOREIRA, ALVES, 2015, s / p.)

For Nery (2015, s / p), this right is closely linked to an immense range of human phenomena, according to,

> With regard to the so-called right to personality development (das Recht auf Entfaltung der Persönlichkeit), in the extensive list of phenomena that signal the existence of interrelations that can be classified with this epithet, we point

MERITUM MAGAZINE • v.15 • n.4 • p. 286-296 • 2020

> out: (a) freedom of action ; (b) bodily freedom of movement; (c) the workforce activity; (d) industrial activity; (e) vocational activity; (f) cultural activity; (g) freedom of association and assembly; (h) freedom of expression of thought; (i) the religious and ethical attitude and activity, and (j) the instruction and the use of training (emphasis in the original) (NERY, 2015, s / p).

Starting from the assumption of the subjectivity of each human being and of the freedom to constitute themselves in their entirety and uniqueness in a social and cultural nucleus, the context imprinted by the fourth industrial revolution is laden with ongoing positive and negative impacts. Thus, it is perceived that the paths to ensure the right to free development of personality pervade, therefore the guarantee of the "right to individuality (das Recht auf Individualität), celebrating a peculiar way of accepting man's individuality, his own character and his approach to the ideal human image" (NERY, 2015, s / p) emphasis in the original.

Individuality, in Hubmann's view (apud Nery, 2015, s / p), has three distinct spheres:

> (a) the individual sphere - name, honor, physical image, image of life, character image, spoken word and written word; (b) the private sphere - what the individual can subtract from the knowledge of the media, and (c) the secret sphere - actions, expressions, feelings that no one should be aware of. (NERY, 2015, s / p)

The protection of the pillars of the individuality of human life in the context of the fourth industrial revolution, must be preserved. Thus, it is noted that certain technologies have their impacts on human nature relatively already studied and mapped by the scientific community, or better understood by the academy as the case of the internet, however others because they are more difficult to specify the impacts yet do not carry the same clarity, as is the case with Artificial Intelligence (AI).

3. ARTIFICIAL INTELLIGENCE: THE MAN / MACHINE RELATIONSHIP AND THE IMPORTANCE OF DATA

According to Dora Kaufman (2018a, p. 19), artificial intelligence "provides the symbiosis between the human and the machine by coupling artificial intelligent systems to the human body", such as prostheses in the brain, bionic limbs, among others. The author describes that the man / machine relationship is marked by the "interaction between man and machine as two distinct "species" connected (man-applications, man-algorithms of AI)".

The term artificial intelligence was first introduced and conceptualized in 1955, by researcher John McCarthy, as "the science and engineering of making intelligent machines, especially intelligent computer programs" (apud KAUFMAN, 2018b, p. 10). Another famous definition was coined by Russell and Norvig, as "the study and conception of intelligent agents, where an agent intelligent is a system that perceives its environment and performs actions that maximize its chances of success" (apud KAUFMAN, 2018b, p. 10).

Analyzing in order to complement the above concepts Davi Geiger pointed out that McCarthy's first definition lacked an explanation of what "intelligence" is. In Russell and Norvig's definition, "definitions of what" success "is, what" perceiving a environment ", than" action "".

Geiger thus composes his definition "Artificial Intelligence is the science and engineering of creating machines that have functions exercised by the brain of animals" (GEIGER apud KAUFMAN, 2018b, p. 10).

It is true that the increase in scientific research and industrial advances in the area of technology has expanded the use of artificial intelligence that has already been incorporated into the daily lives of societies, the advantages and facilities promoted by the algorithms are contrasted with the risks generated by the lack of mapping about the directions that the use of artificial intelligence may entail.

The relationship man-machine is so interwoven when referring to artificial intelligence, because at the same time man is a generator and consumer of data. "The exponential growth of data makes traditional programming unfeasible, inevitably referring to machine learning techniques". Dora Kaufman (2018a, p. 29), teaches that "the learning algorithms are matchmakers: they find producers and consumers to each other with the best of both worlds: the diversity of options and the low cost of the large scale, with the touch of personalization associated with the small ones".

In this context, addressing privacy protection becomes a relevant and very sensitive topic. Davi Geiger (apud KAUFMAN, 2018b, p. 11), clarifies that "it is not just a matter of identifying algorithms, as the problem includes access to data, and the use and distribution of such data. Yes, the combination and correlation of data from different sources producing new personal information is done by algorithms, that obtain statistical correlations".

Establishing the limits between the benefits and harms of services that carry artificial intelligence, as well as analyzing the extent to which they invade the privacy spheres of individuals are discussions that deserve to prosper as "the greatest risk lies in the combination and correlation of data originated in different sources, which generate new private data (statistical correlations) free of supposed privacy agreements" (KAUFMAN, 2018c, p. 49).

Reflection assumes relevance, for the development of artificial intelligence at levels of deep learning, the abundance of relevant data is essential, in these terms it is noted that the development of algorithms is not enough, it is essential that there is data

Fagan and Levmore (2019), provoke in the sense that "a good question to ask at this point is what level of confidence should be required before decision-making is entirely outsourced to the machine or before a human overrules the AI", the authors suggest the importance of integration between humans and machines. "In terms of AI, and its ability to make predictive inferences, the problem of overfit is always present so long as an additional observation adds at least one new variable to consider".

> There are two reasons to think that AI is less likely than humans to be fooled by reversal paradoxes and statistical errors. The first, as suggested earlier, is that AI can handle big data. Reversals are more likely to occur when there is a high level of variance regarding the key variable under scrutiny in the underlying population. In the presence of substantial variance, a random sample is more likely to miss critical features of the population. The initial inquiry generates a biased result when examining the relationship among variables [...] The second advantage of AI in this respect derives from its ability to find connections in data; it looks for things that humans do not know, or have not the energy, to examine (FAGAN; LEVMORE, 2019, p. 29 -30).

MERITUM MAGAZINE • v.15 • n.4 • p. 286-296 • 2020

Every movement of expansion of artificial intelligence requires the systematization of "new legal and regulatory frameworks", therefore, two challenges need to be overcome within the scope of the rules of protection of the privacy of the individual and the sustainable use of artificial intelligence, they are, "the limited knowledge of the topic by legislators and the speed of ongoing transformations" (KAUFMANN, 2018b, p. 13).

Recently, when asked by the European Union about the challenges related to artificial intelligence, the company's response was not to create new laws and regulations that would hinder technological development, asserted that "there are already many regulations and legal codes that are of technology-neutral in nature and therefore broad enough to be applied to AI, but it is worth assessing if there are gaps in the context of specific concrete problems ", they continue that once detected" any gaps identified must be addressed through principled rules of thumb based on existing legislation to avoid the creation of overly complex or conflicting legal obligations "(CHEE, 2020).

4. THE LEGAL PROTECTION OF INDIVIDUALS IN FRONT OF THE ADVANCES ARISING FROM THE USE OF ARTIFICIAL INTELLIGENCE

In the field of protection of the individual, user of technologies involving especially artificial intelligence, it is possible to highlight the general protection already provided for in the national legal system regarding privacy, in particular, art. 5, X of the Federal Constitution.

> In Brazil, the regulations applicable in the case of personal data can be found in the Federal Constitution of 1988 and provide guarantees to citizens in regards to the inviolability of privacy, the confidentiality of correspondence, data and telephone communications, except in cases where there is a judicial order that lifts these rights" (SOARES; CARABELLI, 2019). The important right to informational self-determination, which is a constitutional protection provided in art. 5, X, of the Magna Carta, should be applied in social relations by virtue of its horizontal application by imposing the principle of maximum effectiveness of fundamental rights (SOARES; KAUFFMAN; SALES, 2019). Furthermore, the Law no. 12.965/2014, known as the Brazilian Civil Rights Framework for the Internet, in its art. 7 ensures users the rights to the use of the Internet in Brazil, amongst these rights, the inviolability of intimacy and privacy, the confidentiality of information flow for Internet communications, as well as the rights to the stored private communications. A new legislation was approved and entered into force in 2018 in order to provide greater protection to society in the face of such technological transformation, Law 13.709/2018, which regulates data protection (SOARES, et.al, 2020, p. 3)

In the context of the fourth industrial revolution, new social problems arising from the use of artificial intelligence (AI) or misuse of information and communication technologies (ICTs), entail the need to reinterpret the protection of fundamental rights in the light of new demands. In this regard, Mendes (2011, s / p) defends the fundamental right to the protection of personal data with a view to protecting personality of man, embodied in the articles of the Federal Constitution, namely, "the material right to the protection of personal data, based on art. 5, X, of

the CF / 1988, and the instrumental guarantee for the protection of this right, embodied in the action of habeas data (art. 5, LXXII, of the CF / 1988)".

The importance of protecting personal data, "requires the holder to have effective control over the circulation of your data in society, which can only be achieved by guaranteeing the rights of access, cancellation and rectification of the data" (MENDES, 2011, s / p).

Barrientos-Parra and Melo (2008, p. 208) indicate that the basis for national legislation must be aligned with European Union Directive 95/46 / EC, which establishes, "the protection of individuals with regard to the processing of personal data and on the free movement of such data ", in particular, the author points out the need" that information technology be at the service of the individual and that it does not harm either human identity, human rights, or private life, neither against individual nor public freedoms ".

O Marco Civil da Internet (The Civil landmark of the Internet,) Law nº 1.295, of April 23, 2014, right in the first article indicates the function of the rule to establish "principles, guarantees, rights and duties for the use of the internet in Brazil" (BRASIL, 2014), providing guidelines for the performance of public entities of the State in this field can be considered the first legislation pertaining to data protection in Brazil. Both in art. 3rd from Marco Of the Internet, as well as in art. 7 of the aforementioned law denotes the concern of the converging national legislator for the protection of personal data.

Advancing the guarantee of the fundamental right to the protection of personal data, Law No. 13.709 of August 14, 2018, called the General Law for the Protection of Personal Data (LGPD) establishes in the first article its central objective, namely, that of " protect the fundamental rights of freedom and privacy and the free development of the personality of the natural person "(BRASIL, 2018). However, the law that was scheduled for August 2020 was amended by Provisional Measure No. 959, of April 29, 2020, expanding the vacatio legis to May 3, 2021 (BRASIL, 2020).

In Brazil, specifically about artificial intelligence, in the National Congress the Bill No. 5051, of 2019, which "establishes the principles for the use of Artificial Intelligence in Brazil" (BRAZIL, 2019a) and aims to establish the regulation of AI in the national territory and Bill No. 5691, of 2019, which proposes to institute a National Artificial Intelligence Policy, "with the objective of stimulating the formation of an environment favorable to development of technologies in Artificial Intelligence" (BRASIL, 2019b).

For the time being, the projects under consideration are under discussion and the possible threats of injury to legally protected assets related to the lack of control of artificial intelligence, whether in violation of privacy rights, or in discriminatory automatic decisions or without motivation and explanation, for example. For example, they should be protected by the current legislative framework.

However, it is necessary to to advance on the path towards the development of "legislation that protects society without impeding innovation; generic bans based on abstract fears will only increase bureaucracy and reduce productivity. Good legislation should encourage progress and avoid threats" (COZMAN, 2018, p. 39).

It is important not to forget that finding the link between legislative protection, progress and increment of artificial intelligence will require joint efforts from the various spheres of society, paths that must be followed both at the national level and in alignment with the international cooperation plan for the sustainable development of AI.

MERITUM MAGAZINE • v.15 • n.4 • p. 286-296 • 2020

5. FINAL CONSIDERATIONS

It is noted that the technological transformations arising from the fourth industrial revolution point to the protagonism of the Science of Law in facing the protection of the uniqueness of human life, the guarantees for a safe social space for the free development of the personality. However, it is considered that the role of Law in the context addressed will not necessarily be that of establishing new milestones but, above all, to seek guarantees for the fulfillment of the existing legislative precepts, which should be reinterpreted in the light of the fourth industrial revolution.

State strategies through the establishment of public policies converging to the protection of individuals in the face of uncertainties of artificial intelligence can work with an important device for systemic coping with inequality and potential risks of worsening it as a result of AI and the very social context designed by the fourth industrial revolution.

REFERENCES

ALVES, Fernando de Brito; RIGÃO, Livia Carla Silva. Culture of the periphery and rap songs: a look at the “silenced voices” from the philosophy of Enrique Dussel. **Social Rights and Public Policies Magazine** - Unifafibe. V. 8, N. 1, 2020.

BARRIENTOS-PARRA, Jorge; MELO, Elaine Cristina Vilela Borges. The right to privacy in the technical society: Towards a public policy in the field of processing of personal data. **Legislative Information Magazine. Brasilia,** a. 45. n. 180, Oct. / Dec. 2008. p. 197-213.

BOSTROM, Nick. Superintelligence: paths, dangers, strategies. Rio de Janeiro: DarkSide Books, 2018.

BOSTROM, Nick. **Superintelligence**: paths, dangers, strategies. Rio de Janeiro: DarkSide Books, 2018.

BRAZIL. Law No. 12,965, of April 23, 2014**. Establishes Principles, Guarantees, Rights and Duties for the Use of the Internet in Brazil. Brasília**, DF, April 23 2014. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Accessed on: 10 Jun. 2020.

BRAZIL. Law No. 13,709, of August 14, 2018. **General Law for the Protection of Personal Data (LGPD). Brasília, DF**, Aug 14 2018. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Accessed on: 10 Jun. 2020.

BRAZIL**. Presidency of the Republic. Provisional Measure No. 959. Brasília, DF**, 29 abr. 2020. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Mpv/mpv959.htm Accessed on 08 jun. 2020.

BRAZIL. Federal Senate. **Bill No. 5051, 2019 - Establishes principles for the use of Artificial Intelligence in Brazil.** Senator Styvenson Valentim (PODEMOS / RN). Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=8009064.

BRAZIL. Federal Senate. **Bill No. 5691**, 2019 **- Establishes principles for the use of Artificial Intelligence in Brazil.** Senator Styvenson Valentim (PODEMOS / RN). Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=8031122 fundamental rights in conflict and protection of personality rights in the face of hate speech. Social Rights and Public Policies Magazine - Unifafibe. V. 7, N. 3, 2019.

CASTRO, Alexander; NASCIMENTO, Gabriel Bassaga. Freedom of expression in the face of religious freedom: **fundamental rights in conflict and protection of personality rights in the face of hate speech**. Social Rights and Public Policies Magazine - Unifafibe. V. 7, N. 3, 2019.

CHEE, Foo Yun. Google wants the UE not to create new AI laws**. Reuters.** Brazil, 28 May, 2020.

COSTA, Fabrício Veiga; PINTO, Alisson Alves. The detainee's re-socialization as of the deadline for fulfilling the company's social function in contemporary society. **Social Rights and Public Policies Magazine - Unifafibe.** V. 7, N. 3, 2019.

COZMAN, Fabio G. Artificial Intelligence: a utopia, a dystopia. Teccogs: **Digital Magazine of Cognitive Technologies, TIDD** | PUC-SP, São Paulo, n. 17, p. 32-43, Jan-Jun. 2018. Available at: https://www.pucsp.br/pos/tidd/teccogs/edicao_completa/teccogs_cognicao_informacao-edicao_17-2018-completa.pdf. Accessed on: Jun. 9 2020.

UDHR. **Universal Declaration of Human Rights**. Drafting Committee of the Universal Declaration of Human Rights. 10 Dec. 1948.

EUROPA. **Directive 95/46/EC**. European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Official Journal L 281 , 23/11/1995 p. 0031 – 0050. Available at: https://euricando/eli/dir/1995/46/oj. Accessed on: 15 dec. 2019.

FAGAN, Frank; LEVMORE, Saul. The Impact of Artificial Intelligence on Rules, Standards, and Judicial Discretion. **Southern California Law Review**, v. 93, n. 1, pp. 1, 2019; U of Chicago, Public Law Working Paper No. 704; University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 876. Available at SSRN: https://ssrn.com/abstract=3362563 or http://dx.doi.org/10.2139/ssrn.3362563

KAUFMAN, Dora. Dossier: Deep learning: the Artificial Intelligence that dominates 21st century life. Teccogs**: Digital Magazine of Cognitive Technologies, TIDD** | PUC-SP, São Paulo, n. 17, p. 17-30, Jan-Jun. 2018a. Available at: https://www.pucsp.br/pos/tidd/teccogs/edicao_completa/teccogs_cognicao_informacao-edicao_17-2018-completa.pdf. Accessed on: 08 Jun. 2020.

KAUFMAN, Dora. Interview with Davi Geiger. Teccogs: Digital Magazine of Cognitive Technologies, TIDD | PUC-SP, São Paulo, n. 17, p. 10-15, Jan-Jun. 2018b. Available at: https://www.pucsp.br/pos/tidd/teccogs/edicao_completa/teccogs_cognicao_informacao-edicao_17-2018-completa.pdf. Accessed on: 08 Jun. 2020.

KAUFMAN, Dora. The protagonism of Artificial Intelligence algorithms: observations on the data society. Teccogs**: Digital Magazine of Cognitive Technologies, TIDD** | PUC-SP, São Paulo, n. 17, p. 44-58, Jan-Jun. 2018c. Available at: https://www.pucsp.br/pos/tidd/teccogs/edicao_completa/teccogs_cognicao_informacao-edicao_17-2018-completa.pdf. Accessed on: 08 Jun. 2020.

LAZCANO, Alfonso Jaime Martínez. The conventional right and the straight lines of its implementation in the states parties. **Social Rights and Public Policies Magazine - Unifafibe**. V. 7, N. 3, 2019.

LIXINSKI, Lucas. Considerations about the insertion of personality rights in the Brazilian private system. **Private Law Magazine, Thomson Reuters.** v. 27, 2006. p. 201-222, Jul - Sep, 2006.

LOZANO, Luis Gerardo Rodrígues. Leon duguit and the public service: ideas for the 21st century**. Social Rights and Public Policies Magazine - Unifafibe**. V. 8, N. 1, 2020.

LUCAS, Doglas Cesar. Human rights, identity and the policy of recognition of Charles Taylor. **Social Rights and Public Policies Magazine - Unifafibe**. V. 7, N. 3, 2019.

MAGLIACANE, Alessia. L'armee des reserves dans la mondialisation : la parabole de la femme italienne de la constitution au post-fordisme. **Revista Direitos Sociais e Políticas Públicas – Unifafibe.** V. 7, N. 3, 2019.

MARTÍN, Ignacio Durbán Origen y fundamentos del sistema plurilegislativo civil español. **Revista Direitos Sociais e Políticas Públicas – Unifafibe.** V. 8, N. 1, 2020.

MENDES, Laura Schertel. The fundamental right to the protection of personal data. **Consumer Law Magazine, Thomson Reuters**. v. 79, 2011. p. 45-81, Jul - Sep., 2011. DTR \ 2011 \ 2474..

MORAES, Maria Valentina de; LEAL, Mônia Clarissa Hennig. Supreme federal court and institutional dialogue: is there a jurisdictional control of public policies in Brazil**? Social Rights and Public Policies Magazine - Unifafibe.** V. 7, N. 3, 2019.

MOREIRA, Rodrigo Pereira; ALVES. Right to be forgotten and the free development of the personality of the transsexual person. **Private Law Magazine, Thomson Reuters**. v. 64, 2015. p. 81-102, Oct - Dec., 2015.DTR \ 2016 \ 136.

NERY. Rosa Maria Barreto Borriello de Andrade. Distinction between "personality" and "general personality right" a discipline of its own. Inaugural class given at the Postgraduate Course in Law at PUC-SP, on August 18, 2014, in

the discipline Personality law, data protection and information technologies - 2nd semester of 2014. **Essential Doctrines of Constitutional Law, Thomson Reuters**. v. 8, 2015. p. 473-478, Aug., 2015. DTR \ 2015 \ 11483.

SCHWAB, Klaus**. The fourth industrial revolution**. Trad. Daniel Moreira Miranda. Sao Paulo: Edipro, 2016.

SCHWAB, Klaus. **Applying the fourth industrial revolution.** Trad. Daniel Moreira Miranda. Sao Paulo: Edipro, 2019.

SOARES, Marcelo Negri; Kauffman, M. E .; Chao, K. M .; Saad, M. O. New Technologies and the Impact on Personality Rights in Brazil**. Thinking-Journal of Legal Sciences**, 2020, 25.1.

WHITTAKER, Meredith; et al**. AI Now Report 2018**. IA NOW. Available at: https://ainowinstitute.org/AI_Now_2018_Report.pdf Accessed on June 8. 2020

XU, Li da; XU, Eric L.; LI, Ling. Industry 4.0: state of the art and future trends. **International Journal Of Production Research**, [s.l.], v. 56, n. 8, p. 2941-2962, 9 mar. 2018. Informa UK Limited. http://dx.doi.org/10.1080/00207543.2018.1444806.

Received/*Recebido:* 28.08.2020.

Approved/*Aprovado:* 26.12.2020.

ECONOMIC THEORY OF CRIME: TOWARDS A SCIENTIFICALLY ORIENTED CRIMINAL POLICY

TEORIA ECONÔMICA DO CRIME: POR UMA POLÍTICA CRIMINAL CIENTIFICAMENTE ORIENTADA

Allan Versiani de Paula[1]
Julio Cesar de Aguiar[2]
Nefi Cordeiro[3]

ABSTRACT

The paper aims to answer the question concerning how the scientific method adopted by the economic theory of crime might be useful to the improvement of criminal policy in Brazil. Initially, the paper reviews the literature on economic theory of crime. Then, it uses the hypothetical-deductive method to analyze how the economic theory of crime can be applied to three questions inserted in the Brazilian legal-criminal scenario. The result of the analysis shows the potential of the

Keywords: Criminal law. Economic theory of crime. Criminal Policy.

1. INTRODUCTION

The economic theory of crime emerged in the second half of the 20th century, in the context of American common law, with the publication of the article *Crime and Punishment: An Economic Approach*, by economist Gary Becker (1968).[4] This study is considered one of the

1 Master's Degree student in Law at the Catholic University of Brasília (2019-2020). Post-graduate degree in "Control, Detection and Repression of Embezzlement of Public Resources" from the Federal University of Lavras/MG (2016). Graduated in Law from the Federal University of Minas Gerais (2000). Prosecutor of the Federal Public Prosecutor's Office since 2005. Former Federal Prosecutor of the Office of the Attorney General of the Union (2002-2005). ORCID iD: https://orcid.org/0000-0002-1451-5414. E-mail: allanversiani@gmail.com.

2 PhD in Law from the Federal University of Santa Catarina. PhD in Law from the University of Aberdeen, UK. Professor at the School of Public Policy and Government at the Getúlio Vargas Foundation. Full Researcher-Collaborator at the Institute of Psychology of the University of Brasilia. Master in Philosophy from the Federal University of Goiás. ORCID iD: https://orcid.org/0000-0002-8252-2894. E-mail: juliocesar.deaguiar@gmail.com.

3 PhD in Law from the Federal University of Paraná (2000). Master of Laws from the Federal University of Paraná (1995). He holds a Law degree from Curitiba Law School (1988), Engineering degree from Pontifícia Universidade Católica do Paraná (1998), Military Officer degree from Guatupê Military Police Academy (1983). Minister of the Superior Court of Justice (STJ), currently in the 6th Panel (criminal matters). Professor of the Master of Laws of the Catholic University of Brasilia. ORCID iD: https://orcid.org/0000-0002-1490-3118. E-mail: nefi.cordeiro@msn.com.

4 According to Aguiar (2002, p. 12), Becker's study "revives and perfects the teachings of the utilitarian criminological theory, enunciated by Cesare Beccaria and developed by Jeremy Bentham, still in the 18th century", but its importance goes beyond the criminal field, "because it successfully exemplifies the possibility of extending, outside the traditional mercantile limits, the fundamental assumption of economic theory, that is, the rationality of agents in the use of appropriate means to achieve their objectives". Specifically on the influence of Jeremy Bentham's ideas on Becker's work, see Posner (2002).

How to cite this article/Como citar esse artigo:
PAULA, Allan Versiani de; AGUIAR, Julio Cesar de; CORDEIRO, Nefi. Teoria econômica do crime: por uma política criminal cientificamente orientada. **Revista Meritum**, Belo Horizonte, vol. 15, n. 4, p. 297-312, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.8228.

foundational works of the economic analysis of law[5], an approach that examines legal phenomena based on theories and analytical tools of microeconomics.

The debate about the economic theory of crime is still recent in Brazil, but has intensified in recent times, as evidenced by a growing national academic production on the subject, which, based on the extensive foreign literature developed since Becker's seminal work, is dedicated to discussing the potential and limitations of the theory, besides seeking to apply it empirically[6] in researches that seek to better understand crime in our country.

This article aims to answer the question of how Brazilian criminal policy can benefit from the economic theory of crime by analyzing concrete situations in the Brazilian legal-criminal scenario. Specifically, we intend to evaluate how the scientific method inherent to this theory contributes to the making of more informed decisions on how the state strategy to fight crime should be structured.

The paper is organized as follows. Initially, the central aspects of the economic theory of crime are discussed, without claiming to be exhaustive, which, based on the theoretical-behavioral premise of the rational criminal, intends to guide criminal policy toward optimal dissuasion. Then, the hypothetical-deductive method is used to analyze three concrete situations from which it is possible to identify how the economic theory of crime can be useful for the construction of a more efficient criminal policy in Brazil.

MERITUM MAGAZINE • v.15 • n.4 • p. 297-312 • 2020

2. ECONOMICS OF CRIME: THE PREMISE OF THE RATIONAL CRIMINAL AND ITS NORMATIVE IMPLICATIONS

The economic theory of crime presented by Becker (1968) is a theory of deterrence: criminal law exists to discourage the commission of socially undesirable acts that would not otherwise be adequately prevented. This implies that, from an economic perspective, the purpose of criminal law is not to ration crime by setting prices that allow it to be committed, but to eliminate crime by imposing sanctions to prevent its occurrence[7]. Were it not for the high cost

5 Next to the articles by Ronald Coase (*The problem of social cost*, 1960) and Guido Calabresi (*Some thoughts on risk distribution and the Law of Torts*, 1961).

6 A compilation of empirical studies conducted in Brazil based on the economic theory of crime is found in Olsson and Timm (2012, p. 123-128). In this field, it is worth highlighting the work conducted in correctional facilities by economist Pery Francisco Assis Shikida and his team, whose results were synthesized in Shikida (2010).

7 Cooter (1984) argues that prices should be set when the activity is allowed, while sanctions are aimed at prohibited activities. Prices aim to internalize the costs of the activity so that individuals can decide whether or not to perform it, while sanctions aim to dissuade people from deviant behavior. The latter should be sized taking into account the agent's mental state, which indicates the level of resistance to deterrence (intentional or unintentional act, first act committed or recidivism, etc.). Prices, on the other hand, should be measured based on the extent of the damage caused to a third party, regardless of the agent's mental state. The differences between price and sanction serve to explain why recidivism is punished more severely, as well as why attempts that do not cause damage are punished. If the penalties were prices, recidivism should not influence the severity of the punishment, since it does not increase the damage caused by the second crime. Attempts, on the other hand, would not cause harm to be internalized. The justification is that the objective, in both cases, is deterrence, which is obtained by means of sanctions that must be dosed according to the mental state of the criminal. The recidivist shows more resistance to deterrence, which imposes a more severe sanction. The attempt raises the expected cost of the offense without increasing punishment, having a dissuasive effect similar to the maintenance of a police force, but at a lower cost

of applying criminal sanctions, the optimal level of criminal activity would be zero or close to zero (POSNER, 1985).

Reality shows, however, that crimes do happen, and apparently more frequently than could be considered optimal[8]. This can be explained by the fact that the sanction defined by law for each crime does not correspond to the sanction expected by the criminal who commits it, inasmuch as the two values would only be equivalent if the incidence of the legally imposed sanction were certain. As this does not occur, since not all crimes are discovered and punished[9], the expected cost of the crime[10] is not equal to the sanction abstractly imposed for the offense, but to the amount of the penalty set by law discounted by the probability that the perpetrator will be identified and convicted. According to the premise of the rational[11] criminal, adopted by the economic theory of crime, this is the calculation that the offender makes when evaluating ex ante the benefits and costs of crime, in order to decide to commit the crime if the benefits exceed the expected costs, that is, if the expected value or net benefit of the offense is positive[12].

But to maximize the expected utility from crime, the rational criminal will seek the greatest benefit he can extract from his conduct. Assuming that more serious crimes are usually punished with greater severity, and that the greater seriousness of the offense corresponds to a greater return of utility to the offender, it is possible to conclude that the criminal will increase the seriousness of the offense whenever the benefits of this escalation outweigh the costs inherent to the increase of the expected sanction. In other words, the offender will weigh the benefit generated by each small increase in the seriousness of the offense and the cost of increasing the expected punishment, increasing the seriousness of the crime as long as the marginal benefit exceeds the marginal cost, up to the point where both are equal[13]. To better develop the idea of marginality, imagine that g1, g2 and g3 represent, in increasing order, three different levels of severity of a crime, in all of which the expected value of the crime is positive (i.e., the benefit is greater than the expected costs). Assume that for a certain criminal the benefit at g1 is $100, at g2 is $150, and at g3 is $200, the respective expected costs being $25,

8 The assertion that there is an ideal level of criminality, if morally questionable from the point of view of traditional doctrine, is not so under the lens of the economic approach to criminal law, as will be seen later on.

9 Shikida and Amaral (2019, p. 320) note that "there is no data to estimate the probability of an individual's arrest in Brazil, but it is assumed to be lower than that seen in the United States, which is only 5%. This would imply that in Brazil the probability of success in the crime sector may be greater than 95%."

10 Here understood strictly as the cost arising from punishment, for the sake of simplicity. There are, however, other costs that the criminal sometimes incurs to commit the offense that are unrelated to punishment. These costs are included in Ehrlich's (1996) expected net benefit formula, which is: expected net return = expected gross return - direct costs incurred in the acquisition of the proceeds of crime - income lost in some legitimate activity - potential penalty discounted by the probability of conviction.

11 "Although this assumption of the 'rational criminal' seems to many absurd or inappropriate, these same skeptics, when asked about the social function of criminal sanctioning, usually point to deterrence as at least one of its justifications (if not the main one). But, of course, this answer supports the economist's point, for without rational calculation on the part of at least some would-be offenders, deterrence is an empty concept" (MICELI, 2017, p. 29, our translation). In more recent work, Miceli (2019, p. 25-26) notes that "the premise [of the rational offender] seems more plausible for crimes involving monetary gain, such as white-collar crimes, drug trafficking, and robbery. It is probably less relevant for violent crimes and almost certainly irrelevant for crimes of passion or for perpetrators with some kind of permanent or temporary mental disability. Eide (2000, p. 363-364), however, after citing studies that found "substantial elements of rationality" in crimes of rape, homicide, and domestic violence, cautions that "although the effect of punishment may differ across crime types, the evidence to date indicates that the rational choice frame is relevant to all crime types, and that analyses that a priori reject the possibility that some specific crimes are deterred are inadequate" (our translation).

12 In simple mathematical notation, the expected cost of crime is identified by the equation $Ce=pS$ (where S is the sanction imposed for the offense and p is the probability that the criminal will be held accountable). Thus, the expected value or net benefit can be represented as follows: $Ve=B-pS$ (where B is the benefit to be gained from the crime). A condition for the crime to be committed, therefore, is that $B-pS > 0$ (PATRÍCIO, 2015).

13 The point at which the marginal benefit equals the marginal cost represents, in the view of economists, the economic optimum for almost all decisions (COOTER and ULEN, 2010).

$65, and $125. In this scenario, it will be profitable to the criminal to increase the severity of the crime from g1 to g2, since the marginal benefit ($50), given by the difference between the benefits at g2 and g1, exceeds the marginal cost ($40), indicated by the difference between the expected costs at g2 and g1. It will not be advantageous, however, to escalate severity from g2 to g3, since the marginal benefit ($50) in this case is less than the marginal cost ($60)[14].

If the expected costs of crime for the criminal, on the basis of which the measure of deterrence is defined, are the result of the punishment provided by law (S) discounted by the probability of its application (p), then one can conclude, first, that it is possible to reach the same level of deterrence with different combinations of p and S, and, second, that the achievement of a higher level of deterrence involves increasing those variables, individually or jointly. In fact, for the standard model of the economic analysis of crime, based on the risk[15] neutrality of the criminal, a penalty of $1000 with a probability of 0.1 is equal to a penalty of $500 with a probability of 0.2 or a penalty of $200 with a probability of 0.5: for all of them the expected cost of crime is $100. On the other hand, as p and S rise, the expected cost of crime rises and, consequently, its expected value decreases, leading to fewer crimes being committed. This is the application of the law of demand (or, in the penal sphere, "first law of deterrence"), which prescribes that the demand for a given good (crime) reduces when the cost of acquisition (expected punishment) increases. Cooter and Ulen (2010, p. 480) highlight the empirical support for this statement by stating that, "in laboratory experiments, even rats obey the First Law of Deterrence, and even the worst human being is still more rational than a rat[16]" .

But what is, from the point of view of the economic theory of crime, the appropriate combination between probability of punishment and severity of the sanction? And what is the optimal level of deterrence to be sought by criminal law? Such questions are normative in nature, and concern the second part of the economic theory of crime proposed by Becker, in which,

14 It should be noted that benefits do not always express economic terms (even if not purely monetary), such as those linked to crimes of passion. The majority doctrine, however, considers it possible to translate all benefits, including psychic ones, into economic language (ALFARO and URRUTI, 2019). Similarly, the expected costs of the offense are commonly not expressed in monetary terms. This is because these costs are a function of the penalty imposed for the crime, which, as a general rule, takes the form of restriction of freedom (prison being the main example), not of pecuniary punishment. The conversion of criminal penalties into economic values is based on opportunity cost, understood as what is given up when a scarce resource is used in order to prevent it from having an alternative use. According to this notion, the severity of imprisonment can be measured by the opportunity cost that the penalty carries in terms of loss of income that the criminal would get free and loss of utility due to the restrictions on consumption and freedom to which he will be subjected (BECKER, 1968).

15 The indifference between different combinations of p and S presupposes risk neutrality. For a risk-averse person, the one with a higher penalty with a lower probability is the more dissuasive between two combinations of punishment and probability. Conversely, when the criminal has a preference for risk, a higher probability of punishment deters more. Risk aversion, in this case, indicates that the person prefers a more certain outcome (higher probability) in which he will lose less (lower penalty) than a more uncertain outcome (lower probability) of losing more (higher penalty), even though the expected cost is equal. Risk preference is the symmetrical opposite.

16 There is considerable empirical literature supporting the theoretical proposition that increasing the probability of punishment or the severity of the penalty increases deterrence, and a summary of this scientific production is presented, for example, in Ehrlich (1996) and Eide (2000). Martinez (2016) highlights the studies by Levitt (1998) and Kessler and Levitt (1999), stating that they would have overcome the methodological limitation of previous studies that, when analyzing crime rates, did not distinguish between the effects of deterrence, caused by changes in the probability of punishment or the severity of the sanction, and the effects of incapacitation caused by imprisonment (if there are more prisons, there are fewer criminals on the streets). The study by Kessler and Levitt (1998) is a natural experiment propitiated by the approval and application in California of the three strikes and you're out policy, which can be explained as the imposition of a significant increase in the severity of the sanction after the third conviction. In the words of Cooter and Ulen (2010, p. 513), "this was one of the most drastic and careful studies to find a deterrent effect caused by criminal sanctions that can be differentiated from the incapacitating effects of imprisonment. See also, on this topic, the work of Mendes and McDonald (2001), who, based on the research of 33 studies conducted between 1971 and 1995, whose findings were consistent as to the deterrent effect of increasing the probability of punishment, but not so conclusive regarding the deterrent effect linked to the severity of the penalty, argues that it is impossible to analyze the deterrent effect of each variable in isolation, debiting to this "separation of the package" the fact that some studies have failed to identify important deterrent effects related to the severity of the sanction.

based on the implications of the premise of the rational criminal, propositions are deduced about how the public policy to face criminality should be structured, aiming at the optimal dissuasion. To answer them, it will be necessary to shift the focus of the analysis, hitherto focused on the offender and the costs and benefits related to him, to society and the costs it bears due to crime. These are the social costs of crime, which can be broken down into direct costs and indirect costs.

The direct costs relate to the harm that criminal activity causes to the victims of crime. Economists generally consider these costs to be the difference between the harm caused to the victim and the benefit received by the criminal[17]. Thus, if a thief, in order to steal a stereo that is worth $75 and is installed in a vehicle, breaks the window of the vehicle, which costs $100, and takes the equipment, the benefit to the criminal is $75 and the victim's loss is $175, and the direct damage caused by the crime is therefore $100[18] (COOTER and ULEN, 2010).

Indirect costs, in turn, refer to public and private costs that society incurs due to crime prevention and punishment activities.

In the private sphere, this definition includes expenses incurred by potential crime victims to protect themselves from the actions of offenders, such as placing offending vehicles (electrified fences, shards of glass, etc.) on house walls, installing bars, alarms and security cameras, hiring private security and insurance policies, and creating corporate structures to combat fraud within companies. Given the state monopoly on the right to punish, private costs are related to crime prevention and, when they impact the probability of holding the criminal[19] accountable, they raise the expected cost of crime.

Public indirect costs correspond to the expenses incurred by the State in the services of prevention, investigation and prosecution of crimes, as well as in the activities of enforcement of sentences imposed in the criminal process. In the first group, they involve expenditures with the maintenance of an ostensive police force with a preventive focus and with the operation of state agencies charged with the functions of elucidating crimes that have occurred and putting the perpetrators on trial in order to convict them. The activities of the second group, related to the enforcement of sentences imposed, imply expenses with the operation of the prison system, in addition to expenses for the supervision of compliance with sentences other than imprisonment.

Considering the formula of the expected cost of crime (Ce=pS), one notices that the costs of prevention, investigation and trial impact the probability that the crime will be discovered and its perpetrator held accountable. Increasing this probability requires more public spending, since, says Friedman (2000, p. 225), "it takes more police officers to arrest fifty murderers out of a hundred than to arrest twenty-five, and more time for prosecutors and courts to con-

17 This is the object of controversy among scholars, since some argue that the criminal's benefits should not be considered. Cooter and Ulen (2010) point out that this conclusion may vary depending on the situation under analysis: if someone, lost in the woods, finds an uninhabited cabin, breaks into it, and steals food so as not to starve to death, many would agree that the benefit should be counted as social gain; however, if the crime is rape, most people would find it repugnant to consider the rapist's pleasure as gain.

18 This is a simplification. As a rule, the value that the criminal assigns to the good obtained through crime is lower than the value that the victim assigns to the same good. This value, for Posner (1985), is measured by the willingness to pay, and the coercive transfer that characterizes crime, by evidencing a low willingness of the offender to acquire the good in the market, almost never transfers resources to a more valuable use.

19 Private indirect costs do not always impact the likelihood that the criminal will be punished. Some private deterrents redistribute crime, which will be committed elsewhere or under other circumstances.

MERITUM MAGAZINE • v.15 • n.4 • p. 297-312 • 2020

vict them" (our translation). The costs of enforcing the penalties imposed by the judiciary, on the other hand, are dependent on the severity of the penalty. The cost of imposing sanctions is greater the more severe the punishment, because harsher punishments, such as imprisonment, require large investments in construction, maintenance and operation of prisons, which does not occur with lighter punishments such as fines, which have low enforcement costs and generate revenue for the state (POSNER, 2007). The same occurs when the duration of penalties of the same nature is increased: long prison sentences demand more public resources than short prison sentences and, given the solvency constraints, larger fines tend to imply higher collection costs than smaller fines, since the collection of the former is more difficult than of the latter (POSNER, 2007). As a consequence, raising the expected cost of crime by increasing the probability that the criminal will be convicted or by increasing the severity of the penalties imposed results in a greater commitment of public money.

It is now possible to return to the questions previously formulated about the optimal combination of probability of punishment and severity of punishment, as well as about the level of deterrence to be pursued by criminal law, which propose to identify, respectively, the efficiency of the means of deterrence (regardless of the level of deterrence involved) and the optimal level of deterrence.

On the first question, Friedman (2000) says that an efficient system will seek, among different combinations of probability of punishment and severity of the sanction that cause the same expected cost to the criminal - and therefore have the same deterrent effect - the combination in which the sum of the indirect costs of crime reaches the lowest possible[20] value. From the state perspective, that is, disregarding the private indirect costs of crime[21], the efficient combination will be that in which, for the same level of deterrence, the sum of public expenditures on crime prevention, investigation and trial, on the one hand, and on the enforcement of sanctions imposed by the judiciary, on the other, results in the lowest consumption of public revenue. Thus, for different combinations of probability and severity of punishment that produce the same expected cost of crime, it will be up to the State to evaluate the cost of obtaining each percentage of probability of punishment and the cost of applying each level of severity of punishment to find the least costly and therefore most efficient combination. An example may be useful: suppose, for an offense with an expected cost of $1,000, that for each 1% probability of punishment obtained the state needs to spend $5, and that the cost of enforcing the penalty imposed rises by $5 for each $50 level of severity of punishment. Disregarding other possible combinations, the combination of 40% probability of punishment (which would cost the state $200) with a penalty of $2,500 (cost the state $250) is more efficient than the alternative arrangements of 20% probability ($100) with a penalty of $5,000 ($500) or of 80% probability ($400) and a penalty of $1,250 ($125).

20 Friedman's (2000) approach is broader than this one, as it adds to the indirect costs related to the execution of punishment the opportunity cost incurred by the criminal. The author presents the concept of "cost of punishment", defined as the difference between the cost that punishment imposes on the criminal and the benefit (which may be negative and, therefore, cost) that the same punishment provides to third parties. Therefore, the imposition of a fine would entail a cost of punishment equal or close to zero, since the collection of the fine generates a transfer of the amount from the offender to the State. A prison sentence, conversely, would tend to generate negative benefits, since the public indirect costs inherent in the prison system would be added to the opportunity cost of the convict.

21 In addition to the difficulties of knowing with reasonable precision the costs that citizens assume to prevent crime, private indirect costs are not necessarily aligned with social benefits, but with equally private benefits, as seen in note n. 16 above.

Considering that the economic optimum corresponds to the point where the marginal cost and the marginal benefit are equivalent, efficiency will be maximum when, at the same level of deterrence, there is a balance between the public indirect costs that impact the probability of punishment (prevention, investigation, and trial) and the public indirect costs related to the execution of sentences imposed by the judiciary. At this point, any variation in the combination of probability of punishment and severity of punishment, however minimal, results in an increase in total spending on the public indirect costs of crime.

Of course, the theoretical formulation faces practical challenges. Different sentences have not only different costs, but different deterrent effects. Long prison sentences, for example, are achieved by adding incarceration time to their end. A 4-year prison sentence is longer than a 2-year one because at the end of these, there is the addition of another 2 years. If the offender's discount rate is positive, the additional years will not cause a loss of utility identical to that experienced by the offender in the first few years of imprisonment[22]. Although the reference to the discount rate causes strangeness, since the prison sentence, despite the opportunity cost embedded in it, is a non-monetary sanction, the incidence of the discount stems from the circumstance that people prefer immediate consumption to deferred consumption, therefore assigning less value to future consumption than to current consumption, which consequently requires that they be rewarded for the postponement[23] (POSNER, 1985).

On the other hand, fines in significant amounts usually exceed offenders' ability to pay, which weakens their deterrent[24] effect and makes it necessary, for deterrence to remain at the desired level, to resort either to smaller fines with a higher probability of enforcement or to other forms of punishment, such as imprisonment, which in both cases would raise the indirect costs of crime. Were it not for the limited deterrent potential of the fine, at any level of deterrence the most efficient deterrent, which would result in the smallest sum of public indirect costs, would be the combination of a fine close to infinity, whose enforcement costs would be low, with a probability of punishment close to zero, which would require minimal spending on offense prevention, investigation, and trials (POSNER, 1985). But even in cases where the practical implementation of the theory is feasible, that is, in situations where the wealth of criminals allows the payment of fines at very high levels, there are difficulties in adopting the fine penalty more broadly. Some of these difficulties, as pointed out by Levitt (1997), are the private information that criminals have about their wealth levels (which prevents the state from properly assessing the ability to pay the fines), the possibility of concealment of assets by criminals, and the costs of confiscating them, which can be prohibitive in some cases. Another difficulty is that punishing a crime through a fine, when committed by the rich criminal who can pay it, and through imprisonment, when the criminal is poor, is perceived as unfair

22 Posner (1985) exemplifies that if the criminal has a discount rate of 10%, a 10-year prison term implies disutility only 6.1 times greater than the disutility caused by a 1-year prison sentence, and a 20-year prison term implies disutility 8.5 times greater than a 1-year prison sentence. Decreasing the discount rate to 5%, the figures would be 7.7 times for a 10-year prison sentence and 12.5 times for a 20-year sentence, respectively.

23 There is now a prevailing understanding that future discounting is best described as hyperbolic discounting, rather than constant discounting. This means that future discount rates vary over time, being very high for the near future and relatively low for the far future (MURAMATSU and FONSECA, 2008).

24 The reduction in the deterrent effect of the fine that exceeds the offender's ability to pay arises from the fact that S, in the formula of the expected cost of the offense ($Ce = pS$), in this situation is not the amount of the fine fixed for the offense, but a smaller amount equivalent to the offender's assets. Thus, it is this asset that will define and limit the deterrence, so that the fine, to the extent that it exceeds the criminal's asset, will have no deterrent effect.

(and even unconstitutional) punishment by society, indicating that it considers other values, besides deterrence, important in determining the criminal sanction (MICELI, 2017).

If efficient deterrence, at any level of deterrence, means an internal balance between the indirect costs of crime, the optimal level of deterrence refers to the balance between such indirect costs and the direct costs of crime, the sum of which reveals the social costs of crime. In other words, the optimal level of deterrence will be reached when the sum of the indirect costs and the direct costs of crime lead to the minimization of the social costs of crime, being this minimization, according to Cooter and Ulen (2010), the goal of the economic analysis of criminal law.

As noted earlier, the first law of deterrence prescribes that increasing the expected cost of crime reduces the number of crimes. The fewer crimes committed, the lower the direct costs caused by delinquency. It has also been seen that increasing the expected cost of crime requires raising the probability of punishing the criminal or the severity of the sanction, which calls for increasing the indirect costs of crime. A synthesis of these statements can be outlined as follows: society pays the indirect public and private costs of crime to reduce the damage that crime causes to the victims of crime (direct costs). This reduction, according to Alfaro and Urruti (2019), is the social benefit sought by reducing crime.

According to Kaldor-Hicks[25] , a system in which the indirect costs incurred in fighting crime are greater than the social benefits derived from this fight would not be efficient. Consequently, since the cost of preventing an additional crime exceeds the damage that the crime to be prevented would cause, it is not efficient to deter it. This argument can be presented in another way: as long as the decrease in the direct cost of crime (marginal benefit) exceeds the indirect costs incurred in providing it (marginal cost), these indirect costs (and hence the expected cost of crime) must be increased, up to the point where the optimal level of deterrence is reached, where the marginal social benefit of reducing one more crime is equal to the marginal social cost of doing so[26]. For the economic theory of crime, therefore, it is not efficient to eliminate crime, since the costs of doing so would be greater than the social benefits of eradicating crime altogether.

It is necessary to pay attention, however, to the complexity of establishing the optimal level of deterrence in practice. The greatest risk is that increases in the expected cost of isolated offenses, notably by increasing the severity of the sanction, succeed in reducing the direct costs caused by that specific offense but, due to the existence of substitute crime of greater severity, end up increasing the quantity of the latter, ultimately raising the total social cost of crime (ALFARO and URRUTI, 2019).

If the expected cost of the offense of theft, for example, is equal to that of the crime of robbery, offenders will be incentivized to commit the more serious crime, given the premise that the more serious the offense, the greater the benefits provided to criminals. When this

25 According to this criterion, a public policy is considered efficient when the benefits that result from it outweigh the costs derived from its implementation. This criterion was developed as a way to solve the difficulties of the Pareto criterion, which considers an efficient situation, from the point of view of resource allocation, when it improves the condition of at least one person without worsening that of any other.

26 On the point, Cooter and Ulen (2010) warn that the marginal social costs of reducing crime rise as higher levels of crime reduction are achieved. Thus, further reducing crime by 1% costs less when the rate of crime reduction is 5% than when it has already reached 95%. Conversely, the marginal social benefit decreases as the level of crime deterrence increases. Thus, reducing crime from 5% to 7% has more social benefit than reducing crime from 95% to 97%.

occurs, marginal dissuasion is weakened, understood as the incentive for more serious crimes to be replaced by less serious ones[27] (POSNER, 1985). On this issue, Cooter and Ulen (2010, p. 491) warn that "penalties do not exist in isolation: they are part of an integrated scale that influences their optimal values. Using strong deterrents with less serious crimes generally prevents them from being used for more serious crimes.".

3. APPLIED ECONOMIC THEORY OF CRIME: THE SCIENTIFIC METHOD AT THE SERVICE OF CRIMINAL POLICY

In the criminal-political field, the economic theory of crime and the methodology inherent to it allow us to estimate the effects that may be caused by different strategies to face criminality, contributing to the elaboration of criminal policy based on scientific knowledge, and not on intuition or common sense. The consequence tends to be the adoption of more efficient strategies that achieve better results and optimize scarce public resources.

For example, the economic theory of crime could show that a criminal policy based predominantly on increasing the severity of penalties, which is common in Brazil, might not result in important gains in deterrence due to the high rates at which criminals discount the future[28], and would make the indirect costs linked to the increase in spending on enforcement outweigh the social benefits expected from the adoption of this policy. A model that looked at this issue might conclude that greater social benefits would be achieved by increasing deterrence not by increasing the penalty, but by increasing the probability of punishment, and that this increase would generate even greater social benefits if it were achieved by investing in technologies that facilitate finding the authors of crimes, rather than by hiring police officers. Still as an example, the economic analysis of the use of pardon as a penitentiary policy instrument to mitigate the problem of prison overpopulation could in theory conclude that this policy, due to its negative effect on dissuasion (the reduction of the penalty reduces the expected cost of the offense), in a certain time horizon could lead to an increase in crime and, consequently, more incarceration. This would not only increase the direct and indirect social costs of the offense but also aggravate the problem that was intended to be solved, evidencing the need for the pardon to be associated with measures to recompose the level of deterrence or, perhaps, the need to adopt another policy to solve the serious Brazilian prison problem.

These are just a few examples of how the economic theory of crime can help criminal policy, and many issues that influence the level of criminality have already been addressed by foreign literature[29]. In any case, the specificities of the Brazilian criminal law system and

27 The idea of marginal deterrence goes back to Beccaria (On Crime and Punishment, 2004, p. 69): "[...] if two crimes that affect society unequally receive identical punishment, the man inclined to crime, not having to fear a greater penalty for the more heinous crime, will more easily resolve himself to the crime that will bring him more advantages [...]".

28 Polinsky and Riskind (2017) cite empirical studies that concluded that offenders have high discount rates that appreciably reduce the perceived difference between short and long periods of incarceration.

29 The foreign literature registers studies on various criminal policy issues, having already addressed, to cite a few examples, the influence of abortion decriminalization on future crime rates (LEVITT, 2004), the optimal combination of prison sentences and fines (POLINSKY and SHAVELL, 1984), and the optimal combination of prison, parole, and restrictive sentences (POLINSKY

reality provide ample research field for the application of the economic method to the various problems related to criminality in our country.

To illustrate how the economic theory of crime can be used in the construction of Brazilian criminal policy, three situations inserted in the national legal-criminal scenario are analyzed below. The situations were selected due to their simplicity and capacity to demonstrate the predictive, empirical and normative potential of the economic theory of crime. The analysis will be made in three stages: first, it will be exposed how the economic method works from the premise of the rational criminal to derive predictions about the behavior of the criminal; next, it will be shown how the predictions can be submitted to empirical validation or rejection tests; finally, it will be shown how the scientific conclusions provided by the economic method can support, in view of the social[30] goal to be achieved, normative proposals about which criminal[31] policy measure should be adopted in a given situation.

3.1 PREDICTION: LAW 13.654/2018 AND ROBBERY WITH A KNIFE

This example reflects what happened when Law 13654/2018 was enacted. The law repealed subsection I of § 2 of art. 157 of the Criminal Code, which provided for the use of a weapon (without distinguishing between a melee weapon and a firearm) as a cause of increasing robbery by one-third to one-half. The same law added § 2º-A to art. 157 of the Penal Code, in which the cause of the increase, in a more serious level (2/3), was only for the use of a firearm, with no mention of a melee weapon. This situation lasted until Law 13,964/19, which, among several modifications, restored the increase for the use of a knife to its original level (from 1/3 to half).

It is beyond the scope of this analysis to address the impact of the change on past facts. What matters for the economic theory of crime is to understand how the legal change affected the incentive structure that the criminal considers when deciding, ex ante, whether to commit the crime or not.

A predictive model based on the premise of the rational criminal would offer, as its first and most obvious implication, the conclusion that the removal of the cause of the increase of armed robbery reduced the expected cost of this offense (there was a reduction of variable S in the formula $Ce = pS$), which would probably be followed by an increase in the demand for its commission.

The model would also conclude that by equalizing the penalties for simple robbery and robbery with a knife, which function as substitute crimes, the legislative innovation eliminated the marginal deterrence that existed between the two, which encouraged the substitution of the more serious offense (robbery with a knife) for the less serious offense (simple robbery).

and RISKIND, 2017). Brazilian authors have dedicated themselves to studying this empirical literature in search of solutions compatible with the Brazilian criminal justice system, such as Boson (2015), who analyzed the policy of three strikes and you're out adopted in US states, and Odon (2018), who suggested interesting criminal policy measures that could be adopted in Brazil, which, according to him, would have a high impact on Brazilian crime rates.

30 A social goal is understood as "the state of affairs politically defined as socially desirable" (AGUIAR, 2017, p. 140).

31 This paper adopts the vision of criminal policy proposed by Roxin (2000, p. 22 and 82), who, overcoming the incommunicability between criminal law and criminal policy sustained by Liszt in the late nineteenth century, affirms that there is a "systematic unity" between both, so that criminal law would be "much more the form through which the political and criminal purposes can be transferred to the mode of legal validity.

Consequently, the increase in demand for robbery with a knife would be counterbalanced by a reduction in demand for simple robbery. In fact, since the expected value of the offense is equal to the benefit to be gained from committing the crime minus the expected cost of the crime ($Ve = B - pS$), the expected value of armed robbery would exceed that of simple robbery for two reasons. First, if we consider that the greater seriousness of the crime corresponds to greater benefits (the use of a knife makes it easier to steal), variable *B* will be greater in robbery with a knife. Second, if we consider that the use of a sharp weapon reduces the victim's resistance and makes it easier for the criminal to flee, reducing the chances of apprehension, the variable p in the formula for the expected cost of the robbery with a sharp weapon will be smaller than in that of simple robbery, which decreases the expected cost of the former and, consequently, increases its expected value.

Another implication would be that Law 13,654/2018, by raising the cause of increase for robbery with a firearm to 2/3 and eliminating the increase for robbery with a knife, has created marginal deterrence between these crimes, which did not exist previously because, until then, the penalty for both was equal. Since the two crimes also function as substitutes, the model would indicate that marginal[32] deterrence would encourage some offenders to switch from gunpoint robbery (whose *Ve* decreased due to the increase of *S*) to robbery with a knife (whose *Ve* increased due to the decrease of *S*).

3.2 EXPERIMENTATION: PARALYZATION OF THE MILITARY POLICE OF CEARÁ

In February of 2020, military police officers in the state of Ceará paralyzed their activities for 13 days, between February 18 and March 1, in an attempt to pressure for the fulfillment of their claims. According to data released in the press, the number of violent crimes increased in the period. Compared to February 2019, homicides were up 178%. There were 164 homicides in February 2019 compared to 456 in the same month of 2020. Of these 456 homicides, 312 occurred during the shutdown, an average of 26 per day, compared to an average of 8 per day in the period before the shutdown. Robbery records also increased in the comparison period: they went from 477 in February 2019 to 1280 in February 2020, an increase of 168%.[33]

Just as the implementation of the three strikes policy in California was considered a natural experiment that provided empirical study considered fruitful in confirming deterrence theory, demonstrating the deterrent effect of increases in sanction severity in a manner independent of incapacitation effects, the strike of the military police of Ceará apparently has the aptitude to be a quasi-experiment to evaluate, ex post facto, the theoretical proposition that decreasing the probability of punishment negatively impacts deterrence, which would contribute to the expansion of the existing empirical literature on the subject.

The hypothesis that there is, besides the correlation between the variables "reduced ostensive policing" and "increased violent crime", a causal relationship along the lines proposed by the economic theory of crime is sufficiently strong, and empirical work could validate or refute

32 This marginal deterrence persists, but to a lesser extent, even after Law 13,964/2019, which, as we have seen, restored the cause of increase for robbery with a knife to the original level of 1/3 to half.

33 The data were extracted from the following article: <https://g1.globo.com/ce/ceara/noticia/2020/03/06/312-pessoas-foram-assassinadas-no-ceara-durante-motim-da-pm-diz-secretaria-da-seguranca.ghtml>, accessed on 12.04.2020.

the hypothesis in the situation under examination. What is intended to emphasize, however, is not so much whether the proposition is true or not, but that due to the scientific character of the economic theory of crime, the proposition, based on the premise of the rational criminal, can be submitted to empirical testing that accepts or rejects it, which does not occur in traditional[34] dogmatics.

The significant increase in violent crimes during the period of the strike suggests that the rapid response of the state to such incidents, usually by the military police, plays a relevant role in elucidating the authorship of the crimes and, therefore, in dissuading the perpetrators. In this area, empirical studies could cover, for example, the evaluation of proactive policing initiatives directed to specific regions, the so-called "focused policing", which covers hot spots policing (more police in areas with higher crime rates) and problem-oriented policing, or POP, a strategy in which the police get closer to the community to prevent criminal behavior (ODON, 2018[35]).

3.3 NORMATIVE PROPOSAL: EMBEZZLEMENT COMMITTED BY MAYORS

The cause of increase of art. 327, §2 of the Penal Code[36], applicable, among others, to the crime of embezzlement[37], was introduced by Law 6,799/1980. The justification of the respective bill, on this point, stated that "the conduct is more reprehensible in criminal terms the more power is in the hands of the official, because he has a greater duty to defend it and to be loyal to it[38]", which would require an increase in the penalty for embezzlement. which would require an increase in the penalty when the public official committing the offense holds a commission or a management or advisory position.

Although the judgment of "reprehensibility" expresses a evaluative criterion that cannot be empirically compared, there seems to be an economic explanation for the more severe penalty for functional crimes committed by persons holding a commission or a management or advisory position. The explanation is based on the premise that, since the expected cost of the offense is equivalent to the sanction imposed discounted by the probability of punishment (Ce=pS), any reduction in p must be accompanied by an increase in S for the expected cost of the offense to remain the same (SHAVELL, 2016). The positions and functions specified in the cause of increase are assigned greater portions of power than those assigned to positions at lower levels of the state hierarchy. And the more power the agent holds, the less likely he or

34 "Although it seeks the logical systematization of positive law by means of doctrinal texts, dogmatics does not propose hypotheses, nor is it susceptible to empirical testing. While the language of science is assertive and bipolar (true/false), the language of dogmatics fails to achieve this veritative function. How to prove or disprove a dogmatic 'thesis' if there is no possibility of testing it, but only of accepting or not its rhetorical arguments, either by the doctrine that follows it, or by the courts? The criterion becomes pragmatic (in the philosophical sense of the term), that is, dogmatics may be useful or useless for persuasive purposes and technological aid, but it does not reach truth or even falsity. By the Popperian criterion, therefore, dogmatics is not science" (CARVALHO, 2014, p. 129-130).

35 Also according to Odon (2018), an example of a POP-based program is Fica Vivo (Stay Alive), implemented in the Morro das Pedras region in Belo Horizonte/MG, which in the first six months reduced the homicide rate by 69%.

36 Art. 327, § 2 of the Penal Code: "The penalty will be increased by one-third when the perpetrators of the crimes provided for in this Chapter are occupants of commissioned positions or positions of direction or advisory functions of a direct administration body, mixed economy society, public company or foundation established by the public power."

37 Art. 312. A public official appropriating money, valuables or any other movable good, public or private, of which he has possession by reason of his office, or embezzling them for his own benefit or for the benefit of others: Penalty: confinement, from two to twelve years, and a fine.

38 Bill 1.066/1975, of the House of Representatives.

she is to be punished for functional crimes, since that power is generally associated with conditions that are more conducive to concealing the crime and making it more difficult to fully investigate it. In the most extreme cases, the criminal may not only be responsible for appointing, dismissing or removing employees of the internal control bodies, but also for controlling the budget destined to the activities of prevention and detection of deviations that this body carries out. In order that, in these situations, the expected cost of the offense is not higher for the common employee, the lower probability of punishment for crimes committed by the occupants of commissioned, management and advisory positions is compensated by increasing the penalty applicable to them.

The economic rationale presented justifies the cause of increase for those occupying the heads of the Executive Branch (president, governors and mayors).[39] The analysis will then focus on the crime of embezzlement committed by mayors. This crime, contrary to what occurs with regard to other heads of the Executive Branch, is not provided for in art. 312 of the Criminal Code, but in a special law, Decree-Law 201/1967, which in art. 1, I, typifies the mayor's conduct of "appropriating public property or income or embezzling it for his own benefit or for the benefit of others. The penalty for deprivation of liberty is the same as in art. 312 of the Penal Code (imprisonment of two to twelve years), which makes the penalty for embezzlement of mayors abstractly less than that applicable to crimes of embezzlement committed by governors and the president, since the latter are subject to the increase provided for in art. 327, § 2 of the Penal Code. For the same reason, the penalty imposed on mayors is, in the abstract, lower than that applicable to their subordinates in commissioned or directive and advisory positions. These observations, which can be reached by a simple reading of the legal provisions under analysis, could justify, on the basis of normative criteria relating to the "greater reprehensibility" of embezzlement committed by mayors, the correction of what appears to have been a legislative error, which is all the more evident because the increase in the penalty of art. 327, § 2 of the Penal Code is applied to mayors when they are perpetrators of crimes that are subject to such an increase, such as the crime of passive corruption (art. 317 of the Penal Code).

But the economic analysis of the crime of embezzlement of a mayor provides an argument that might not be easily perceived. It indicates that the crime provided for in art. 1, I of DL 201/1967 has a lower expected cost not only than the embezzlement of other heads of the Executive Branch or other officials occupying a commissioned position or a management and advisory function, but also the embezzlement of the simplest public official, since the reduction of p in the formula of the expected cost of the mayor's embezzlement, inherent to the means that the position confers to make it difficult to discover and solve the crime, is not accompanied by an increase of S. And, as the condition of mayor is elementary to the embezzlement of art. 1, I of DL 201/1967, it is communicated to the co-authors of the crime, by force of art. 30 of the Penal Code, even if individually they would be liable for the embezzlement of art. 312 of the Penal Code and eventually be subject to the surcharge of art. 327, § 2 of the Penal Code. In other words: the embezzlement of municipal civil servants who hold positions

39 The Federal Supreme Court recognizes that those holding elective office may be covered by the elementary "management function", since any other interpretation would lead to the absurdity of punishing the assistant occupying a commissioned position and a management/advisory function more severely than the person in general charge of the Public Administration (INQ 1769/PA and INQ 2606/MT). It is interesting to note that this understanding evidences a concern with the consequences of possible interpretations. The difference is that traditional hermeneutics evaluates the consequences by resorting to intuition and common sense, and not to a scientific theory that makes it possible to formulate hypotheses about human behavior that, in principle, are empirically falsifiable.

of commission or management and advisory functions (such as municipal secretaries), when committed in competition with the mayor, will also have a lower expected cost than the embezzlement of the simplest civil servant. This scenario suggests that the lower expected cost of the embezzlement of art. 1, I of Decree-Law 201/1967 is capable of increasing the demand for this crime, both by mayors and by those who occupy commissioned posts and management and advisory positions in the municipal Executive Branch (in this case, in competition with the mayor). Therefore, a more efficient deterrence of this offense, whose reprehensibility (evaluative criterion) was previously recognized by law when it was established as a crime, requires a legislative reform that equates the custodial penalty imposed for the crime of art. 1, I of DL 201/1967 to that of art. 312 of the Penal Code plus the increased penalty of art. 327, § 2 of that code. And this could be proposed based on the conclusions obtained from the application of the economic theory of crime.

MERITUM MAGAZINE • v.15 • n.4 • p. 297-312 • 2020

4. CONCLUSIONS

This article applies the economic theory of crime to criminal policy, aiming to demonstrate its usefulness as a scientific foundation for the definition of that policy.

After reviewing the central propositions of the economic theory of crime, three situations inserted in the Brazilian legal-criminal scenario were analyzed in order to exemplify how the theory can be used to subsidize the political decisions that structure the state strategies to fight crime.

We conclude that the economic theory of crime and the scientific method inherent to it generate knowledge that makes it possible to estimate the impacts of different criminal policy configurations, favoring better informed state decisions. This is possible because the premise of the rational criminal allows predictions to be made about criminal behavior that, in principle, can be submitted to empirical validation or refutation tests, thus producing conclusions that, depending on the social goal to be reached, lead to normative propositions about the criminal policy measure that should be adopted in the analyzed situation.

The conclusions revealed by the economic theory of crime qualify the state choices that define how and in what amount expenditures will be made on crime prevention, investigation and trial, which will indicate the probability of punishing criminals, and how penalties will be scaled for each type of offense, which will dimension the expenditure on the execution and supervision of sanctions. The consequence tends to be the adoption of more efficient strategies to fight crime, which obtain better results and optimize public resources.

The economic theory of crime has limitations, which show that it is not the definitive solution to all problems of criminal policy. But no criminological theory is, and the recognition of limitations does not mean that the theory is not useful. The usefulness of the economic theory of crime to guide the construction of criminal policy seems undeniable, as indicated by the vast empirical literature corroborating the premise of the rational criminal. In Brazil, there is a wide field for research that seeks, based on the application of the theory, to better understand the phenomenon of criminality and help our legal and criminal system to face it more efficiently.

REFERENCES

AGUIAR, J. C. D. Economic approach to law: epistemological aspects. **Lusíada: Revista de Ciência e Cultura**, Coimbra, v. 2, n. 1, p. 169-186, Jan. 2002.

AGUIAR, J. C. D. **Analytic-behavioral theory of law**: towards a scientific approach to law as a functionally specialized social system. Porto Alegre: Núria Fabris, 2017.

ALFARO, C. P. R.; URRUTI, L. A. Economic analysis of criminal law. In: ACCIARRI, H. A. **Law, economics and behavioral sciences**. [S.l.]: Ediciones SAIJ, 2019. p. 147-176. Available from: http://www.bibliotecadigital.gob.ar/items/show/1713. Accessed 16 December 2019.

BECCARIA, C. **On Crimes and Penalties**. Translation by Torrieri Guimarães. São Paulo: Martin Claret, 2004.

BECKER, G. S. Crime and Punishment: An Economic Approach. **The Journal of Political Economy**, v. 76, n. 2, p. 169-217, Mar-Apr 1968. Available from: https://pdfs.semanticscholar.org/f252/e0a5a33891158be5ee683493ae13280c82ff.pdf. Accessed on: 6 January 2020.

BOSON, D. S. Three strikes and you're out: an economic analysis of sentencing. **Brazilian Journal of Criminal Sciences**, São Paulo, v. 23 n. 116, p. 17-37, sep-out 2015.

CARVALHO, C. Is a "science" of law possible? Situation and perspectives for Brazilian legal dogmatics. In: PORTO, A. M.; SAMPAIO, P. **Law and economics in two worlds:** legal doctrine and empirical research. Rio da Janeiro: FGV Publisher, 2014. Chap. 4, p. 121-143.

COOTER, R. Price and Sanctions. **Columbia Law Review**, v. 84, p. 1523-1560, 1984. Available at: https://scholarship.law.berkeley.edu/facpubs/1613/. Accessed on: 04 Jan 2020.

COOTER, R.; ULEN, T. **Law & Economics**. Translation by Luis Marcos Sander and Francisco Araujo da Costa. Porto Alegre: Bookman, 2010.

EHRLICH, I. Crime, punishment, and the market for offenses. **Journal of Economic Perspectives**, v. 10 n. 1, p. 43-67, 1996. Available at: https://www.ufrgs.br/ppge/giacomo/wp-content/uploads/2019/03/Crime-Punishment-and-the-Market-for-Offenses.pdf. Accessed on: 04 Apr. 2020.

EIDE, E. Economics of criminal behavior. In: BOUCKAERT, B.; GEEST, G. D. **The Economics of Crime and Litigation (Encyclopedia of Law and Economics).** Cheltenham: Edward Elgar, v. 5, 2000. p. 345-389.

FRIEDMAN, D. D. **Law's Order:** What Economics has to do with Law and why it matters. Princeton: Princeton University Press, 2000.

KESSLER, D.; LEVITT, S. D. Using sentence enhancements to distinguish between deterrence and incapacitation. **Journal of Law and Economics**, v. XLII, p. 343-363, April 1999. Available at: <http://pricetheory.uchicago.edu/levitt/Papers/KesslerLevitt1999.pdf>. Accessed on: 04 Apr. 2020.

LEVITT, S. D. Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines**. International Review of Law** and Economics, New York, v. 17, p. 179-192, 1997. Available at: https://pricetheory.uchicago.edu/levitt/Papers/LevittIncentiveCompatibilityConstraints1997.pdf. Accessed July 15, 2020.

LEVITT, S. D. Why do increased arrest rates appear to reduce crime: deterrence, incapacitation, or measurement error. **Economic Inquiry**, v. 36 n. 3, p. 353-372, jul 1998. Available at: http://pricetheory.uchicago.edu/levitt/Papers/LevittWhyDoIncreasedArrest1998.pdf. Accessed on: 04 Apr. 2020.

LEVITT, S. D. Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not. **Journal of economic perspectives**, v. 18 n. 1, p. 163-190, 2004.

MARTINEZ, A. P. Evidence on the deterrent effect of punishment in the case of economic crimes. www.jota.info, 2016. Available at: https://**www.jota.info**/especiais/evidencias-efeito-dissuasorio-da-pena-no-caso-de-crimes-economicos-22092016. Accessed on: 16 January 2020.

MENDES, S. M.; MCDONALD, M. D. Putting severity of punishment back in the deterrence package. **Policy Studies Journal,** v. 29 n.4 , p. 588-610, november 2001. Available at: https://repositorium.sdum.uminho.pt/bitstream/1822/2929/1/GlasgowPSJ.pdf. Accessed on: 04 Apr. 2020.

MICELI, T. J. The use of economics for understanding law: An economist's view of the cathedral. In: ULEN, T. **The Methodology of Law and Economics**. Cheltenham, UK: Edward Elgar, 2017. Chap. 2, p. 18-43.

MICELI, T. J. **The paradox of punishment**: reflections on the economics of criminal justice. Cham: Palgrave Macmillan, 2019.

MURAMATSU, R.; FONSECA, P. Economics and psychology in explaining intertemporal choice. **Revista de Economia Mackenzie**, v. 6 n. 6, p. 87-112, 2008. Available at: http://editorarevistas.mackenzie.br/index.php/rem/article/view/810. Accessed on: 08 Apr. 2020.

ODON, T. I. Public security and the economic analysis of crime: designing a crime reduction strategy for Brazil. **Revista de Informação Legislativa**, Brasília, v. 55 n. 218, p. 33-61, Apr-Jun 2018. Available at: http://www12.senado.leg.br/ril/edicoes/55/218/ril_v55_n218_p33. Accessed on: 13 Aug 2020.

OLSSON, G. A.; TIMM, L. B. Economic analysis of crime in Brazil. In: BOTTINO, T.; MALAN, D. **Direito penal e economia**. Rio de Janeiro: Elsevier: FGV, 2012. p. 111-131.

PATRÍCIO, M. The Economic Analysis of Crime: A Brief Introduction. **Revista Jurídica Luso-Brasileira**, Lisbon, v. 1, p. 157-175, 2015.

POLINSKY, A. M.; RISKIND, P. N. Deterrence and the optimal use of prison, parole and probation. **Stanford Law and Economics Olin Working Paper no. 507**, May 2017. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968614. Accessed on: 24 Jul 2020.

POLINSKY, A. M.; SHAVELL, S. The optimal use of fines and imprisonment. **Journal of Public Economics**, v. 24, p. 89-99, 1984.

POSNER, R. A. An Economic Theory of the Criminal Law. **Columbia Law Review**, v. 85, p. 1193-1231, october 1985. Available at: https://pdfs.semanticscholar.org/6448/aee7b1aaa0785667ee8f0ba4fb7e9fe0a3c0.pdf. Accessed on: 5 January 2020.

POSNER, R. A. The economic analysis of law movement: desde Bentham hasta Becker. **The economic analysis of law movement: desde Bentham hasta Becker**, v. 44, p. 37-54, 2002. Available from: http://revistas.pucp.edu.pe/index.php/themis/article/view/10057. Accessed 16 December 2019.

POSNER, R. A. **Economic Analysis Of Law**. Translation by Eduardo L. Suárez. 2nd ed. Ciudad del Mexico: Fondo de Cultura Economica, 2007.

ROXIN, C. **Criminal Policy And Legal-penal System**. Translation by Luis Greco. Rio de Janeiro: Renovar, 2000.

SHAVELL, S. **Fundamentals Of The Economic Analysis Of Law**. Translation by Yanna G. Franco. Madrid: Editorial Universitaria Ramón Areces, 2016.

SHIKIDA, P. F. A. Considerations On The Economics Of Crime In Brazil: a summary of 10 years of research. **Economic Analysis of Law Review**, Brasília, v. 1 n. 2, p. 318-336, jul-dez 2010. Available at: https://www.researchgate.net/publication/286060021_Consideracoes_sobre_a_Economia_do_Crime_no_Brasil_Um_Sumario_de_10_Anos_de_Pesquisa. Accessed on: 8 Aug 2020.

SHIKIDA, P. F. A.; AMARAL, T. B. D. Economic Analysis of Crime. In: TIMM, L. B. **Law and Economics in Brazil**: studies on the economic analysis of law. 3rd. ed. Indaiatuba, SP: Foco, 2019. Chap. 13, p. 311-334.

Received/*Recebido:* 31.08.2020.

Approved/*Aprovado:* 26.09.2020.

THE BASIS OF CALCULATION OF FEES: CONSIDERATIONS AROUND BINDING SUMMARY NO. 29 AND THE "COST OF STATE ACTIVITY"

A BASE DE CÁLCULO DAS TAXAS: CONSIDERAÇÕES EM TORNO DA SÚMULA VINCULANTE Nº 29 E O "CUSTO DA ATIVIDADE ESTATAL"

Carlos Victor Muzzi Filho[1]

ABSTRACT

The article examines, in the light of the Binding Precedent No. 29 of the Supreme Federal Court, the supposed need for the fee (rate) calculation base to reflect the cost of state activity, stating the thesis that this link does not exist, especially in view of the Supreme Court's guidance Federal Court signed in a similar binding summary.

Keywords: Fee (rate). Quantitative aspect. Binding Precedente 19/STF.

RESUMO

O artigo examina, à luz da Súmula Vinculante nº 29 do Supremo Tribunal Federal, a suposta necessidade de que a base de cálculo da taxa reflita o custo da atividade estatal, afirmando a tese de que não existe esta vinculação, principalmente ante a orientação do Supremo Tribunal Federal firmada na referida Súmula Vinculante.

Palavras-chave: *Taxa. Aspecto quantitativo. Súmula vinculante 19/STF.*

1. INTRODUCTION

The study of fees, in Brazilian law, still seems contaminated by what Alfredo Augusto Becker called "the biggest mistake" in tax law, that is, "the contamination between legal principles and concepts and pre-legal principles and concepts (economic, financial, political, social, etc.)" (BECKER, 1972, p. 35). It is enough to see that it is still recurrent to link the rates to the

1 Graduated in Law from the Federal University of Minas Gerais (1992), Masters (2004) and Doctorate (2013) in Tax Law from the Federal University of Minas Gerais (2004), in addition to specialization in State Law at PUC-MG (1997)). Assistant Professor II at FUMEC University, in the undergraduate and masters courses. He also teaches in a specialization course in Tax Law, at Faculdades Milton Campos and at CAD – Updating Center in Law, as well as in a specialization course in Civil Procedure, at Universidade FUMEC. He has professional practice in public law, being the State of Minas Gerais Attorney, and also in private law. Lattes: CV: http://lattes.cnpq.br/8301401234076151. E-mail: cvmuzzifilho@uol.com.br.

How to cite this article/Como citar esse artigo:
MUZZI FILHO, Carlos Victor. The basis of calculation of fees: considerations around binding summary no. 29 and the "cost of state activity". **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 313-327, 2020. DOI: https://doi.org/ 10.46560/meritum.v15i4.8339.

cost of *specific expenditure* of the State, attributing to the taxes the cost of *general expenses* of the State. Thus, for example, Anis Kfouri Júnior, points out that the collection of taxes has "the objective of financing the *overhead* of the State", and the fee, "unlike taxes", has "its collection destined to cover the cost" of the service which is her generating event (KFOURI JÚNIOR, 2012, p. 93 and 95, *"passim"*).

It is certain, however, that the legal nature of the tax should not be linked to the destination given to the revenue collected from it. The National Tax Code (CTN - Law nº 5.172, of October 25, 1966), as notorious, provides that the "specific legal nature of the tax is determined by the fact that generates the respective obligation, being irrelevant to qualify it [...] the legal destination of the proceeds of its collection" (art. 4, item II), although there is E, although there is a fierce theoretical dispute over the prevalence of this statement concerning special contributions (SPAGNOL; FERRAZ; and GODOI, 2014, p. 197). Besides, the Constitution of the Republic, of October 5, 1988 (CR / 1988), as a general rule, prohibits the "[...] linking of tax revenue to an organ, fund or expense [...]" (167, item IV). However, despite this, at all times, such linkage of the tax revenue to the expense related to its taxable event appears in legal arguments developed, both in forensic cases and in theoretical studies.

In case-law terms, the Federal Supreme Court (STF) does not present clear and defined decision parameters, oscillating on a case-by-case basis, without being able to perceive the existence of a common pattern or orientation in the decisions handed down. And this occurs even after the edition of the Binding Precedent nº 29 of the Supreme Federal Court, an instrument that, theoretically, should portray the dominant understanding in that court (art. 103-A of CR / 1988; Law nº 11.417, of December 19, 2006).

The purpose of this article, therefore, is to discuss the basis for calculating fees, based on the guidance established in the Binding Precedent nº 29 / STF, confronting this guidance with the idea that the basis for calculating fees should reflect the "cost of the state activity", a parameter that, at least, would serve as a maximum limit to guide the volume of funds raised with the rate requirement. What is sustained here is the legal dissociation between the legal validity of the fee and the volume of funds raised, which does not need to be equivalent to the cost of state activity.

It should be emphasized that, in political and economic terms, it is even recommended that the institution of fees should have as a parameter the cost of state activity that constitutes a taxable event. It is also recommended, from a political angle, the creation of collection limits, preventing the imposed rate from becoming a very "expensive" tax, not least because parsimony in tax collection can function as a legitimate factor for taxation. But these are pre-legislative considerations, which do not affect the legal validity of the rate eventually imposed.

This article maintains that CR / 1988 only determined *what cannot be* the basis for calculating fees, but did not impose or define what should be the basis for calculating fees (BRASIL, 1988). For this reason, the margin of action of the ordinary legislator, in defining the quantitative aspect of the rate, is very broad, even broader than the margin of action to the calculation basis taxes. This is because, if the complementary law sets the tax framework, defining the taxable event, the taxable persons, and the calculation base (art. 146, subparagraph III, paragraph a, of CR / 1988), concerning the tax rates, don't there is even this definition in a complementary law, except for repetition, in art. 77, single paragraph, of the CTN, of the prohibition contained in art. 145, § 2º, of CR / 1988, plus the prohibition to calculate the rate "[...] according to the capital

of the companies" (final part of the sole paragraph of the referred art.77; but, also here, the parameter is negative, as the rate *cannot be* calculated based on the capital of the companies).

Methodologically, the article is divided into two parts. In the first, the legal configuration of the fee is discussed, in the light of the Brazilian legal system. In the second part, the STF's case law guidance is examined, especially with a view to Binding Precedent No. 29 / STF. In the end, it is expected, as a conclusion, to state that the basis for calculating fees should not necessarily be the cost of state activity, although it can be done at the option of the legislator since such cost is not a legal parameter mandatory for stipulating the fee amount.

2. FEES: GENERATING FACT AND CALCULATION BASE

Fees, art. 145, §2, of CR / 1988, "cannot have their tax calculation base". CR / 1988 unequivocally adopted the option of defining "what cannot be the basis for calculating the rate", avoiding, then, defining "what should be the basis for calculating the rate" (BRAZIL, 1988).

CR / 1988 could have opted for a positive definition, that is, it could, in the same paragraph 2 of art. 145 have stated, for example, that *the basis for calculating fees should be the cost of state activity*. In this context, there would be a clear and unique parameter to quantify the rates (BRAZIL, 1988).

Nevertheless, this was not the path chosen by CR/ 1988. Thus, from the constitutional text, there is a (negative) determination that the rate does not have "its tax calculation base".

The complementary law of general rules of tax law, CTN, likewise, provides, in the sole paragraph of art. 77, that "[...] the rate cannot have the same calculation basis or taxable event as those corresponding to tax, nor be calculated according to the capital of the companies" (BRAZIL, 1966). Therefore, the rate calculation base cannot be "identical" to the tax calculation base, nor can it be calculated according to the capital of the companies. Here too, it should be repeated, the legislator opted for the *negative criterion*, instead of disposing of, more simply, that the "basis for calculating the rate is the cost of state activity that is the generating factor for it".

Notwithstanding the literalness of the constitutional text, as well as that of the CTN, what Paulo de Barros Carvalho defined as the "superlative valuation" of the calculation base is still present, which would be the result of the great influence exerted by Alfredo Augusto Becker in Brazilian doctrine (CARVALHO, 2019, p. 357)[2]. And Paulo de Barros Carvalho himself, while emphasizing the exaggeration in the "valuation" of the calculation base, argues that in the "General Theory of Tax Law", the calculation basis fulfills three functions: i) "measuring function"; ii) "objective function"; and, especially for this article, iii) "comparative function" (CARVALHO, 2019, p. 357 and 362, *"passim"*). The basis for calculating the rate fulfills this third and last "comparative function" when it is, obviously, compared with "[...] the material criterion of the hypothesis", being able, then, to confirm, to affirm or to affirm "[. ..] what appears in the text of the law, in an obscure way" (CARVALHO, 2019, p. 2019).

2 Alfredo Augusto Becker, a mythical name in Brazilian tax law, maintains that the "core" of the "hypothesis of incidence of the legal taxation rule" is "[...] the calculation basis and gives the tax the legal genre. The adjective elements are all the other elements that make up the composition of the incidence hypothesis (BECKER, 1972, p. 343).

From these assumptions, the conclusion reached by several tax assessors is reached, according to which the rate, if it adopts its tax calculation base, will become a true tax, because the calculation base, in this hypothesis, will not confirm the taxable event (the "material criterion of the hypothesis", alluded to by Paulo de Barro Carvalho). For this very reason, Paulo de Barros Carvalho himself maintains that the basis for calculating the fee must necessarily portray "[...] the measure of the intensity of the State's participation. Should the legislator mention the existence of a tax, but choose a measuring basis that is, in fact, foreign to any activity of the Public Power, then the tax type will be another, naturally a tax" (CARVALHO, 2019, p. 71)[3].

In the same vein, Alfredo Augusto Becker, to distinguish the tax rate, states that "[...] the legal rule that has chosen the *state service or state thing* as the basis for calculating the tax, will have created a tax" (BECKER, 1972, p. 346). Later, Becker points out that, in the case of "[...] dealing with fees, only the value of the state *service* or state *thing* can be taken as the *basis of calculation* [...]" (BECKER, 1972, p. 348). The taxpayer recognizes that "[...] it is impracticable to take the *real* value of the service [...]", and it is, therefore, permissible for the legislator to "indirectly" fix the value, always following, however, the "measure of state service (or thing)" (BECKER, 1972, p. 348/349, *"passim"*).

Still in this same line, as an example, see the lesson of Misabel Abreu Machado Derzi, in his notes for updating the work of Aliomar Baleeiro (BALEEIRO, 2013). Emphatically, Misabel Derzi, invoking lessons from Paulo de Barros Carvalho, Alfredo Augusto Becker, Alberto Xavier, among others, accentuates the syntagmatic character of the rates, for which reason, among others, points out the following consequence:

> [...] the syntagmatic character should also be reflected in the tax calculation base, which should measure the cost of the State's performance, in proportion to each obligation. Nor should it vary according to the taxpayer's own thing, a strange fact. Fees that elect a calculation basis different from the cost of the state action relative to the taxpayer (value of the property, vehicle, value of the cause, the value of the work, etc.) are imposed in disguise, as a rule, instituted against the rules of the Constitution (BALEEIRO, 2013, p. 845).

Sacha Calmon Navarro Coêlho, equally emphatic, points out that between calculation base and taxable event "[...] there is a relationship of almost carnal inheritance (*inherent et ossa)*, a relationship of pertinence, of harmony", so that the rate, "[...] any fee, cannot have a tax calculation base as a species" (COÊLHO, 2020, p. 56/57, "*passim*")[4].

Luís Eduardo Schoueri also asks "[...] what is the basis for calculating the fee?" (SCHOUERI, 2017, p. 195). And, after recognizing that, "due to the constitutional mandate, there is already the first answer, even if in the negative" (SCHOUERI, 2017, p. 195), he adds the following explanation:

> [...] if the justification of the fee is not to force the entire community to bear an expense that can be attributed to an individual taxpayer, it is clear that there is an indication of the possible calculation basis: it will be enough to measure, although with a certain degree of approximation, the value of the activity that the referred taxpayer demanded from the State (SCHOUERI, 2017, p. 195).

---

3 Interestingly, Paulo de Barros Carvalho, in a footnote after the aforementioned excerpt, records the guidance established in the Binding Precedent No. 29 of the Supreme Federal Court, according to which the adoption in the tax calculation base of "any of the tax calculation base, as is the example of the 'tested property', does not constitute an offense to the provisions of art. 145, § 2, of the Constitution "(CARVALHO, 2019, p. 71, note nº 10).

4 Sacha Calmon also refers to the Binding Precedent No. 29, stating his disagreement: "[...] the great danger is to weaken the difference between tax (fact of the taxpayer) and tax (fact of the State) consistent with state actions [.. .] "(CÔELHO, 2020, p. 57/58).

It is not the case, here, to carry out a comprehensive review of the literature, but the invocation of real pillars of Brazilian tax law, Misabel Derzi, Sacha Calmon, Paulo de Barros Carvalho, Alfredo Augusto Becker, and Luís Eduardo Schoueri, lends itself to the demonstration that, in our doctrine, the assimilation between the “generating facts” of the tax and its “basis of calculation” is recurrent. In other words, if the CR / 1988 defines the “taxable facts” of the tax (exercise of police power or provision of public service, potential or effective, specific and divisible, according to art. 145, subparagraph II), then it is stated that the calculation bases chosen by the legislator must reflect the “cost” of these “generating facts”, the cost of “state activity” (BRAZIL, 1988).

This logical-legal consequence affirmed by several authors, however, is not supported by the literality of the constitutional text, thus requiring an exegetical construction that seeks, as emphasized by Luís Eduardo Schoueri, the “justification” for the creation of the tax. But it is not just the literal limit of art. 145, § 2º, of CR / 1988 (which contains a precept of a negative nature, as already stated) that must be considered, and a systematic understanding of the legal system must be sought, and especially in the purpose of this article, the guidelines established by the Supreme Federal Court, in Precedent No. 29 / STF, as set out in the subsequent topic.

3. BASE OF CALCULATION OF THE FEE IN THE LIGHT OF THE BINDING SUMMARY Nº 29 / FTS

As seen, the tax cannot have its tax calculations base, which means, for several authors, that the tax calculation base must be established based on the cost of state activity, being foreign to it, as Misabel Derzi points out, in an update note to the work of Aliomar Baleeiro, anything “something of a taxpayer” (BALEEIRO, 2013, p. 845).

It should be noted that the constitutional text, at first sight, establishes broader protection for taxpayers than the protection established by art. 77, single paragraph of the CTN, because the latter provides that the bases for calculating fees cannot be *identical* to the bases for calculating taxes. Now, the *identical is the same*, it is *very similar*, being, therefore, a much stricter protection rule, because it would act only if there was an *identity* between the basis for calculating the rate and that of the tax. However, to prohibit, as the CR / 1988 prohibits, the adoption for the *tax base tax rate*, is to prohibit the adoption of the tax base for the rate that *could also be* the tax calculation base, even if it was not *identical,* which is why the constitutional rule seems to have a much broader scope, at first glance, than the CTN rule (BRAZIL, 1966).

Hugo de Brito Machado, in this line of argument, compares the wording of CR / 1988 with the wording adopted in Constitutional Amendment No. 1, 1969 (EC No. 1/1969), whose art. 18, § 2, provided that the fee could not “[...] be used as the basis for calculating what has been used for the incidence of taxes”. According to Hugo de Brito Machado, in the current CR / 1988, “[...] it is not necessary that a *certain quantity was used for the incidence of taxes*. Even if it was used for the calculation of any tax. It is enough that it is proper, that is to say, adequate for the calculation of taxes” (MACHADO, 2017, p. 442, “passim”).

Notwithstanding the possibility of recognizing itself in the rule of art. 145, § 2º, of CR / 1988, a broader limitation for the definition of the tax calculation base, the STF jurisprudence, over time, did not endorse such interpretative orientation (BRAZIL, 1988). Far from this, the jurisprudence that came to be built does admit that the tax calculation base considers *facts of the taxpayer*, as long as there is no "integral identity" with the tax calculation base.

3.1 STF FEES AND JURISPRUDENCE: SUMMARIES Nº 595, 665 AND BINDING SUMMARY Nº 19

As an example of the path taken by the STF jurisprudence, Precedent No. 665, of the Supreme Federal Court, approved on September 24, 2003, according to which "the Inspection Fee for the Securities Markets established by Law 7,940 / 89". The basis for calculating this fee, whose constitutionality was affirmed by the STF, is determined based on the net worth of the inspected companies, adopting specific rates, that is to say, varied values fixed in "BTN - National Treasury Bonds", which are linked the ranges of equity values (according to Table A of Law No. 7,940, of December 20, 1989)[5].

It should be added that after the edition of Precedent No. 665, the Supreme Court, when judging on 30.30.2006, ADI No. 453 / DF, Full, Minister Rapporteur Gilmar Mendes, whose object was also the same Law No. 7.940, of 1989, the Federal Supreme Court reaffirmed the constitutionality of the tax. And, specifically based on calculation, Minister Gilmar Mendes said that "[...] the fluctuation of the amounts charged derives from the amplitude of the taxpayer's net worth, which identifies a need for greater inspection". And, according to Minister Gilmar Mendes, the "[...] variation of the amounts posted not only reflects the contributory capacity of the interested party but also reflects the amount of public service provided,' uti singuli "".

In a criticism of Precedent No. 665, of the Federal Supreme Court, Sacha Calmon Navarro Coêlho reiterated that the adoption of "net equity" as the basis for calculating the rate would not measure "[...] the State's performance in favor of the taxpayer. On the contrary, this exception is charged solely based on a particular fact, the net equity it has [...]" (COÊLHO, 2020, p. 59). The STF, however, reaffirmed that shareholders' equity would be a safe parameter to estimate the degree of state intervention, assuming that the greater the company's net equity, the greater the inspection activity. It is, however, a mere "approximation" (SCHOUERI, 2017, p. 195) or indirect criterion (BECKER, 1972, p. 348), because there is no necessary correlation between the company's net equity and the inspection work of the activity.

Long before Precedent No. 665, still in force of EC No. 1/1969, the STF also edited Precedent No. 595, of December 15. 1976: "The municipal road conservation fee for which the calculation basis is identical to the rural land tax is unconstitutional". Here, too, the identity between the tax calculation base and the tax base was prohibited, but the use of factual elements related to the taxpayer[6] was not prohibited in the tax calculation base6+.

5 Thus, for example, for "publicly-held companies" with a net worth of up to 10,000,000 BTN, the fee is 1,500 BTN; for shareholders' equity whose value ranges from 10,000,000 to 50,000,000, the fee is 3,000 BTN; and net assets above 50,000,001 BTN, the fee is 4,000 BTN (Table A of Law No. 7,940, 1989).

6 It should be noted, however, that subsequently the issue of Precedent No. 595 / STF, in other decisions, the STF stated that to configure the rate to be unconstitutional, "identity in one of the launch criteria with ITR would suffice. The tax excludes the fee "(Extraordinary Appeal No. 96.848-SP, Full, Rel. Min. Néri da Silveira, DJe, 29.Jun.1984). However, as indicated in the text, the STF came to abandon this orientation that the identity of one of the criteria adopted for the tax calculation base would render

There is, then, a certain line of continuity between Summaries nº 595 and nº 665 and the most recent Binding Summary nº 29 / STF, approved on 03 Feb. 2010, with the following wording: “It is constitutional to adopt, in the calculation of the fee amount, one or more elements of the tax calculation base, as long as there is no full identity between one base and another”. Thus, the understanding was consolidated that the tax calculation base cannot keep “full identity” with “calculation base specific to a certain tax”, however, preventing anything from the adoption of elements that concern the taxpayer.

In this context, in the light of the Binding Precedent No. 29 / STF, the statement that the tax calculation bases must necessarily *measure the cost of state activity* cannot be supported, since they can adopt “one or more elements of the base of own tax calculation ”, and only“ full identity ”is not allowed between the tax calculations base and that of the tax.

In the opposite sense, Werther Botelho Spagnol, in a work written jointly with Luciano Ferraz and Marciano Seabra de Godoi, criticizes the Binding Precedent No. 29 / STF, stating that it caused the “emptying” of the content of art. 145, § 2º, of CR / 1988 (SPAGNOL; FERRAZ; GODOI, 2014, p. 211). The criticism, of course, stems from the link that Werther Botelho Spagnol, like so many others, claims to exist between the basis for calculating the fee and the cost of the state service, pointing out, then, that this “[...] calculation base must correspond, as closely as possible, at the cost of police power and/or the public service provided, and it is unavoidable to adopt elements specific to taxes, whose measurement is based on the ability to pay ”(SPAGNOL; FERRAZ; GODOI, 2014, p. 211). Such an argument has already been faced in this article, when it is stated that this intended link was not made by the constitutional text, which is why the interpretation based on the Binding Precedent nº 29 / STF, about the expression “own calculation basis ”, does not apply. it shows absurdity, proving to be reasonable, either from the historical perspective or from the literal perspective.

The observation that we have, in this scenario, is that the thesis that the tax-generating fact is a state activity was overcome by the STF case law, its calculation base would necessarily calculate the *cost* of this state activity. After all, if that were the case, how can we admit that the tax calculation base considered “one or more elements of the tax calculation base”?

Even if the assumption was made that elements of the tax calculation base would serve to estimate the cost of the state action, it is a mere assumption or “approximation”, with no necessarily direct and objectively measurable relationship between these *elements and the cost of state activity*. Returning to the example of the Inspection Fee for the Securities Markets, just imagine a company that has a very high net worth, operating, however, with few and large investors. Such a company would carry out far fewer operations than, for example, a smaller company that operated with dozens or hundreds of small investors, so that, in this basic example, shareholders’ equity, the criterion adopted to *quantify* the referred rate, would not be effectively measuring the amount of state activity.

It is worth adding here, closing this topic, that it is not being affirmed that *the tax calculation base cannot reflect the cost of state activity*. What is stated is that, legally, *there is no obligation for the basis for calculating fees to be the cost of state activity*. This reflection will be the option of the legislator, which is not prohibited by the constitutional text but is also not man-

the tax calculation base unconstitutional, settling on the argument based on the “integral identity” between the rate and tax calculation bases, so that it qualifies as unconstitutional.

datory by the same constitutional text. The argument developed by Luís Eduardo Schoueri, based on the justification of the rates, is shown to be meta-legal, because it dispenses with the legal rules to be based on arguments contaminated by that "mistake" mentioned by Alfredo Augusto Becker, due to the "contamination" of the tax law by " pre-legal principles and concepts (economic, financial, political, social, etc.)" (BECKER, 1972, p. 35).

In short, legally, CR / 1988 only prohibits the rate from having its tax calculation base, which, in the interpretation signed by the STF, in the Binding Precedent No. 29 / STF, means to say only that the tax calculation base rate cannot be identical to the tax calculation base. Hence the need to examine two other circumstances that also corroborate the guidance established in Binding Precedent No. 29 / STF, thus removing the consideration of the cost of state acts as an essential factor for stipulating the basis for calculating fees: the option for the establishment certain value for rates and their use in the field of extra-taxation.

3.2 RATE WITH A CERTAIN AMOUNT (WITHOUT CALCULATIONS BASE) AND "CHINESE SKILLS"

Not infrequently, rates are stipulated by the legislature in a certain amount, thus dispensing with the calculation basis and rates (either specific rates or "*ad valorem*" rates).

Two examples can be given: (i) the fee of R$ 1,000.00 (one thousand reais) for the dispatch of possession and of the weapons (art. 11 and Attached Table, subparagraph V, both of Law No. 10,826, of December 22, 2003); and (ii) the fee of R$ 257.25 (two hundred and fifty-seven reais and twenty-five centavos) for issuing a passport (Article 3, subparagraph I, item a, of Complementary Law No. 89, of February 18 of 1997, combined with Article 49 of Decree No. 3.345, of November 30, 1938, and Table Attached to Ordinance No. 927, of July 9, 2015, of the Minister of Justice)[7]. Several other examples could be cited, at the federal, state, and municipal levels, but these two examples are enough to demonstrate that there are rates established in certain amounts, which will hardly represent the cost of state activity.

Theoretically, it could even be assumed that, when fixed by the legislator, such rates established in a fixed amount would represent the cost of state activity. It is, of course, a mere assumption, which would require thorough research in the processing of the respective bills, with the need to examine any financial statements that the stipulated amount would represent the cost of state activity. Anyway, even if there was this correlation between the value effectively established and the cost of the state activity, it is not reasonable to suppose that, almost seventeen years after the fixing of the rate for the dispatch of the weapon (Law nº 10.826, of 2003), the cost of state activity has not changed. Just as it is also not credible to assume that the cost of the activity related to the issuance of the passport has remained unchanged for five years, since it was last readjusted in 2015, by Decree No. 927, of the Minister of Justice.

7 The calculation of the fee for issuing a passport would merit its research. Decree No. 3,345, of November 30, 1938, issued by the Vargas Dictatorship, established the "Passport Regulation", fixing the amount of the respective fee (art. 49). Complementary Law No. 89, of 1997, providing for FUNAPOL - Fund for Equipment and Operationalization of the core activities of the National Federal Police - the following: "Art. 3rd - FUNAPOL's revenue comprises: I - fees and fines charged for migration services, provided by the Federal Police Department, as follows: a) fees for the issuance of travel documents, instituted by art. 49 of Decree No. 3,345, of November 30, 1938, and updated under current legislation ". The last "update", as noted, was made by Decree No. 927, 2015, of the Minister of Justice, without explaining which monetary restatement criterion was used, if any.

The issue is dealt with by Sacha Calmon Navarro Coêlho, who notes that there is "[...] an embarrassing question regarding the current techniques for setting the value of fees" (COÊLHO, 2020, p. 58). Recalling that "in most cases, the amount payable for the fees is fixed randomly, at *a forfait*, Sacha Calmon recognizes that "this does not match well with the functions reserved for the calculation basis of them, even by constitutional imperative. Doesn't the Constitution say that the tax cannot have a calculation basis identical to that of the tax? The calculation base here must measure the state's performance" (COÊLHO, 2020, p. 58, "passim").

It should be reiterated that Sacha Calmon Navarro Coêlho removes from a negative command (the rate cannot have its tax calculation basis) a positive order (the rate must measure the state's performance), but, instead of concluding, then, by unconstitutionality of the criterion *"a forfait"* (fixed value) adopted "in most cases", appeals to the presumption, again hardly credible, that the fixed value corresponds to the cost of the state activity: "In these cases, it is assumed that the base of calculation measures the costs of state activity by the over-provision of the required public service, the *forfait* "(COÊLHO, 2020, p. 58).

The reason for such a presumption is unknown, which more closely resembles a belief or a desire. But there is no legal guarantee (or accounting, or economic, or of any kind) that the fixed amount established represents, even if approximately, the cost of state activity.

On the other hand, there are obvious practical difficulties in fixing, concretely, the cost of given state activity, even due to the constant interaction between different public bodies involved in given police activity or the provision of public services. Besides, there are still variations concerning the real demand for state activity, which also affects the eventual definition of the exact value or close to the rate, because, obviously, the frequency with which the state activity is exercised influences the cost of this same activity, to each taxable person: if a given activity costs x Reais per month, if it is provided for a thousand taxable persons, this cost would be *x / 1,000*, which is much lower, in principle than the cost of a service provided to only ten taxable persons per month *(x / 10)*.

In this regard, there was an interesting discussion in the judgment, by the STF, of RE 416.601-DF, Full, Minister Rapporteur Carlos Velloso, judged on 10.10.2005 (DJ, 30. September 2005), in which the constitutionality of the Environmental Control and Inspection Fee - TFCA, instituted by Law nº 6.938, of August 31, 1981, with the modification made by Law nº 10.165, of January 28, 2000 (articles 17-B, 17-C, 17-D, 17-G). Among the controversies faced by the STF, it is worth examining the statement that TFCA would be unconstitutional because its calculation base would be the "economic size" of each taxpayer (measured by the "annual gross revenue", combined with the "pollution potential", as 17-D, § 1; and Annex XI). Minister Carlos Velloso, in dismissing the alleged unconstitutionality of the TFCA, used a lesson from Sacha Calmon Navarro Coêlho, in an opinion attached to those records, making the following transcript in the judgment issued by the STF:

> Regarding the alleged abusiveness of the TFCA value, it should be noted that its amount goes from R$ 50.00 (fifty reais), for the micro-company with a high degree of environmental pollution or use of mineral resources, up to the ceiling of R$ 2,250, 00 (two thousand, two hundred and fifty reais) per establishment of a large company also framed in the maximum degree of pollution or use.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 313-327 • 2020

> They do not seem to me to be excessive values, especially when it comes to the cost of inspecting an oil platform on the high seas, which depends on displacement by helicopter, the use of the most modern safety equipment, a large number of men and hours spent.
>
> One cannot ignore, however, the virtual impossibility of direct mathematical measurement of the cost of each State action (the collection of garbage from a given household, over the course of a month; the issue of a passport, etc.). The calculation would require Chinese skills such as researching the time spent making each passport, and its correlation with the minute wages of the officials in charge and the monthly rent value of the Federal Police building where the document was issued, among other intangible variables, to collect the cost of issuing each passport, for the requirement of the corresponding rate (which would vary for each taxpayer, according to whether their document had required more or less work or had been issued in their own or rented building). The same is true for garbage collection: imagine the ridiculousness of having garbage dumps, such goldsmiths, weigh the debris produced day by day by each household with a precision scale, so that the rate could correspond to the total amount of garbage produced each month by the taxpayer (I highlighted).

As it is not possible to ascertain the “Chinese Skills”, Sacha Calmon Navarro Coêlho, in the opinion quoted in RE 416.601-DF, Full, Minister Rapporteur Carlos Velloso, is content to demand “[...] reasonable equivalence between the real cost of services and the amount to which the taxpayer can be compelled to pay [...]”, without specifying, however, what this“ reasonable equivalence ”would be, nor how to determine its configuration. In the case of TFCA, as seen, Sacha Calmon understood that the stipulated values are not excessive, but did not offer objective legal criteria to define this reasonableness between the fee and the cost of the state service, which, repeat, is virtually impossible to measure mathematically, according to Sacha himself.

In this sense, the link between the fee amount and the “reasonable equivalence” reflects, once again, the “biggest mistake” pointed out by Becker, for importing concepts from other areas into law, without making it possible to adequately transpose those concepts. for legal language. What would be “reasonable equivalence” (Sacha Calmon) or “a certain degree of approximation” (Schoueri), or even the “closest possible form” (Spagnol)? They are, of course, extra-legal data, which could (and even should) be taken into account by the legislator, especially as a factor that legitimizes taxation, but it is not data that can be used by legal operators unless legal discussions can be based in mere assumptions (for this one, there is “reasonable equivalence”, for that one, however, the “closest possible form” was no longer adopted ...).

From this perspective, then, the use of rates with fixed values also points to the mistake of intending, legally, to require a correlation between the tax calculation base and the cost of state activity. This correlation does not exist, which is why, in many cases, rates with certain values are adopted, which do not represent the cost of state activity.

3.3 EXTRA-TAXATION AND FEE: CONSIDERATIONS ABOUT CONTRIBUTIVE CAPACITY AND RATE

Another circumstance to be considered in this article, which also influences the understanding of the tax calculation base, is the use of extra- taxation concerning this tax species.

Extra- taxation, is the use of the tax to induce or restrain certain behaviors or acts, making the tax become, in Sacha's words, "an instrument of economic, social, cultural policies, etc." (COÊLHO, 2020, p. 162). The discussion on extra- taxation is not going to be deepened, which is why, here, I reiterate only what I stated in another article: "[...] there is no incompatibility between the extra fiscal use of taxation and the principle of equality. Yes, it is understood that equality, about extra- taxation, is based on other criteria of discrimination, other than just the economic capacity of the taxpayer "(MUZZI FILHO, p. 243). In the same vein, Sacha Calmon Navarro Coêlho, when discussing the constitutional principle of isonomy and that of contributory capacity, makes two considerations: "In certain situations, the legislator is authorized to treat equals unequally, without offending the principle; such are the cases derived from *extra-taxation* and *police power* "(COÊLHO, 2020, p. 162, highlighted in the original).

Therefore, taxes, including the tax, can be used by the legislator as an instrument to discourage certain conduct or to stimulate other conduct desired by the legislator. Two other examples, here, can illustrate the argument being developed.

There are certain activities that, financially, are expensive, that is, they cost a lot, and their remuneration through the fee, if the fee had to remunerate the entire cost, would make the payment of the tax impracticable. The most eloquent example is perhaps the *judicial fee*, required for the provision of the judicial service. The 2019 Accounting Report, of the Government of the State of Minas Gerais, points out that the collection of the *judicial fee*, in that year, was in the order of R$ 218 million (two hundred and eighteen million reais), for a total expense of the Judiciary Power of the order R$ 6.6 billion (six billion and six hundred million reais). Even if the resources resulting from the *judicial inspection fee*, required about public records services, which were in the order of R$ 756 million (seven hundred and fifty-six million reais), were added, we would have a total amount of R$ 974 million (nine hundred and seventy-four million reais), or 14.75% of the total expenditure of the Judiciary[8].

See, then, that, if it were a constitutional imperative that the *judicial fee,* obligatorily, had to correspond to the cost of state activity, the need for a substantial increase in the tax would prove to be inescapable. But, since the judicial service is a true constitutional guarantee, the legislator, more than he can, must stipulate modest values, so as not to make the value of the tax prohibitive, thus ensuring effective access to the jurisdiction, under the terms of art. 5, subparagraph XXXV, of CR / 1988 (BRAZIL, 1988).

Another example can be seen in the aforementioned fees for the *issuance of a weapon and a fee* for the *issuance of passports*. The first was stipulated at R$ 1,000.00 (one thousand reais), with annual renewal, while the issue of a passport costs R$ 257.25, with a 10-year renewal[9]. The discrepancy between the values (and the validity periods of the documents)

8 Information from the Minas Gerais State Accounting Report, fiscal year 2019, is available at: http://www.fazenda.mg.gov.br/governo/contadoria_geral/demontracoes_contabeis/relatorios_contabeis/relatoriocontabil2019.pdf

9 According to art. 38, subparagraph I, of the Travel Documents Regulation, approved by Decree No. 5,978, of December 4, 2006, with subsequent amendments.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 313-327 • 2020

makes it possible to affirm, without much effort, that the *fee for the expedition of the possession of the weapon* had its value exacerbated because government policy does not favor the use of weapons by the population, using the tax as a strategy to discourage this use of weapons. On the other hand, since there is no intention to discourage Brazilians from traveling abroad, the value of the *fee for issuing passports* is substantially lower, notably when comparing the validity period of the documents in question. Both rates are used for extra-fiscal purposes, and there is certainly no financial equivalence between the cost of the respective state activities and the (certain) amounts required by the tax law.

If, however, it is mandatory as a legal requirement that the rates are necessarily stipulated, according to the cost of state activity, the possibility of having extra-fiscal employment of the tax species is lost, because it could never vary due to policies public policies adopted by the State.

It should be noted, in passing, that the issue could be further developed from the perspective of the principle of contributory capacity. Although CR / 1988, referring to the contributory capacity, provides that the "taxes [...] will be graduated according to the economic capacity of the taxpayer" (art. 145, § 1) (BRAZIL, 1988), the STF has already decided that this principle of contributory capacity can also be applied about fees. The theme goes beyond the objective of this article, noting Werther Botelho Spagnol that the "question is plausible", having not been "still satisfactorily appreciated by the STF" (SPAGNOL; FERRAZ; GODOI, 2014, p. 211).

Werther Botelho Spagnol explains that CR / 1988, when linking the contributory capacity to taxes, part of the finding that the taxable event relates to the taxable person, making it necessary, then, to consider the contributory capacity of this taxable person. The same phenomenon would not be configured concerning rates, because the facts that generate these are state activities, which do not reflect the taxpayers' ability to pay (SPAGNOL; FERRAZ; GODOI, 2014, p. 263). However, Spagnol recognizes that the "residual and extraordinary" use of contributory capacity, "as in the case of granting an exemption, in favor of the poorest, of fees linked to the exercise of fundamental rights (exemption from court fees for example)" (SPAGNOL; FERRAZ; GODOI, 2014, p. 263)[10].

Despite his reservations, Werther Spagnol cannot fail to record, with criticism, that "on several occasions the STF's jurisprudence has manifested itself in the sense of agreeing that the legislator uses economic capacity as a criterion for grading rates", citing some decisions judicial (SPAGNOL; FERRAZ; GODOI, 2014, p. 263/264).

Before the literality of art. 145, § 1, of CR / 1988, the use of contributory or economic capacity seems to be inappropriate. However, it can be replied that CR / 1988 determines that the contributory capacity *should be* used in taxes, but does not prohibit its use, at the discretion of the legislator, in other tax species (BRAZIL, 1988). Thus, if taxes are *to be* graduated according to the contributory capacity, there is no explicit prohibition on the use of contributory capacity concerning fees (or other taxes), it is reasonable to maintain that they, the fees, *may be* graduated according to the contributory capacity.

And one could also invoke Roberto Ferraz's more detailed lesson that "the contributory capacity applies to all taxes, but in each tax in a unique way, specific to that tax" (FERRAZ,

10 I emphasize that, in my opinion, the example used by Werther Botelho Spagnol, contemplates the hypothesis of tax immunity (article 5, subparagraph LXXIV, of CR / 1988), but, of course, there are several cases of exemption about fees, almost always contemplating needy people, in the application of the principle of contributory capacity.

2013, p. 202). It should be noted that Roberto Ferraz understands that the basis for calculating the fees must be "the cost of the state activity that authorizes the institution" (FERRAZ, 2013, p. 203), but still does not rule out eventual use of the contributory capacity *concerning*, not only at rates but at all other tax species.

As has been said, however, this work does not follow this path of argument, although it may unveil new and interesting horizons. Within the limits outlined here, the possibility of using the fee to serve other purposes besides mere fundraising, which exists and can be verified in several cases besides those exemplified here, is another circumstance that invalidates the thesis that the fees should correspond to the cost of state activity. Often, due to the high cost of state activity, it will not be recommended that the fee reflect this cost, under penalty of making access to state activity extremely difficult. In other cases, however, although the cost of state activity is revealed to be low, the exacerbation of the rate may be justified as a deterrent to unwanted conduct by public policies adopted. Then, plaster the value of the fee at the cost of state activity, because supposedly so determined by the CR / 1988, it is to exclude the legitimate use of extra-fiscality concerning fees, which allows us to reaffirm that it is not necessary, legally, that the tax base calculation of the fee corresponds to the cost of the state activity.

Already closing this topic, it is worth recalling an old lesson from Geraldo Ataliba regarding this repeated statement that the tax must reflect the cost of state activity:

> The legal concept of fee is very simple. The idea of remuneration, consideration, payment, provocation, benefit, proportionality or divisibility of the service to which it eventually corresponds does not belong.
>
> All of these notions belong to the science of finance. They are pre-legal, for that very reason. These are considerations that must be taken into account by the legislator when instituting the tax.
>
> They are not transported to the right. They do not have the most insignificant legal expression (ATALIBA, 1969, p. 205).

In his argument, Geraldo Ataliba reiterates that the "tax measure does not influence the legal nature of the tax exemption or even its enforceability" (ATALIBA, 1969, p. 206). And he concludes: "Faced with a 'disproportionate' rate - non-legal quality - all you can do is criticize the legislator and consider it unfair. But in any case the tax must be paid. It is legal" (ATALIBA, 1969, p. 206).

In the same vein, in a classic work on the subject, Bernardo Ribeiro de Moraes also rejects the supposed need for taxes to be calculated, always, based on the cost of state activity:

> The relationship between the measure of the fee and the cost of the service or the state activity does not influence the concept of the fee. The amount of the fee is not an element that characterizes its legal nature. On the other hand, there is no formula capable of finding the real cost of state activity, which is difficult to ascertain (MORAES, 1976, p. 182).

It is insisted that what is sustained does not imply that there are no quantitative limits on fees. There are clear political, social, and economic limits, which must be considered by the legislator, who does not act only based on legal criteria, as Bernardo Ribeiro de Moraes notes, "[...] it would not have felt, the notorious disproportion between the cost of the service and the global collection of the respective fee "(MORAES, 1976, p. 185). What is sustained is that, in the light of CR / 1988, there are no legal criteria in the interpretation set out in Binding Prece-

dent No. 29 / STF that may obligatorily link the value of the fee to the cost of state activity, with insufficiently subjective criteria being insufficient. as the possible "reasonable equivalence", or "a certain degree of approximation"[11].

4. FINAL WEIGHTING

Based on the arguments set forth here, it is possible to affirm, by way of final consideration, that the constitutional text does not require that the fees have values linked to the cost of the respective state activities, given the setting of an only negative parameter by art. 145, § 2, CR / 1988: rates *cannot have* their own tax calculation base (BRAZIL, 1988).

The guidance signed by the STF, in its Binding Summary No. 29, reinforces what has been stated, preventing it from being necessary, for the legal validity of the fee, that its value be related to the cost of the state activity, since the said binding summary legitimizes the use, by the legislator, of quantitative criteria linked to the taxable person and unrelated to the cost of state activity.

The argument also reinforces the well-known mechanism for stipulating the right amount for fees, values that do not need to be correlated with the cost of state activity, not least because it would be very difficult to stipulate, at the legislative level, the amount of the cost of state activity, which it will vary, not only due to its internal costs but also due to the demand of the state activity itself.

Moreover, the extra-fiscal use of fees is a circumstance that also avoids the requirement that the cost of state activity is the necessary parameter for stipulating the *"quantum debenture"*. There are state activities that, being extremely expensive, would become unfeasible for most of the population, if the required fee included that high cost, as with the *judicial fee*. On the other hand, there are state activities whose cost is not so high, but public policies adopted may recommend increasing the rate, to discourage the use of such state activities, as occurs concerning the *fee for the expedition of the possession of the gun weapon*.

Finally, the lack of legal determination linking the value of the fee to the cost of state activity does not mean that, in the pre-legislative scope, political, social, and economic considerations cannot encourage the legislator to consider, rather, the "approximation" between the value of the tax and the cost of state activity, as a mechanism to legitimize the tax. It is even recommended that the legislator do so, but, after all, to paraphrase Geraldo Ataliba (ATALIBA, 1969, p. 206), before an "expensive" rate, the tax law offers few alternatives to the taxpayer, who can even criticize the legislator, but will have to pay the required amount, because it is "legal".

11 The legal limit that could be invoked, in this tone, would be the prohibition against confiscation (art. 150, subparagraph IV, of CR / 1988), a theme, however, which is also very different from the objective of this article, even due to the difficulties of understanding and application of that fence.

REFERENCES

ATALIBA, Geraldo. **Apontamentos de Ciências das Finanças, Direito Financeiro e Tributário.** São Paulo: Revista dos Tribunais, 1969.

BALEEIRO, Aliomar. **Direito tributário brasileiro.** 12 ed. atualizada por DERZI, Misabel Abreu Machado. Rio de Janeiro: Forense/GEN, 2013.

BECKER, Alfredo Augusto. **Teoria geral do direito tributário.** 2 ed. São Paulo: Saraiva, 1972.

BRASIL. *Código Tributário Nacional.* Texto promulgado em 25 de outubro de 1966, com as alterações adotadas pelos Decretos nº 82/1966 e n°6.306/2007. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm. Acesso em: 31 ago. 2020.

BRASIL. Constituição (1988). *Constituição da República Federativa do Brasil.* Texto constitucional promulgado em 5 de outubro de 1988, com as alterações adotadas pelas Emendas Constitucionais nos 1/1992 a 91/2016. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Acesso em: 11 set. 2020.

BRASIL. Supremo Tribunal Federal. *Súmula nº 595*. Disponível em: https://jurisprudencia.stf.jus.br/pages/search/seq-sumula595/false. Acesso em: 19 dez. 2020.

BRASIL. Supremo Tribunal Federal. *Súmula nº 665*. Disponível em: https://jurisprudencia.stf.jus.br/pages/search/seq-sumula665/false. Acesso em: 19 dez. 2020.

BRASIL. Supremo Tribunal Federal. *Súmula Vinculante nº 29*. Disponível em: https://jurisprudencia.stf.jus.br/pages/search/seq-sumula778/false. Acesso em: 19 dez. 2020.

BRASIL. Supremo Tribunal Federal. *RE 416601 / DF*. RECURSO EXTRAORDINÁRIO

Relator(a): Min. CARLOS VELLOSO. Julgamento: 10/08/2005. Publicação: 30/09/2005

Órgão julgador: Tribunal Pleno. Disponível em: https://jurisprudencia.stf.jus.br/pages/search/sjur10094/false. Acesso em: 19 dez. 2020.

BRASIL. Supremo Tribunal Federal. *ADI 453 / DF*.AÇÃO DIRETA DE INCONSTITUCIONALIDADE. Relator(a): Min. GILMAR MENDES. Julgamento: 30/08/2006. Publicação: 16/03/2007. Órgão julgador: Tribunal Pleno. Disponível em: https://jurisprudencia.stf.jus.br/pages/search/sjur6914/false. Acesso em: 19 dez. 2020.

CARVALHO, Paulo de Barros. **Curso de direito tributário.** 30 ed. São Paulo: Saraiva, 2019.

COÊLHO, Sacha Calmon Navarro. **Curso de direito tributário brasileiro.** 17 ed. Rio de Janeiro:Forense/GEN, 2020.

FERRAZ, Roberto. **Taxa – Instrumento de sustentabilidade.** São Paulo: Quartier Latin, 2013.

KFOURI JR., Anis. **Curso de direito tributário**. São Paulo: Saraiva, 2012.

MACHADO, Hugo de Brito. **Curso de direito tributário.** 38 ed. São Paulo: Saraiva, 2017.

MINAS GERAIS, Governo do Estado. **Relatório Contábil do Estado**, exercício de 2019. Disponível em: http://www.fazenda.mg.gov.br/governo/contadoria_geral/demontracoes_contabeis/relatorios_contabeis/relatoriocontabil2019.pdf. Acesso em 19 dez. 2020.

MORAES, Bernardo Ribeiro de. **Doutrina e prática das taxas.** São Paulo: Revista dos Tribunais, 1976.

MUZZI FILHO, Carlos Victor. Princípio constitucional da igualdade e os impostos estaduais. *In:* **Princípio da igualdade: uma abordagem multidisciplinar.** RESENDE, Antônio José Calhau de; BERNARDES JÚNIOR, José Alcione (coordenadores). Belo Horizonte: Assembleia Legislativa do Estado de Minas Gerais, Escola do Legislativo, Núcleo de Estudos e Pesquisas, 2018, p. 233-257.

SCHOUERI, Luís Eduardo. **Direito tributário.** 7 ed. São Paulo: Saraiva, 2017.

SPAGNOL, Werther Botelho; FERRAZ, Luciano; GODOI, Marciano Seabra de. **Curso de direito financeiro e tributário.** Belo Horizonte: Fórum, 2014.

Received/*Recebido:* 01.11.2020.

Approved/*Aprovado:* 26.12.2020.

THE IMPLICATIONS OF GOOD FAITH AS A COGENT RULE IN INTERNATIONAL PROCEDURAL AGREEMENT IN LIGHT OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNACIONAL SALE OF GOODS OF 1980

AS IMPLICAÇÕES DA BOA-FÉ COMO REGRA COGENTE NOS NEGÓCIOS INTERNACIONAIS À LUZ DA CONVENÇÃO DE VIENA SOBRE COMPRA E VENDA INTERNACIONAL DE MERCADORIAS DE 1980

Renata Alvares Gaspar[1]
Mariana Romanello Jacob[2]

ABSTRACT

This article aimed to analyze the objective good faith in international procedural agreement in light the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG). To perform this analysis, the study started, firstly, from the premise that good faith in the globalized era has been undergoing as a response of Law to the changes imposed by international commerce, researching its possible reasons. Once the motivations of such changes were clarified, the current configuration of good faith in globalized commerce was focused on, delimiting the institute in multiconnected relationships, which gathered distinct and

1 Post-Doctoral Student at PPGD - Federal University of Uberlândia, with CNPq Scholarship. PhD in Law from the University of Salamanca-España (2008) and Master in Latin American Studies (in Political Science/Human Rights) from the same University (2005). Both titles were revalidated by USP - University of São Paulo. Legal Consultant for MERCOSUR in the Focem Jurisprudential Database Project (2008). Vice-President of Communication and Publications of ASADIP - American Association of Professors of International Law (2017-2019). Researcher member of the International Civil Procedure Research Network (UFU, Coordinator Professor Dr. Thiago Paluma). Author of books and scientific articles. Develops research projects in the scope of International Civil Procedural Law. Leader of the Study Group Law, Globalization and Citizenship. Member of the Brazilian Academy of International Law. Legal Consultant active in the areas of Private International Law and International Legal Cooperation. ORCID id: http://orcid.org/0000-0002-2600-3686. E-mail: renataalvaresgaspar@gmail.com.

2 Gratuated in Laws from the Pontifical Catholic University of Campinas. Member of the Study Group "Law, Globalization and Citizenship" under the leadership of Prof. Dr. Renata Alvares Gaspar. Member of the American Association of Private International Law (ASADIP). Lawyer. E-mail: mariana.romanello@gmail.com.

How to cite this article/Como citar esse artigo:
GASPAR, Renata álvares; JACOB, Mariana Romanello. The implications of good faith as a cogent rule in international procedural agreement in light of United Nations Convention on Contracts for the Internacional Sale of goods of 1980. **Meritum Law Journal**, Belo Horizonte, vol. 15, n. 4, p. 328-348, 2020. doi: https://doi.org/ 10.46560/meritum.v15i4.6963.

sometimes almost opposite legal systems; therefore, CISG was essential, as it is an emblematic instrument of a standardization of the International Commercial Law, whose structuring allowed a relevant flexibility to the various systems that handle it. Considering that a specific cut of good faith was made from the CISG, the inductive method was applied to understand the impacts of this new configuration on transnational affairs in general, in order to understand the impacts that this new configuration has been generating. The conclusion focuses on this understanding and, in particular, on what is required from the contracting parties in light of this rethinking. Thus, the bibliographical research was used, mostly doctrinaire, however with some contributions from the normatization and dialogue of international sources, as well as jurisprudence, especially to corroborate the induction method.

Keywords: Good Faith. International Commercial Law. International procedural agreement. United Nations Convention on Contracts for the International Sale of Goods.

RESUMO

Este artigo teve por objeto a análise da boa-fé objetiva nos negócios internacionais à luz da Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias de 1980 (CISG, sigla em inglês). Para realizar tal análise, o estudo partiu, primeiramente, da premissa de que a boa-fé da era globalizada sofreu e vem sofrendo transmutações como resposta do Direito às mudanças que o comércio internacional impõe, pesquisando suas possíveis razões. Aclaradas as motivações de tais mudanças, focou-se na atual configuração da boa-fé no comércio globalizado, desenhando-se os alcances e limites do instituto nas relações multiconectadas, reunidoras de sistemas jurídicos distintos e, às vezes, quase opostos; para tanto a CISG foi essencial, pois é instrumento emblemático de vocação uniformizadora do direito contratual internacional, cuja estruturação enseja uma flexibilização relevante aos diversos sistemas que a manuseiam. Para os fins do presente estudo, adotou-se, portanto, o método indutivo, eis que se parte de um recorte determinado, qual seja, a boa-fé à luz da CISG, para compreensão dos impactos que esta nova configuração da boa-fé gerou – e vem gerando – nos negócios transnacionais de forma geral. A título de conclusão foca-se nessa compreensão e, em especial, ao que se exige dos contratantes à luz dessa repaginação. No que toca ao procedimento, fez-se uso pesquisa bibliográfica, majoritariamente doutrinária, porém com alguns contributos da normatização e diálogo de fontes internacionais, bem como da jurisprudência, sobretudo para corroborar a indução ora adotada como método.

Palavras-chave: *Boa-fé objetiva. Direito do comércio internacional. Negócios jurídicos internacionais. CISG.*

1. INTRODUTION

The good faith, as a true objective expression of human conduct, as well as a form of externalization of ethics and standardization of conducts considered to be loyal[3], accompanies commerce long before it approaches to the borders of National States and, later, dissociates itself from them with the globalization movement.

As can be seen, even in Germanic medieval times[4], the objective feature of good faith was outlined by acting in the spirit of *treu und glauben*, gradually deviating from the subjective

3 From the perspective of interpretation arising from German Law and the connotation attributed in the countries of Common Law, Judith Martins-Costa (MARTINS-COSTA, 1995, p. 120), quoting Ernesto Wayar (WAYAR, Volume I, p. 19), describes a composition of elements of what objective good faith means in general: "(. ...) it means (...) model of social conduct, archetype or legal standard - according to which 'each person must adjust his own conduct to this archetype, acting as an upright man would act: with honesty, loyalty, probity'".

4 António Menezes Cordeiro (MENEZES CORDEIRO, 2011, p. 162-176) teaches that the oaths of honor during the Germanic medieval period are a landmark for the objective meaning of good faith.

sphere and readjusting the focus to the externalized conduct, regardless of intimate elements of the subject.

As it happens, multifaceted by definition - which reflects, in essence, human behavior - and a legal instrument increasingly recognized as capable of adding security to commercial relations, the objective good faith, over time, has been resized in relevance and, consequently, in imperativeness. And the vicissitudes and idiosyncrasies of globalization were, in particular, a potentiating context of this mutation.

It happens because the sharp and accelerated dissemination of commerce on a global scale, the virtualization of commercial relations, the consequent encounters - and clashes - of pluralities that are typical of cross-border trade and the huge economic transactions that have resulted from these new possibilities - added to the economic crises caused throughout this set – shapes the scenario where the objective meaning of good faith has gained a dimension not experienced until that time: good faith acquires, in this context, *locus* to reshape itself from legal principle to cogent rule; in other words, it ceases to merely "illuminate" the path and becomes the path itself - at least, the authentically legitimate one.

The United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) is an emblematic expression of this mutation, because it enshrines objective good faith in its Article 7 expressly and unequivocally: "(1) In interpreting of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application, and the observance of good faith in international commerce."[5].

By doing so, as a classic instrument of hard law, it positions good faith in a status of cogency and, therefore, mandatory compliance. This resignifies the role of good faith in legal affairs: under the aegis of this Convention, good faith is a norm of mandatory rule of compliance; and, as such as, an important limit to the autonomy of the will.

The dimensions gained by objective good faith in contemporary contracts was significant. Because of that, beyond the hard law - where cogency is the defining element - even soft law[6] instruments, so precious to the dynamics of cross-border trade and so manageable in the name of autonomy of the will, were impacted by this imperativeness to the point that they are only forbidden to remove the good faith clause.

The UNIDROIT Principles, for example, a classic instrument of soft law, although enshrining in its first article the freedom of contracting and autonomy of the will, provide, in Article 1.7, the duty of objective good faith as an unavoidable or even manageable obligation to contract-

5 The content of this article and other provisions of the CISG throughout this text are transcribed from Presidential Decree No. 8,327/2014, which internalized the convention to the Brazilian legal system. Considering that the Portuguese language is not part - until the publication of this work - of the six official languages of the United Nations (UN), and therefore there is no version in Portuguese from the institution itself, it choosed to extract the Brazilian legal text.
The soft law is the source of Law that, in the light of transnormativity, dialogues with the hard law, making its provisions more flexible and serving as an instrument to achieve the best interpretation of the legal rule. The soft law consists, therefore, of principles, model laws and other instruments that subsume these characteristics in international commerce. To deep in the theme, see Lauro da Gama e Souza Júnior. (SOUZA JÚNIOR, 2006, p. 245-250).

6 The soft law is the source of Law that, in the light of transnormativity, dialogues with the hard law, making its provisions more flexible and serving as an instrument to achieve the best interpretation of the legal rule. The soft law consists, therefore, of principles, model laws and other instruments that subsume these characteristics in international commerce. To deep in the theme, see Lauro da Gama e Souza Júnior. (SOUZA JÚNIOR, 2006, p. 245-250).

MERITUM LAW JOURNAL • v.15 • n.4 • p. 328-348 • 2020

ing parties: "(1) Each party must act in accordance with good faith and fair dealing in international commerce. (2) The parties may not exclude or limit this obligation."[7]

In this context, the Law could not remain unrelated and legal norms started to be interpreted considering good faith not only as a principle, however also as a legal rule of necessary applicability. This transmutation gives rise to a resignification of the autonomy of the will in the context of international contracts, causing, in cascade, effects in contemporary transnational deals: the autonomy of the will is no longer unlimited.

This new conception of contracting and, therefore, of the legal affairs is even more challenging, considering that good faith implies, inexorably, a business action portrayed in the legal appreciation of trust and cooperation - even if in minimal, or even passive, parameters.

This scientific study aimed to contribute to the materialization of this role of good faith in transnational procedural agreement, proposes, therefore, to analyze the changes perceived by good faith until its current format, understanding them, both in cause and consequence.

To this end, this article is structured so as to analyze and, as much as possible, respond to the contemporary problems surrounding good faith. It begins by studying the mention "legal mutation" of objective good faith, as well as its current status in cross-border trade relations, under the aegis of a specific cut: the CISG.

Next, it studied some of the implications that the resignification of good faith raises to the current procedural agreement, in other to assess its possible impacts on the contracts derived therefrom, and what, consequently, is required from international commerce players on behalf of objective good faith. It should be noted that this analysis occurred, in particular, by conclusions obtained in the scientific work developed by Renata Alvares Gaspar and Mariana Romanello Jacob (ALVARES GASPAR; JACOB, 2015)[8], concerning the pursuit of common material outline of objective good faith in transnational commerce that, being plural, demands legal certainty through points of convergence as to what is considered objective good faith in international commerce.

At the end of this scientific effort, there is a reflection in the form of conclusions about the direction in which the rethinking of objective good faith leads in the context of legal relations and, furthermore, its implications in commercial relations of the global world, particularly in the behavior of the subjects that generate and participate in these relations.

For this purpose, the inductive method was used, which shaped the efforts to promote an analysis performed first on a specific cut, the good faith by CISG, so that it could be expanded, from that point on, to an assessment of general conclusions, which are the implications of good faith in current transnational procedural agreement. This has demanded to know, in parallel, the construction of the limitation of the autonomy of will of the parties, precisely, in the contractual sphere; which, in principle, may appear as a paradox. The result of this research,

7 In the official comments to the UNIDROIT Principles (available on: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf). Accessed on 06/06/2020) the annotation regarding the mandatory nature of the principle is elucidative and corroborates the understanding that this study sustains: "The duty of the parties to act in accordance with good faith and fair dealing is of such a fundamental nature that the parties may not contractually exclude or limit it." (p. 20-21, our translation of the English original).
This is a research concluded by the referred authors as the result of the Scientific Initiation institutional research (year 2014-2015) by the Pontifical Catholic University of Campinas, modality FAPIC/Rectory scholarship.

8 This is a research concluded by the referred authors as the result of the Scientific Initiation institutional research (year 2014-2015) by the Pontifical Catholic University of Campinas, modality FAPIC/Rectory scholarship.

then, is presented in this text as an academic contribution to the debate. As a method of procedure, it was adopted bibliographical research, mostly, doctrinaire, however with some contributions from the standardization and dialogue of international sources, as well as from jurisprudence, especially to corroborate the induction now adopted as a method.

It is also important to mention that this study is built within the method framework of human rights, understood here as a civilizing effort for the promotion and maintenance of social - and especially commercial - relations under the protective mantle of human dignity[9].

This method perspective implies affirming that, in a globalized world, where differences are on the agenda - which means that the actors of this global society are constantly characterized for their cultural and, therefore, legal differences - Law experiences daily challenges, not only to guarantee the legal certainty of transnational deals, however also, to ensure, in a conditional manner, that people - and their dignity do not turn the freedom to contract into a legal mechanism to violate their condition as people in the current society, marked by the expansion of cross-border trade, which on many occasions treats people and their rights, as elements of negotiation, in calculations of costs and profits.

It is, therefore, a matter of thinking and studying Law through a method perspective that gives new meaning to individual rights based on collective rights[10]. This article, supported by (underpinned on) this redefinition, uses the aforementioned method view with a focus on instrumentalizing the Law to reach points of convergence between the subjects and the plural systems, without loosing the right to difference, in an attempt to, provide balance and equity in transnational legal relations, to which every subject has a right, as regardless of differences and pluralities are always and inherently equal in dignity.

At the same time, when reflecting, at the end of this research, on what the current limits of objective good faith in international deals represent, the choice for this human-rights-based method allows conclusions that transcend the sphere of legal relations that are strictly a matter of negotiation, and for this reason, its adoption as a method conductor of the study.

9 This method was used by Renata Alvares Gaspar (ALVARES GASPAR, 2016) who, when dealing with mixed arbitration for foreign investment, finds that the arbitrator, arbitration tribunal or judge cannot disregard, when applying the appropriate legal regime, the right to development as a human and fundamental right, so that this perspective should method guide both the hermeneutic reading of the law, as well as its application.

10 This point of view, mainly, on the inferences obtained from the study developed by Jürgen Habermas (1997) who, when dealing with politics, power and Law, relates, among other aspects and concepts, private and public autonomy, and human rights in the perspective of their legitimacy in a democratic system. To deepen the theme, see this topic Jürgen Habermas (HABERMAS, 1997).

2. GOOD FAITH: FROM REGENT PRINCIPLE TO COGENT NORM

From a historical[11] perspective, as seen[12], it was not in contemporary times, nor with the expansion of global and multiconnected commerce, that a mutation in the principle of good faith as a rule governing legal relationships of a commercial nature was demanded.

As it happens, cross-border trade, in the roots of *lex mercatoria*[13], especially due to the process by which it is shaped - customs and traditions -, contributes significantly to the construction of a good faith behavior as a duty in relations. Such contribution, even before the CISG, had been expressly stated, "the principle of good faith had been applied to international commerce relations as a 'general principle of law of the *lex mercatoria*'" (MARTINS-COSTA, 1995, p. 121).

In the same view, Frederico Eduardo Zenedin Glitz, when dealing with customs, traditions and business practices, brings, as an example, good faith as a kind of ethics proper to the merchant class and its status as an international custom within these relations:

> Simply imagine for example, that the principle of good faith in deals has been identified as a typical social convention among merchants (as if it were an ethic restricted to a class, and, hence, other statements: guaranteed by the "mustache's thread" and "gentlemen's agreement"), becoming typical international custom (for example, enshrined by the CISG) [...] (Our translation from Spanish) (GLITZ, 2012, p. 156).

The ethics imposed by good faith in mercantile relations from that time onwards allows to infer that, judging by the commercial practices verified in the context, it was known that leaving the parties of a procedural agreement to the free will of an unrestricted freedom can lead, due to the power games that shape such relationships, to the oppression of one of the agents, who, for various reasons, sees their freedom minimized, if not totally subjugated, by the exclusive will of the other, who, for extra or meta-legal reasons, imposes, in a "natural" way, its deals decisions over others.

Therefore, it is needed to repeat, for emphasis, that good faith in its objective feature, as a guiding principle of legal relations in the international commerce scenario, has not originated in contemporary times, nor has it resulted from the numerous consequences of globalization. Nevertheless, the context of globalization has significantly contributed for the meaning and role of the principle of good faith to be modified in relevance and cogency, no longer merely guiding human behavior in these relationships, however becoming a general duty of behavior materialized in a legal rule.

---

11 It should be noted that it is not the scope of this research to undertake an immersion in the history of good faith, it is also reckless to risk, in these brief lines. For this purpose, there are many eminent works that have dealt with this theme in the scope determined. To deep in the theme, see, for example: Judith Martins-Costa (MARTINS-COSTA, 2000); António Menezes Cordeiro (MENEZES CORDEIRO, 2011); Edward Allan Farnsworth (FARNSWORTH, 1963).

12 See note2.

13 The existence of a "first", a "new" and even of the *lex mercatoria* itself has no pacific opinion in the doctrine. Frederico Eduardo Zenedin Glitz (GLITZ, 2012, p. 126-132), for example, systematizes a series of distinctions between the first and contemporary *lex mercatoria*. However, since this is not the object of this study, this discussion will not be held, only admitting the existence of a specific regulation for transnational businessmen, an established theme for jurists, whose terminology, in this research, it is not necessary to explore.

When the expansion of cross-border trade reaches global scales and starts to unite or connect distinct - sometimes diametrically opposed - cultures, in an interconnection of unprecedented pluralities, good faith as a limit to party autonomy starts to be challenged so that some commerce agents are not subjected to others with their will based on greater economic power.

It happens because it is known that one does not contract in Brazil as one contracts in Japan, just as one does not contract in Morocco as one contracts in the United States. This plural scenario, therefore, also brings about a new level of legal uncertainty, which, as always, demands a response from the Law.

Undoubtedly, one of the answers – and, perhaps, the most complex and important - was the redefinition of the concept of good faith, causing the mutation of its nature to endow it with coercion, in a crucial point, once again, unknown in magnitude and in proportion - in the history of Private International Law. It no longer merely illuminates the path and becomes the very path to be followed, through a new conception, no longer being that one linked to subjective decisions of the actors of commerce, but rather, linked to the objective behavior of such actors.

Despite the efforts, over time, in the attempt to limit the unrestricted autonomy of the will of the parties and the opportunism that this limitlessness generates in commerce acts across borders, the contemporary turning point lies in the legal materialization - and this is where it begins the essence of this scientific work - Vienna Convention on the International Sale of Goods of 1980. This document is considered the historical-legal effort of the cogency in a uniform manner of the consolidated customary practices of international commerce, also receiving, as Vera Jacob Fradera (FRADERA, 2011: 2-3), inspiration from other written legal models, such as German Contract Law and the Uniform Commercial Code of the United States, under the auspices of the United Nations Commission on International Trade Law (UNCITRAL)[14]. This normative instrument, as taught by the author, is the result of a doctrinal and political movement arising, among other issues, from the need to “create solutions to adapt to an environment where the diversity of legal systems is always present and economic and political instability is, more often, the rule” (FRADERA, 2011, p. 2).

As an instrument of transnational vocation and, therefore, allegedly compatible with different legal systems, the CISG is, currently, the largest codified compilation by hard law[15] of uniform rules of international commerce, with a high degree of acceptance (considering the number of signatories[16]). Moreover, being a Convention, its cogency for those who ratify it is inescapable[17] and, therefore, less susceptible debates when compared to customs and traditions, which, even as rules, leave more room for volatility and substantive discussions.

In order to satisfy its foundations, one of the ways offered by the CISG to allow various systems to come together under the same regulation was the adoption of principles and open clauses that admitted, by vagueness, flexibility and identity. Judith Martins-Costa, when ana-

---

14 It cannot forget that UNCITRAL, as an organization linked to the UN, is responsible for the development of international commerce from the UN's point of view, that is, as an instrument for the maintenance of world peace, a perspective that is applied throughout this work.

15 It is emphatically said "codified by hard law" to distinguish it from the "codification" pleaded by the new *lex mercatoria* through soft law instruments, to which the CISG does not belong, since it is a classic hard law instrument.

16 Ninety-three signatories until the date of publication of this paper. List of signatories available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status. Accessed on: 03 jun. 2020.

17 Excepted only if, in a concrete case, the parties adopt its Article 6, which allows the CISG to be set aside, even if it is a ratified treaty: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”

lyzing some of the factors that make the CISG a successful source for the development of a uniform Contract Law, emphasizes that:

> Among these various vectors is, equally, the fact that the Convention has harbored a fertile principiology, in order to allow - by reason of the very character of certain principles that it adopts - its own constant flexibilization, thereby reducing the unalterability that usually marks and stiffens regulatory texts. (MARTINS-COSTA, 1995, p. 118)

One of the open clauses adopted was the objective good faith in Article 7 of the Convention, which requires the interpretation of the CISG to take into account the need to ensure respect for good faith in international commerce. Therefore, in a clear, express, and uniform manner, the international society has decided to adopt an important limit to the will of the commerce actors, which does not go unnoticed by them and by the jurists who dedicate themselves to this area of human experience.

In other words, even with the characteristics of a principle - evoked to perform functions of interpretation, implementation and control (FRADERA, 2011, p. 14), the good faith, definitively objective at this point, gains, with this commandment, status of a cogent rule. It happens because it is determined by a Convention - the classical form of codifying International Law - concluded both to support any player in transnational commerce, regardless of its legal origin, and to limit the actions of more powerful actors, tempted to impose their wishes and desires to the other partners of this game. Therefore, good faith, with the status of a cogent norm at the core of the CISG, becomes, obligatorily, as global as the commercial relations that demanded it.

With coercive nature and as an imperative rule of conduct, good faith, in the relationships regulated by the CISG functions as a guideline and a controller of the parties' behavior. Therefore, it acquires true restraining force of unlimited wills among the agents of commerce.

Under the given circumstances, the list organized by Judith Martins-Costa (MARTINS-COSTA, 1995, p. 121-122) is explanatory in regard to the articles of the Vienna Convention that are impacted by the good faith printed in article 7, concerning the creation of lateral rights and duties of the contracting parties (and, therefore, containment of unlimited postures as argued here). The article. 77[18] is an example. It dictates the duty of cooperation for the good performance of the contract and the assumption of the necessary measures not to increase the damage (which, moreover, is an incorporation of the duty of mitigation, typical of Anglo-Saxon Law).

At the end, the renowned author concludes:

> As it can be seen, the list of duties that result from good faith is extensive and its breach may even lead to the configuration of contractual debt, even when the main obligation is fulfilled. Hence, it constitutes a source of optimization of the contractual conduct, in the view of the full and effective fulfillment of the purpose for which the bond was created, that is the contractual performance. (Author's emphasis) (MARTINS-COSTA, 1995, p. 122)

18 A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 328-348 • 2020

It is worth mentioning that the understanding of good faith as necessary to commerce relations and its consequent coercive imposition does not occur only in the transnational sphere. In the United States, for example, a country belonging to the Common Law, the phenomenon becomes clear with the materialization of the duty of good faith in commerce relations by its codification in the Uniform Commercial Code[19]. Luciano Benetti Timm teaches that the principle of objective good faith "does not properly derive from the Common Law tradition, however from legislation, in other words, from the UCC, paragraph 1-304, combined with paragraph 1-201(20)" (TIMM, 2012, p. 536).

The strength of the right to freedom in this legal system and the contractual relationship based intensely on economic efficiency did not give room to the cooperative and guaranteeing vision of good faith of other legal systems (especially Civil Law and Islamic Law). Harold Dubroff (DUBROFF, 2012, p. 571) notes that, before the adoption of the UCC, the Common Law of most American states had not yet recognized an implicit duty of good faith, and that it was a creation of the New York Common Law (a jurisdiction, not known for its liberal approach to contract interpretation).

Thus, the general imposition of good faith came to occur with the force of rule, in an explicit recognition of its essentiality to procedural agreements[20]. The model law represented a turning point because it included the obligation of good faith within the scope of all commercial contracts and, roughly half a century after the enactment of the UCC, the implied duty of objective good faith eventually became accepted as part of the common law in most states (DUBROFF, 2012, p. 571).

Once understood that, in addition to being an imperative legal rule under the CISG, in a context where its concept and scope are not univocal, as seen by the example above, it is now important to investigate, its scope and limits in international affairs. Such investigation should consider the different perspectives of this legal institute in order to finally enable a universalizing - and/or standardized - concept that is capable of contemplating all the differences and all the protection that this norm is designed to provide. The reason is that no clause in theory and form is authentically valid if it lacks material contours suitable for its practical application.

3. CURRENT REACH AND LIMITS OF GOOD FAITH

As can be seen, faith to a cogent rule takes an emblematic stage in the legal regency of cross-border trade relations, plural by nature. This important step, however, becomes empty if the players in international commerce. It is worth saying, those directly impacted by the provisions of the CISG - do not find, in the good faith stamped in theory, the feature of identity when it is applied to practice; with this, it will lack credibility and, in a "domino effect" and a worst-case scenario, it will lack the legitimacy of its resulting legal rule.

---

19 Model law promulgated in 1951, for National Conference of Commissioners on Uniform State Laws and for the American Law Institute.

20 It should be noted, at this point, that, as Harold Dubroff (DUBROFF, 2012, p. 564-571) teaches, there was indeed jurisprudential recognition of its implicit existence in domestic contracts (the author mentions the case of Kirk La Shelle Co. v Paul Armstrong Co., 1933, often cited as the main initial case regarding the duty of good faith), however in a more punctual and localized manner.

It is known as one of the worst scenarios because, especially in a context where consensus is the maximum, the absence of legitimacy practically causes the loss of concrete validity of the norm, since, even when defined on a treaty or convention, if its content is not known, there is no way to expect its practice. Thus, a scenario could be drawn in which the parties would tend to apply article 6 (see note 15) with the intention of distancing themselves from the Convention.

At this point, a brief parenthesis is important to emphasize that the criterion of the legitimacy of the norm as an essential element of its validity (transcending the mere legality) is proper to an insurer view, adopting, ultimately, the protection of human dignity (in accordance with the method conductor applied to this study.

It happens because, from other perspectives, the legitimacy criterion is not necessarily applied. According to Ricardo Manoel Oliveira Morais and Adriana Campos Silva, for example, the "fact that liberalism adopts the criterion of utility as the principle of valuation means that no instance, not even infra-constitutional legislations, has to submit to the criterion of legitimacy"[21] (MORAIS; SILVA, 2017, p. 240).

From the perspective of legitimacy, therefore, it is necessary to find a concept for the good faith stamped in the CISG as a legal rule, a concept that achieves such legitimacy among all parties adhering to it.

For this, it is important that this identification transcends its generic material contours in order to find the specific and carefully established legal circumstances, which safeguards legitimacy, due to mutual recognition, of all actors involved, considering the essential internationality element of this Convention, so that it can effectively make sense. With this, good faith is endowed with legitimacy for all actors who have to apply it as a legal rule for their deals, shielding it, as much as possible, from distortions arising from the diversity of legal systems in question.

In this regard, Francisco Augusto Pignatta, when dealing with the general application of the rules of the CISG, is clear when he says that "to obtain the uniform application of the Convention, the judge should be attentive to international notions of a uniform character and avoid notions of national character contained in its national Law." (PIGNATTA, 2011, p. 23).

In other words, it seems fundamental, for the proper functioning of the CISG, to identify the real conduct that, in the practices of commerce considered in the plurality of the International Community[22] , any actor recognizes as such and, therefore, identifies as worthy of social and legal observance in the name of objective good faith, in cross-border trade relations.

Also, this task loses its simplicity if objective good faith is understood, for the players in international commerce, as an important limit of their alleged unrestricted autonomy in the procedural agreements.

21 It is not meant that other viewpoints do not also aim at the protection of human dignity, according to the structuring scientific means themselves. It is only intended to clarify that, given the method applied to this work, the adoption of the criterion of legitimacy of the norm is mandatory.

22 The expression. International Community is used, in this research, in accordance with the progress of studies on the subject. The term International Society was used according to the Westphalian paradigm of coexistence among States, this paradigm has been overcome (TOMUSHAT, 1999, p. 59-63).

It is possible to affirm - based on the scientific work developed by Renata Alvares Gaspar and Mariana Romanello Jacob (ALVARES GASPAR; JACOB, 2015)[23] - that the answer is in the common denominators of the various legal systems existing in the International Community, which reveals that there is a common behavior among the players involved in international commerce, which can be found both in the observance and in the unfolding of a specific method.

The method adopted by the mentioned authors refers to the study of systems, considering the specificities of its internal regulations on the analyzed theme under analysis, based on the method of diatopical hermeneutics, popularized by Boaventura de Sousa Santos (SANTOS, 1997)[24]. Such method, as known, is understood, in the context of this research, to maximize the differences between the legal systems under analysis and, conversely, to identify their convergences.

As the referred scientific work reveals, this is not an easy task, since its accomplishment necessarily implies an observation of the legal systems from "within" and not the contrary. It happens because, from the outside to the inside, one would research, from the beginning, one system based on another, provoking a comparative study, which, for the intended purposes, would not be adequate, because it would lead to an analysis based on preconceptions imprinted, by the researcher, from the dogmas of their own system. This method approach requires important precautions, under the risk of being offensive - in substance and in form - to the truths materialized in the legal systems analyzed.

After, therefore, a detailed research about the conception of good faith in the mentioned scientific work[25], the authors found, as a common denominator, the legal figure of abuse of right, which is considered by the current that develops it from good faith and also studies it in its objective meaning. This legal phenomenon, as known, reflects a negligent posture regarding good faith: which means those who act in abuse of rights act commissively or omissively in a way that is contrary to objective good faith.

On the other hand, it is understood that the regular exercise of the right has, for different[26] legal systems, the same connotation: the one who acts regularly within the limits of the right itself, acts with objective good faith. Such conduct, in a commercial relationship by itself, essentially established by the autonomy of the will, is naturally relevant, since every freedom has its limit. This limit points, universally, at least to the respect for the other part of the agreement. In other words: not everything is worth to achieve commercial objectives.

When, however, this idea of relational good faith is transported to the international scenario of different pluralities, decentralized and horizontal - where, in theory, the imposition of one legal system over another should not be admitted and where the players interacting there should be obliged to dialogue, to ensure that everyone knows and reaches a consensus on the limits of each one's actions makes the regular exercise of the law, as a universal expres-

23 See note 6.

24 The distinguished jurist, based on the philosophical conception of diatopical hermeneutics inaugurated by Raimon Panikkar (PANIKKAR, 1984, p. 28), proposes this hermeneutic modality in order to find a multicultural conception of human rights. Nevertheless, the essence of the method can be transported to other perquiries, as it was done in the work alluded to. For further information on this subject, see Boaventura de Sousa Santos (SANTOS, 1997, p. 23 and following).

25 See notes 6 and 24.

26 In the scientific work in reference, in which this analysis was carried out, the study was based on three *locus* (representing three legal systems): i) Roman Germanic, with the exception of French Law, given its specifications; ii) Islamic Law, in which the generalization can be understood in the field of commerce, since the Prophet had commerce as his profession; and, iii) Anglo-Saxon Law, with a specific analysis of the American subsystem (considering that English Law is different in many aspects).

sion of objective good faith, gain new and emblematic proportions of relevance and practical functionality.

Based on the arguments presented above and supported by the aforementioned scientific work, finding in the regular exercise of the right a common denominator related to good faith as a demonstration of non-harmful behavior, leads to a second denominator, this one concerning background: acting with otherness.

It happens because the requirement of regularly exercising rights as demanded by a rule of objective good faith, even if it is under minimum terms that, when contracting, the objective of reaching, at any price, individual advantages from freedom of action, so proper of international commerce, should be taken into account, as well as the obtainment of advantage by the deals are shaped by respect for the advantages that the other party is also pursuing, because the other has an equal right to pursue them.

Otherwise, it would be an unbalanced relationship and, therefore, legally illegitimate, from the point of view of the method adopted in this research, that is, the human rights protection framework as a method tool, leading to the result obtained.

This implies, therefore, an obligation to, even if only minimally, take the other contracting party into consideration. This means that the parties involved must, at least, cooperate with each other, ensuring that their freedom of action will not interfere, directly or indirectly, with the counterpart's right to act.

It should be noted that, in the figure of abuse of rights, the otherness is a condition *sine qua non* of the legal transaction, since abuse is only represses when the other's right has been affected. The perception of the other ceases, therefore, to be a merely moral or subjectively ethical conduct; it becomes an imperative, because it is determined by a legal instrument that regulates rules of conduct; therefore, a cogent norm.

In order to add credibility to this argument, it is possible to think, as an example, about the institute of damage mitigation[27] having good faith as its foundation. Christian Sahb Batista Lopes, when searching for the justification of the mitigation rule in Brazilian Law, and placing the abuse of rights as one of the possible grounds, explains that[28]:

> Acting in good faith implies, in the Law of obligations, a cooperative attitude between creditor and debtor. Therefore, a creditor who claims to be compensated despite not having acted in good faith, in other words, who did not act in a cooperative manner to prevent the damage from occurring through reasonable efforts, abuses the right to compensation. In the event of a debt, good faith requires that the creditor cooperate with the debtor and avoid damage to its own assets, in order to avoid the waste of economically and socially relevant resources. If it is possible to avoid the damage by means of reasonable efforts, the socially expected conduct of the noble man is to act in a way that such damage does not occur. If, however, the creditor violates this rule

27 A widely accepted figure in international commerce - subject to specificities and divergences as to the consequences of its application to different legal systems - the mitigation of losses is, in general, an obligation imposed on the creditor that, harmed by a debt, must avoid or make reasonable efforts to prevent the losses and damages resulting from the breach, under penalty of not being compensated for the losses that could have been mitigated. On the subject see Christian Sahb Batista Lopes (LOPES, 2011).

28 It should be noted that the author argues that the abuse of rights is a possible foundation of damage mitigation, especially as a ratification that mitigation it is based in good faith, however, does not see it as the only foundation. For further information on the subject see Christian Sahb Batista Lopes (LOPES, 2011, p. 153-161).

> imposed by good faith and subsequently seeks compensation for the damage suffered, the exercise of his right to compensation is abusive, as it manifestly exceeds the limits set by good faith. (Our emphasis) (LOPES, 2011, p. 158).

Thus, it is deduced that the counterpart, even if in debt, is placed, in the last analysis, as a measure of the creditor's right, above all, of the limits to be respected and that outline the perimeters for abuse. After all, if the holder of the right were allowed to remain inert and permit the damages to reach vertiginous numbers. It would be disregarded the figure of the debtor, who would be able to be obliged to excessive reparations, possibly not consistent with the debt itself and that, with measures driven by the creditor's good faith, could be avoided. Thus, under the cloak of objective good faith, the perception of the other becomes mandatory, hence the otherness sustained here.

Otherness is, therefore, the "minimum" - which will be referred as a standard, not in the sense of value judgment, however as an indispensable quality within the principle of objective good faith. Having a posture - even if passive - of good faith in a contractual relationship requires the perception of the counterpart as a subject. A subject who is free and, therefore, bearer of rights in the same condition and order.

Thus, from this argumentative construction carried out since the analysis of the reality object of the referred study - which, as indicated, aimed to finding the universalizing common denominator of the concept of objective good faith in order to mark its limit and scope in international procedural agreement - the figure of abuse of rights was found which, when not observed, will irradiate legal effects on the international deals in question, conditioning the application of the legal rules applicable in the concrete case, to demarcate and indicate responsibilities and their legal consequences.

Nevertheless, what has been defined here as a standard does not prevent it from gradually being differently apprehended in terms of increased protection and scope of understanding, which would be a gain for humanity. But what is defended here is that the "extra" is not the starting point. It is in the standard that the common material contours and new global behavioral expressions of contractual objective good faith begin to be unraveled. Considering that, its reach and limits can be revealed in the scope of international procedural agreement, allowing a clearer visualization of human behaviors and legal responses that will grant more legal certainty to cross-border relations.

4. IMPLICATIONS IN INTERNATIONAL PROCEDURAL AGREEMENT

With the exception of criticism or reverence, a debate not covered by this work, even though it is tangential to the analysis made here, it is a well-known fact that the capitalist model is not only the essential channel for obtaining profits, but also for its maximization, from the individual advantages obtained in a free market[29]. In this space, contemporarily, there is a

29 On the topic, indispensable to see Thomas Piketty (PIKETTY, 2014).

dispute between freedom as something absolute and as something that needs to be considered relative.

It happens because, *a priori*, the incessant search for the maximization of individual advantages (which materializes in profit) can cause thoughts and attitudes that claim individual freedom as unlimited by those who consider that maximum profitability that can only be obtained if the freedom to act is also maximum, that is, without the restrictions and, therefore, the “obstacles” that the Law imposes when it turns individual freedom into something relative in the name of others’ rights.

Thus, questioning the absolute individual freedom - considering that the capitalism finds its best realization in a full freedom (fictitious by nature) -, imposing on it intrinsic limits of a relative perspective reveals itself as the only possibility that such maximization occurs, however, coexisting with the (re)signification of individual rights based on collective rights. In this regard, Jürgen Habermas teaches that:

> The conscious conduct of the life of the singular person is measured by the expressivist ideal of self-realization, the deontological idea of freedom, and the utilitarian maxim of the multiplication of individual life chances. Whereas the ethics of collective forms of life are measured, on the one hand, by utopias of a non-alienated, solidarity-based coexistence within the horizon of consciously assimilated and critically continued traditions, on the other hand, by models of a just society, whose institutions configure in order to regulate behavioral expectations and conflicts in the symmetrical interest of all actors; a variant of this are the ideas of the increase and just distribution of social wealth, cultivated in the Welfare State. (HABERMAS, 1997, p.132)

It consists, briefly, in the only possibility of guaranteeing the realization and construction of a collective ethic.

This debate is not, therefore, unscathed by the regulation of good faith in its objective facet that, as a cogent legal rule imposes, for pleasure or displeasure, limits to the maximization of profits arising from solely individual advantages, since it forces the consideration of the other, the counterpart of the deals, whose contempt or disrespect are not allowed, nor considered by ethics that, as seen, is increasingly built in a collective way.

It is important to notice that when one seeks accumulation, the tendency, inexorably, is to focus on oneself. Individual efficiency, in theory, would have to be taken to the extreme for the supposed systemic guarantee. The reason is that, as known, within the concept of capitalism, there is no accumulation that is collective.

In a business relationship, this is evident; each party, more often, dedicated to taking care of what is its own, safeguarding its interests and turning to everything that will pave the way in the search for the “pot of gold” that lies in the outcome of negotiations. In this aspect, profit at any price is, as demonstrated, understood in an improper way, since it is interpreted purely as business efficiency. Thus, at first sight, the called “law of survival” seems to lead more to the motto of “every man for himself”.

For no other reason, reviewing all the reality exposed above in light of the CISG, it can be understood that in international contractual relations, by imposing the principle of objective good faith as a cogent rule, the scenario that is faced gains other contours and, therefore, another perception from the legal point of view and - as it could not be - from the human point of view.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 328-348 • 2020

It happens because being the regular exercise of rights - and the duty of otherness resulting therefrom - the standard of transnational objective good faith, what this whole context has shown is that, in the end, the construction of profit, at first strictly individual, is in fact only achieved if it occurs with the look on the other, through the observance of this collective ethic. This will be the legal way to endow deals operations with legitimacy in a sustainable manner.

Thus, by the logic of the system there is a great tendency toward individualism. The standard, as an imperative rule of conduct of one of the world's largest[30] transnational agreement conventions, imposes a partial deviation and demands a panoramic acting, in which noticing the role, the position, and the right of the other must necessarily condition one's own acting.

Thus, ethics - intrinsic to contractual good faith - has the character of responsibility, where the right to freedom of action can be exercised in its amplitude, but never outside its outline. The ethics is responsible, in order words, for considering the other as a condition for one's own action/performance in the deals.

And all this fits into this system. In the current economic model, the figure of the counterpart (seller, purchaser, supplier, service provider, carrier and other business parties), like other factors of production and market, is *conditio sine qua non* for obtaining profit. The figure of the "other", therefore, is nothing new, since the barter, this knowledge is had.

Taking otherness as a premise of the cogent norm, the framework results in the imposition of humanizing the other[31] and recognizing their dignity.

It cannot, therefore, under the aegis of the CISG, admit the objective allocation of the counterpart as a thing, cost or expense, which admits transaction, accepting, for example, the offense to their right and the mere compensation of this choice. The reparation, of course, will arise, in addition to the damage caused, also from the breach of the hermeneutic guideline of the Convention itself and the duties arising from good faith, thus configuring two forms of non-compliance.

An emblematic example of this double debt is the recent decision of the Court of Justice of Rio Grande do Sul[32] known as "the case of the chicken feet" which, applying to the CISG (and also the UNIDROIT Principles), maintained the declaration of the rescission of the purchase and sale contract, the purchase and sale of frozen chicken feet, and the restitution of the amount determined in the first instance, based on the seller's breach of the main obligation to deliver the goods (art. 30 of the CISG[33]), and also of good faith[34] itself:

> In the present case, the judicial declaration of termination of the contract does not dissociated itself from the recognition of the flagrant offense, by the seller /defendant, of the duty of the contracting parties to proceed according to the dictates of good faith, the highest canon of international relations governed by the new *lex mercatoria*, as infering from the reading of

30 When one of the "largest" is said, it means one of the highest numbers of signatory countries. See note 14.

31 It is not being said that this lack of humanity necessarily happens in the current model of market relations. What is intended to demonstrate is that the cogency of the principle of objective good faith through the CISG does not give room or opening for this to occur and represses it if it does.

32 BRAZIL. Court of Justice of Rio Grande do Sul. Civil Appeal number 70072362940. 12th Civil Chamber. Appellant: *Anexo Comercial Importação e Distribuição Ltda. - EPP*. Appellee: *Noridane Foods S.A*. Reporting Judge: Umberto Guaspari Sudbrack. Porto Alegre, RS, Brazil, Publication: February 14, 2017.

33 Article 30: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

34 Since this is not the scope of this work, other possible judgments on the subject (national and international) were not cited.

> article 1.7 of the Unidroit Principles and artlice 7.1 of the Vienna Convention of 1980 - the latter, moreover, is an explicit command to the Judges (state or arbitration) that apply the Convention. In effect, in order to create a uniform of rules for the treatment destined to international commercial relations, the Vienna Convention of 1980 structured the notion of contract based on two fundamental pillars, that is, private autonomy and objective good faith, from which is is deduced, among others, their duty to act with negotiating loyalty, imposing the comprehension that the international sales contract of goods must be understood as a cooperative relationship between the parties. In the present case, as can be seen, there was a frontal violation of the pillar of good faith, leading to the resolution of the contract, in accordance with the other rules in this regard dictated by the Convention. (Reporter's emphasis, pages 28-29 of the judgment).

It is inferred that the non-performance of the essential obligation (in this case, the delivery of goods) was not considered in isolation as the only reason to give rise to contractual resolution. The good faith, considered as a command to the judge, one of the pillars of the Convention, was considered in the analysis of the seller's conduct towards the purchaser and limits the second pillar: the private autonomy.

The limitation exposed here, of course, is not that intimate imposition, where subjective convictions are affected; irrelevant aspect for objective good faith. It is necessary to consider, in compliance with Article 7 of the CISG, the exteriorized conduct. It must reflect an action directed, even if passively, to the other, recognizing them as a subject of rights in international commerce.

The implication of this in international procedural agreement is remarkable, since with the cogency of the principle of good faith, obtaining profit takes a new path: understanding and respecting the position of the other party. It happens because the respect of the Convention necessarily involves the obligation to transcend the exclusivity of the individual, and only then, to reach the much sought-after "pot of gold". Conquering it, therefore, goes through the obligation to find in the other party the beginning and the end of the right themselves.

Another implication is the reformulation of the system from other conceptual limits and above all, of an economic nature, since maximizing individual advantages within free commerce is limiting factor that permanently marks internal and, in the case of this analysis, international transactions.

Compliance with transnational rules imposes the disregard of the motto "every man for himself", not only regarding to profits, however also about the duration of international deals. In order to survive and remain, one must necessarily consider the other and their rights. The fact is that everyone is interested in the existence of good contracting parties - understood to be those who objectively act as such - and the legal certainty resulting from this fact, which favors the Law. The role of the CISG, therefore, is to implement this notion.

An illustrative parallel of this panorama can be made from the work developed by Renata Alvares Gaspar and Felipe Castro (ALVARES GASPAR; CASTRO, 2018) which, although related to International Investment Law and, therefore, different scope of the present article, brings conclusive notes that are applicable to the various areas of the contemporary globalized market; such as, profitability, foreign investments and contracts - these directly covered by the present study.

MERITUM LAW JOURNAL • v.15 • n.4 • p. 328-348 • 2020

After exhaustive analysis of the foreign investment contract and the scope of its effective and legitimate legal certainty, from its social function in the globalized scenario, the mentioned authors conclude that the protection of citizenship and human dignity are essential conditions for the maintenance of a stable market for international investments, since without this protection, social collapse would ensue, affecting the system cycle necessary for the healthy financial market desired by the investors (ALVARES GASPAR; CASTRO, 2018, p. 334-339). Taking that into consideration:

> (...) As has been widely substantiated in this paper, foreign investment can only enjoy effective legal certainty when entering a national state if it is attentive to the interests of citizenship, in order to avoid social collapse capable of destabilizing all protection to the economic effects of the investment made. The legal certainty that is conferred by the Rule of Law to foreign investment is only achievable if justice and social welfare are observed; outside this dictum, the risk to the investment is unpredictable. (...) (ALVARES GASPAR; CASTRO, 2018, p. 334, emphasis added)

Establishing a parallel with the present work, it is inferred that the relative conditions and limitations found nowadays in the globalized market regarding the achievement of maximum profitability and the autonomy of the will demonstrate that the Law has been configured as an instrument for the equalization of forces that, in a classic liberal conception, used to oppose each other, and are nowadays understood and regulated by the Law as symbiotic and necessary for the maintenance of the system itself.

In this present context, the CISG is the materialization of this mister and places the objective recognition of the human dignity of the other (materialized by contractual good faith) as the central element for legal transactions to be considered valid and legitimate under the major regulatory norms of cross-border trade (for example and in this study, the CISG).

And all this, in plural and multiconnected relations, where so many differences and - as a consequence - disagreements tend to appear, providing a promising scenario: the opening for what is here called fraternity in international procedure agreements.

It should be emphasized that objective good faith does not require an affectionate, intimate, subjective fraternity. Nor could it, since this is part of the individual sphere. Rather, a fraternity that imposes the consideration of the other in their intrinsic dignity, from specific negotiating actions, which denote respect and, therefore, their humanity, so that the contractual relationship is really balanced and fulfills as many objectives as there are people involved in it.

5. CONCLUSION

The entire scientific effort undertaken within these brief lines has led to the identification and the comprehension of certain aspects of objective good faith in regard of international procedural agreements, being the CISG the ideal expression of the cogence of principle in these relations in the global world.

Primarily, some reasons for the mutability in the juridical nature of the institute of objective good faith have been verified, such as the rule of imperative conduct.

Also, the range and the limits of good faith in its objective aspect and as a cogent rule have been inquired, ensuring the importance of finding its material configuration, because the subjects of international commerce are plural and, as an expression of legal certainty, need minimally common concepts of the legal institutes that rule their International affairs, in a global society.

As one of the common denominators regarding to the scope and limits sought, the regular exercise of the right was identified as an act of good faith. In other words, in the transnational scenario, those who do not abuse their rights act in accordance with the rule of objective good faith.

In these lines, it has also been identified that otherness, as a minimum standard, imposes on the international commerce agent the obligation of a minimally objective consideration for the other; the recognition, although not subjective, that the other is as equal in the right to freedom to pursue profit, as in the duty to observe the limits of this pursuit.

Finally, the implications raised by the scope and limits of good faith in international procedural agreement were verified, inferring that the search for something valuable only appears to be individual. But, in the context of the evolution of deals relations in the International Community, it is no longer possible to legitimately seek it without considering the other as an integral and equal part of this search; in order words, it is not possible to disregard the objective of the party with whom one is negotiating.

These findings, although of great relevance, are, as said, punctual and it is necessary, in order to achieve what is intended by the present work, an effort to understand what these scores represent when analyzed as a whole. In other words, what they mean, in practical terms, and where all these consideration guide global commerce relations, given the undeniable moment of transition of human life in all its perspectives.

As mentioned, the formal elevation of objective good faith as a cogent rule, because it is expressly imposed by the CISG, is, in fact, a great reflection of what, in practice, was required as a response of the Law (customs and traditions) as a way to provide a minimum of legal certainty in the international commerce relations (most of the times of high risk due to the nature of the operations).

This means that the option to oblige its legal observance resulted from a practical need that started to be perceived by the international commerce players themselves and seen as a condition for the coexistence of all. Thus, from a legal and objective aspect, these players are subject only to the challenges that are inherent to market relations immersed in fair play, and not to the insecurity of behaviors, omissive and commissive, that, when manifested, contrast with, over time, has being expected of a fair and balanced commercial relationship.

This observation leads to another: in a context in which, due to the logic of the system, there are tendencies towards individual and exclusivist perceptions and motivations, it becomes mandatory, as a cogent rule, to recognize the other party's position, its rights and duties, and to condition the limits of one's own actions having the other party as a parameter, thus, representing a paradigm overcoming[35].

35 The verb overcome is chosen instead of the traditional expression "paradigm break" because it is based on the premise that the previous truths have undergone a process of maturation, practical and theoretical, resulting in the overcoming of the issue and not in its breaking - which brings the connotation of destruction, rupture.

Such overcoming provides, as indicated, what is called fraternity in international deals. A fraternity, of course, in an objective sense, which does not cover the sphere of religions, ethnicities or individual choices. Yet, it requires, in legal terms, that all those that are acting in cross-border deals recognize the other as equal in dignity and that the conduct of their actions reflect this recognition, even if it does not exist at the intimate.

The fraternity, therefore, requires the same dignity recognized in oneself to be recognized in the other. Furthermore, in a context where the individual, for so long, seemed to be the only rule and where freedom was claimed for, having rules that impose this perspective of otherness makes it possible to think of a step towards fraternity in multiconnected commercial relationships, which can be understood as a scenario of changes. The changes in perceptions and paradigms allow for a reanalysis of the system, about what is necessary, permitted and desired for commercial relations and, of course, for the Law and its much pursued legal certainty.

Finally, these changes confirm the international *jus cogens*, to which human rights belong, with emphasis on the first of all the commands of the Universal Declaration of Human Rights of 1948, a well-known landmark of international normatization regarding human rights in world history: "Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." (Emphasis added).

It is possible to infer, therefore, that these changes in cross-border trade relations, especially when put into practice, make the protection of dignity feasible, becoming an important instrument for the implementation of such protection and of the spirit of fraternity in the field of transactional legal affairs.

Finally, an exercise of fraternity exteriorized as a thought resulting from the urgency of reflecting humanity as a species, detached from the idea of individualization, nationality, and social class is indispensable, as the former president of Uruguay, José Mujica, pointed out[36].

REFERENCES

II Celac Summit - Declaration of Havana - Speech by the President of Uruguay José Mujica. Archipiélago - **Cultural Journal of Our America**. Universidad Nacional Autónoma de México, v. 21, n. 83, 2014, p. 12-14. Available on: http://www.revistas.unam.mx/index.php/archipielago/article/view/55640/49356. Access on: 5 Jun.2020

ALVARES GASPAR, Renata. International legal cooperation: recognition of foreign awards in mixed arbitrations and the changes promoted by Law number 13.129 of May 2015 in this context. In: RAMOS, A. (Org.). **Private International Law:** Controversial Issues. Belo Horizonte: Arraes, 2016, chapter 7, p.132-148.

ALVARES GASPAR, Renata; CASTRO, Felipe. Legal Certainty, Economic Function and Right to Development in International Investment Contracts: a critical approach in light of the case Urbaser S/A and another *versus* Argentine Republic. In: MENEZES, W. (Org.). **International Law Series in expansion**. 1ed. Belo Horizonte: Arraes, 2018, v. XIV, p. 323-341.

ALVARES GASPAR, Renata; JACOB, Mariana. The maximization of good faith from the CISG in international contracting: the soundness through the dissonances between Civil Law, American Common Law and Islamic Law. In: Meeting of Scientific Initiation, XX, 2015, Campinas. **Annals of the XX Meeting of Scientific Initiation** - ISSN

36 Speech made by former Uruguayan President José Mujica at the II Cumbre of CELAC in Havana, January 2014. Transcript of the speech found at: http://www.revistas.unam.mx/index.php/archipielago/article/view/55640/49356. Access on: 5 Jun. 2020.

1982-0178. Campinas: PUC-Campinas, 2015. Available on: https://wl.sis.puc-campinas.edu.br/websist/Rep/Sic08/Resumo/2015812_114954_435381879_resESU.pdf. Access on 5 Jun. 2020.

BRAZIL. **Decree Number 8.327/2014** - United Nations Convention on Contracts for the International Sale of Goods – UNCITRAL. Available on: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/decreto/D8327.htm. Access on: 7 Jun. 2020.

BRAZIL. Court of Justice of Rio Grande do Sul. **Civil Appeal Number 70072362940**. 12th Civil Chamber. Appellant: *Anexo Comercial Importação e Distribuição Ltda. - EPP*. Appellee: Noridane Foods S.A. Reporting Judge: Umberto Guaspari Sudbrack. Porto Alegre, RS, Brazil, Publication: 14, February 2017.

DUBROFF, Harold. The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic**. St. John's Law Review**. v. 80, n. 2, art. 3, Feb. 2012. Available on: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1200&context=lawreview. Access on: 7 Jun. 2020.

FARNSWORTH, Allan Edward. Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code. **The University of Chicago Law Review**. v. 30, n. 4, Summer. 1963. Available on: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3337&context=uclrev. Access on: 5 Jun. 2020.

FRADERA, Vera Jacob de. The saga of the uniformity of international sales and purchases: from *lex mercatoria* to the Vienna Convention of 1980. In: FRADERA, V. J.; MOSER, L. G. M. (Org.). **International Sale and Purchase of Goods:** Studies on the 1980 Vienna Convention. São Paulo: Atlas, 2011, chapter 1, p. 1-21.

GAMA E SOUZA JR., Lauro da. **International Contracts in the light of the UNIDROIT 2004 Principles**: Soft Law, Arbitration and Jurisdiction. Rio de Janeiro-São Paulo-Recife: Renovar, 2006.

GLITZ, Frederico Eduardo Zenedin. Notes on the concept of *Lex Mercatoria*. **Legal Review**, v. 1, n. 28, p. 123-144, 2012. Available on: http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/413/318. Access on: 5 Jun. 2020.

GLITZ, Frederico Eduardo Zenedin**. Globalization of Contract Law**. Translation of Maria Noel Antas. São Paulo: Clássica, 2012. Available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620384. Access on: 5 Jun. 2020.

HABERMAS, Jürgen. **Law and Democracy**: between facticity and validity. Translation of Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, v.1, 1997.

LOPES, Christian Sahb Batista. **The mitigation of damages in contract law**. Belo Horizonte: UFMG, 2011. Presented as a doctoral dissertation, Federal University of Minas Gerais Law School, 2011. Available on:

https://repositorio.ufmg.br/handle/1843/BUOS-8MQG8H. Access on: 3 Jun. 2020.

MARTINS-COSTA, Judith. Good faith in private law: system and topical in the bond process. 1. São Paulo: **Courts Review**, 2000.

MARTINS-COSTA, Judith. The principles that inform the international sales and purchase contract in the Vienna Convention of 1980. **Legislative Information Review**. n. 126, Brasília, Apr.-Jun., 1995. Available on: http://www2.senado.leg.br/bdsf/bitstream/handle/id/176328/000497455.pdf?sequence=1. Access on: 5 Jun. 2020.

MENEZES CORDEIRO, António Manuel da Rocha. **The good Faith in the Contract Law**. 4.ed. Coimbra: Almedina, 2011.

MORAIS, Ricardo Manoel Oliveira; SILVA, Adriana Campos. Economic liberalism and security practices: the whitin of liberal democracies. UFPR University of Law Review, Curitiba. v. 62, n. 3, p. 221-242, Sep.-Dec. 2017. ISSN 2236-7284. Available on: http://revistas.ufpr.br/direito/article/view/53720. Access on: 5 Jun. 2020. DOI: http://dx.doi.org/10.5380/rfdufpr.v62i3.53720.

PIGNATTA, Francisco Augusto. Controversies around the field of application of the Vienna Convention of 1980: the case of the theory of guilt *in contrahendo*. In: FRADERA, V. J.; MOSER, L. G. M. (Org.). **International Sale and Purchase of Goods**: Studies on the Vienna Convention of 1980. São Paulo: Atlas, 2011, chapter 2, p. 22-43.

PIKETTY, Thomas. **The capital in the Twenty-First Century**. Translation of Mônica Baumgarten de Bolle. Rio de Janeiro: Intrínseca, 2014.

SOUSA SANTOS, Boaventura de. For a multicultural conception of human rights. **Critical Review of Social Sciences**. n. 48, p.11-32, 1997. Available on: http://www.boaventuradesousasantos.pt/media/pdfs/Concepcao_multicultural_direitos_humanos_RCCS48.PDF. Access on: 5 Jun. 2020.

TIMM, Luciano Benetti. Common Law and Contract Law: an introduction to North American Contract Law. **Review of the Institute of Brazilian**. v. 1, n. 1, p. 525-572, 2012. Available on: https://blook.pt/publications/publication/54931b2e51e8/. Access on: 5 Jun. 2020.

TOMUSHAT, Christian. International law: ensuring the survival of mankind on the eve a new century. General course on public international law. ***Recuil des cours***, v. 281, p. 9-438, 1999.

UN. **United Nations General Assembly**. Universal Declaration of Human Rights. 1948. Available on: https://nacoesunidas.org/wp-content/uploads/2018/10/DUDH.pdf. Access on: 07 Jun. 2020.

UNIDROIT. **Unidroit Principles of International Commercial Contracts**. 2016. Available on: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf. Access on: 07 Jun. 2020.

Received/*Recebido:* 25.04.2019.

Approved/*Aprovado:* 04.07.2020.